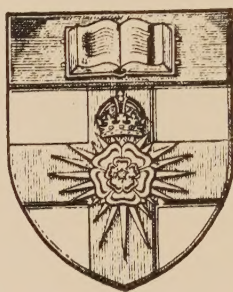


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THE ALL ENGLAND LAW REPORTS REPRINT

BELL AND ANOTHER v. LEVER BROS., LTD.

[HOUSE OF LORDS (Lord Hailsham, Lord Blanesburgh, Lord Warrington, Lord Atkin and Lord Thankerton), June 28, 25, 26, 29, 30, July 2, 3, 6, December 15, 1931]

[Reported [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258;
48 T.L.R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98]

Mistake—Mistake of fact—Agreement to terminate contract on payment of compensation—Belief that contract not otherwise terminable—Contract in fact terminable owing to breach by one party.

Company—Director—Profit from contract—Liability to account to company.

A mutual mistake as to some fact which, by the common intention of the parties to a contract, whether expressed or implied, constitutes the underlying assumption without which the parties would not have made the contract they did, and which, therefore, affects the substance of the whole consideration, is sufficient to render the contract void.

The liability of the director of a company in respect of a profit made by him from a contract in which his company also is concerned is quite different from his liability, if any there be, in respect of his profit from a contract in which the company has no interest at all. In the first case, unless by the company's regulations he is permitted to retain his profit, he must account for it to the company. In the second case, the company has no concern in his profit and cannot make him accountable for it unless it appears that in earning the profit he made use either of some property of the company or of some confidential information which came to him as a director of the company.

The respondent company entered into service agreements with the appellants under which the appellants were for five years to act as chairman and vice-chairman respectively of the N. Co., which was under the control of the respondent company. In March, 1929, the N. Co. being desirous of amalgamating with a rival company, it was agreed between the respondents and the appellants that the appellants should resign their positions in consideration of payments by way of compensation. In concluding those agreements all parties proceeded on the assumption that the appellants' service agreements were not liable to immediate termination by the respondents by reason of the appellants' misconduct, but later that assumption proved to be mistaken as it appeared that, during the continuance of the service agreements, without the

knowledge of either the respondent company or the N. Co., the appellants had engaged in private transactions resulting in a secret profit to themselves. The respondents accordingly brought an action claiming rescission of the compensation agreements and the repayment of all moneys paid thereunder as being paid under a mistake of fact. The jury found that the appellants' transactions constituted breaches of the appellants' service agreements, which would have entitled the respondents to determine those agreements forthwith if they had known of the transactions; that when the respondents entered into the compensation agreements of March, 1929, they did not know of the appellants' transactions; that, if they had done so, they would not have entered into those agreements; and that when the parties were negotiating the agreements of March, 1929, the appellants did not have in mind their acts in respect of the transactions.

Held: the erroneous belief on the part of both parties to the agreements of March, 1929, that the service contracts were not determinable except by agreement did not involve the actual subject-matter of the agreements, but merely related to the quality of the subject-matter and so was not of such a fundamental character as to constitute an underlying assumption without which the parties would not have entered into the agreements, and, therefore, the respondents were not entitled to succeed in their action.

Notes. Considered: *Nicholson and Venn v. Smith Marriott* (1947), 177 L.T. 189; *Harrison and Jones, Ltd. v. Bunten and Lancaster, Ltd.*, [1953] 1 All E.R. 903. Referred to: *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] All E.R.Rep. 352; *Swain v. West (Butchers), Ltd.*, [1936] 3 All E.R. 261; *Reading Corp'n. v. Rudland* (1940), 84 Sol. Jo. 634; *Re Diplock's Estate, Diplock v. Wintle*, [1947] 1 All E.R. 522; *Solle v. Butcher*, [1949] 2 All E.R. 1107; *Leaf v. International Galleries*, [1950] 1 All E.R. 693; *Frederick E. Rose (London), Ltd. v. William H. Pym, Junr. & Co.*, [1953] 2 All E.R. 739.

As to the effect of a mistake of fact, see 23 HALSBURY'S LAWS (2nd Edn.) 132 et seq., and for cases see 35 DIGEST 95 et seq. As to the powers and duties of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 293 et seq., and for cases see 9 DIGEST (Repl.) 497 et seq.

Cases referred to:

- (1) *Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385, C.A.; 9 Digest (Repl.) 86, 366.
- (2) *Costa Rica Rail. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746; 70 L.J.Ch. 385; 84 L.T. 279; 49 W.R. 337; 17 T.L.R. 297; 45 Sol. Jo. 424; 8 Mans. 374, C.A.; 9 Digest (Repl.) 518, 3422.
- (3) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473; 61 L.J.P.C. 50; 67 L.T. 508; 57 J.P. 21; 8 T.L.R. 752, P.C.; 35 Digest 69, 657.
- (4) *Aberdeen Rail. Co. v. Blaikie Bros.* (1854), 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461, H.L.; 10 Digest (Repl.) 1267, 8948.
- (5) *London and Mashonaland Exploration Co., Ltd. v. New Mashonaland Exploration Co., Ltd.*, [1891] W.N. 165; 9 Digest (Repl.) 492, 3226.
- (6) *Nocton v. Lord Ashburton*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 30 T.L.R. 602, H.L.; 35 Digest 55, 493.
- (7) *Halsey v. Brotherhood* (1880), 15 Ch.D. 514; 49 L.J.Ch. 786; 43 L.T. 366; 29 W.R. 9; 1 Goodeve's Patent Cases, p. 218; on appeal (1881), 19 Ch.D. 386; 51 L.J.Ch. 233; 45 L.T. 640; 30 W.R. 279, C.A.; 36 Digest (Repl.) 984, 3294.
- (8) *Noad v. Murrow and another* (1879), 40 L.T. 100.
- (9) *Strickland v. Turner (Executive of Lane)* (1852), 7 Exch. 208; 22 L.J.Ex. 115; 155 E.R. 919; 12 Digest (Repl.) 414, 3221.
- (10) *Scott v. Coulson*, [1903] 1 Ch. 453; 72 L.J.Ch. 223; 88 L.T. 12; 51 W.R. 394; 19 T.L.R. 162; on appeal, [1903] 2 Ch. 249; 72 L.J.Ch. 600; 88 L.T. 653; 19 T.L.R. 440, C.A.; 35 Digest 103, 100.

- A (11) *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 2039; 12 Digest (Repl.) 260, 2020.
- (12) *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329; 19 W.R. 1059, D.C.; 12 Digest (Repl.) 75, 415.
- B (13) *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 22 Digest (Repl.) 156, 1411.
- (14) *Gompertz v. Bartlett* (1853), 2 E. & B. 849; 23 L.J.Q.B. 65; 22 L.T.O.S. 99; 18 Jur. 266; 2 W.R. 43; 2 C.L.R. 395; 118 E.R. 985; 6 Digest 322, 2143.
- (15) *Gurney v. Womersley* (1854), 4 E. & B. 133; 24 L.J.Q.B. 46; 24 L.T.O.S. 71; 1 Jur.N.S. 328; 3 C.L.R. 3; 119 E.R. 51; 6 Digest 151, 991.
- C (16) *Re Scottish and Universal Finance Bank, Ltd., Ship's Case* (1865) 2 De G.J. & Sm. 544; 12 L.T. 256; 13 W.R. 599; 11 Jur.N.S. 331; on appeal, sub nom. *Downes v. Ship* (1868), L.R. 3 H.L. 343; 37 L.J.Ch. 642; 17 W.R. 34; sub nom. *Downes v. Ship, Re Scottish and Universal Finance Bank, Ltd.*, 19 L.T. 74, H.L.; 9 Digest (Repl.) 142, 822.
- (17) *Street v. Blay* (1831), 2 B. & Ad. 456; 109 E.R. 1212; 17 Digest (Repl.) 107, 210.
- D (18) *Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, 3327.
- (19) *Bank Line, Ltd. v. A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, 3365.
- E (20) *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, 3410.
- (21) *Healey v. Société Anonyme Française Rubastic*, [1917] 1 K.B. 946; 86 L.J.K.B. 1254; 117 L.T. 92; 33 T.L.R. 300; 34 Digest 73, 506.
- (22) *Fletcher v. Krell* (1872), 42 L.J.K.B. 55; 28 L.T. 105; 37 J.P. 198; 34 Digest 79, 565.
- F (23) *Mackay v. Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 12 Digest (Repl.) 489, 3676.
- (24) *Couturier v. Hastie* (1856), 5 H.L.Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur.N.S. 1241; 10 E.R. 1065, H.L.; 12 Digest (Repl.) 414, 3222.

Appeal from an order of the Court of Appeal (SCRUTTON, LAWRENCE and GREER, L.JJ.).

G By agreements dated Aug. 9, 1923, Oct. 9, 1923, and July 1, 1926, made between the respondents (plaintiffs in the action) and Bell and Snelling, the appellants (defendants), it was agreed that the appellants should act as chairman and vice-chairman respectively of the Niger Co., Ltd., for five years, devoting the whole of their time to the business of the company. The assets of the Niger Co. were afterwards transferred to a new company called the United Africa Co., Ltd., and in March, 1929, the respondents entered into a further agreement with the appellants under which they paid them £50,000 as compensation for the termination of the agreement of July 1, 1926, and in full satisfaction of all claims against the respondents or the Niger Co. Subsequent to this agreement it was discovered that the appellants had entered into certain dealings on their own account which they had kept secret from the respondents. The respondents then demanded a return of the £50,000. The appellants admitted they were liable to account for profits on the private dealings, but denied liability to repay the £50,000. The respondents then brought this action claiming damages for fraudulent misrepresentation and breach of contract. The jury by their findings negatived the allegation of fraudulent misrepresentation or concealment, but found that the appellants had committed a breach of contract owing to the private transactions, and that the respondents were entitled on this account to terminate the service contract of 1926 and would have elected to do so had they known of the breach in question. They further found

that the respondents did not know of these private transactions when they entered into the agreement of 1929, and that the appellants had not those transactions in mind at the interview leading up to that agreement. The Court of Appeal held (i) that the cancellation agreement was invalidated on the ground of mutual mistake, so that payments made under it could be recovered; and (ii) that the appellants were under an obligation, before and at the time of their negotiation of the contract to terminate, to disclose their dealings in breach of their contracts, and the contract to terminate could be avoided by this non-disclosure. The appellants appealed.

Schiller, K.C., Pritt, K.C., and Philip Vos for the appellants.

Sir John Simon, K.C., Stuart Bevan, K.C., and Wilfrid Lewis for the respondents.

The House took time for consideration.

Dec. 15. The following opinions were read.

LORD BLANESBURGH.—I understand that my noble and learned friend, LORD HAILSHAM, agrees with the judgment about to be delivered by my noble and learned friend, LORD WARRINGTON. The views which I now proceed to express are my own.

This is an appeal by the defendants from an order of the Court of Appeal of Nov. 17, 1930, which affirmed a judgment of WRIGHT, J., of the previous June 5, pronounced after the trial of the action before himself and a City of London special jury. By his judgment the learned judge, among other things, ordered that two several agreements—I propose to refer to them as the agreements of settlement—made on March 19, 1929, with each of the appellants by the respondents, Lever Bros., Ltd., should be set aside and that the moneys received under them should be repaid to Levers. The sum which the appellant Mr. Bell had thus to repay included premiums amounting to £1,224 2s. 3d. on an endowment policy, later to be mentioned, which under the agreement of settlement with him had been paid by Levers on his behalf.

The facts of the case and the course of the litigation make a long story, even if, in detail, those incidents only are dwelt upon which have a bearing upon the issues remaining to be dealt with on the appeal. In the Niger Co., Ltd., a company of large resources, with a paid-up capital of £4,750,000 and issues of debenture stock aggregating £5,500,000, Levers had as shareholders a controlling interest. They held in and after 1925 99·5 per cent. of the issued share capital. The business of the Niger Co. was to deal in West African products, including cocoa. It is with its cocoa business alone, extensive enough in itself, but only a portion of its total activities, that this case is immediately concerned. For several years before 1923 the Niger Co. had been meeting with heavy losses, and Levers, for the protection of their then large investment in it, had themselves been financing or bearing these losses. Confronted in 1923 with the urgent problem of securing less unfavourable results, Levers approached the appellants with an invitation to undertake between them the reorganisation and management of the Niger Co. At that time Mr. Bell was joint manager of one of the great London banks. He had had a long experience of banking, with some knowledge of trade on the West Coast. Mr. Snelling's selection was due to the fact that he was an accountant of exceptional ability who had just rendered notable service to Levers in bringing about a favourable adjustment of Inland Revenue demands upon them.

Under Mr. Bell's engagement with his bank he was entitled on retirement after a few further years' service to substantial pension rights. As he would forfeit these if he were to leave the bank to take up other work, some substituted provision on this head, operative without reference to the duration of the new service, was for him of essential importance. It does not appear that any similar sacrifice was involved by Mr. Snelling's acceptance of the offer made to him, and this difference of circumstance in the two cases is reflected in the final agreements reached. In the result Levers' invitation was favourably entertained by both appellants, and in

A due course the conditions of their employment were embodied in letters passing between Levers, or the late Lord Leverhulme on Levers' behalf, and the appellants respectively. These letters and the formal agreements referentially embodying their terms—separate agreements with each appellant—were to the following effect. For Mr. Bell, Levers were to take out and pay all premiums upon an endowment policy on his life, maturing at sixty or previous death, for an amount which on death before maturity would provide £16,200, and on maturity would provide £1,500 per annum or £16,200 at his option. The policy was to belong to Mr. Bell and the premiums were to be paid by Levers, notwithstanding the termination of his engagement, unless it was terminated by himself. To this obligation on Levers' part I must return later. I pause now only to observe that Mr. Bell's secession from the service of his bank to undertake his new employment—an act at once complete—was the entire consideration for this particular promise on Levers' part and stands out separate from the other provisions of the agreement. For the rest Mr. Bell was to be appointed and maintained by Levers as chairman of the Niger Co. for five years from Nov. 1, 1923, at a salary of £8,000 a year, during which time he was to devote the whole of his time and attention during business hours "to the business" of Levers. Thus was it expressed in the formal agreement of D Aug. 9, 1923. As to Mr. Snelling, he was to serve "in regard to the West African interests" of Levers (note the phrase) for five years from Oct. 1, 1923, at a salary of £10,000 per annum to March 31, 1925, and of £6,000 per annum for the rest of the term. There was in the formal agreement with him the same provision as to his time and attention that was contained in the agreement with Mr. Bell.

E In July, 1926, by further agreements then entered into, the service of the appellants was continued. The earlier contract with Mr. Bell was replaced by a fresh agreement for five years from July 1, 1926, at the same salary and insurance premium, with the addition of a commission in certain events which never in fact became either actual or prospective. Mr. Bell was to be chairman of the Niger Co. for the whole term. The new agreement with Mr. Snelling was for the same extended period, at his same salary of £6,000 per annum, with the same commission as in Mr. Bell's case. Mr. Snelling was to be vice-chairman of the Niger Co. F for the whole term.

On Sept. 14, 1923, Niger formally appointed both appellants to be directors of the company and the appellant Bell to be its chairman. On April 8, 1924, Mr. Snelling was formally by the Niger Co. appointed vice-chairman of the company. G From the autumn of 1923 until the end of April, 1929, when their service ceased under the agreements of settlement now in question, the joint management of the appellants continued through the exercise by them of the duties attached to these two offices and to the directorate of the Niger Co.'s associated companies, to which also they were appointed. With reference to that joint management it is convenient at once to observe that, although in the letters of appointment it was to the "business" or to "the West African interests" of Levers that the appellants H were respectively apparently to attend, yet from the beginning to the end of their engagement, as probably always intended, it was in the business of the Niger Co. that they were exclusively employed. It was by their appointment to the chairmanship and vice-chairmanship of the Niger Co. and to the directorate of its many associated companies with all attendant responsibilities as such, that they were clothed with the necessary and only powers of management and control which they I ever exercised or possessed. The consequences flowing from all this are important. As will appear later these were never fully appreciated at the trial, and the resultant confusion is only now clearly revealed before your Lordships' House. Although Lord Leverhulme in one of his letters to Mr. Bell did point out to him that he would be responsible for his acts to the shareholders of the Niger Co., it is not plain that by that expression Lord Leverhulme meant more than Lever Bros., Ltd., and it is sufficiently clear from other indications that to his business mind Levers' West African interests, Levers' West African business, and the Niger Co., Ltd., were practically convertible terms, notwithstanding the fact that the 0·5 per cent.

outstanding shares in the Niger Co. represented 23,750 shares of £1 each held by 300 shareholders, and that £5,500,000 debenture stock was outstanding in the hands of the public. And this view, natural enough perhaps to a layman of Lord Leverhulme's realism, remained persistent up to the close of the plaintiffs' case at the first hearing of this action. Until then Levers were the only plaintiffs, the theory still apparently being that the Niger Co. was so subordinate to Levers that to a suit which in large measure was for the vindication of its own proprietary rights it was not even necessary to make it party. The addition of the Niger Co. as plaintiffs after the first hearing corrected, formally, this misconception, but it never entirely disappeared. Levers' West African interests, although there were none in question which were not the property of the Niger Co., was a description that survived even at your Lordships' Bar, while the appellants, both in the summing up and in the questions put to the jury, were represented as servants, serving two masters, Levers and the Niger Co., each of whom had separate rights of dismissal depending upon identical considerations. A B C

How serious in its present consequences that confusion may prove to be will emerge in the sequel. At this stage it suffices to observe that if regard is had, as it must necessarily be, to the essential separation in personality between Levers and the Niger Co., to say nothing of their possible divergence in interest, the relation in which the appellants ultimately stood to Levers and the Niger Co. respectively is not, as I think, in any way doubtful. By Levers' agreements with them, Levers were bound to maintain the appellants in their respective offices in the Niger Co. for the prescribed term at the prescribed remuneration. The appellants in return agreed with Levers, but with Levers only, to devote the whole of their business hours and abilities to the discharge of their duties. As between the appellants and the Niger Co. it was in that company's articles of association that their terms of service were to be found: *Swabey v. Port Darwin Gold Mining Co.* (1), and it was by the general law as modified by any provisions of these articles that their responsibilities and liabilities to the Niger Co. in respect of any acts of their own would fall to be ascertained: *Costa Rica Rail. Co., Ltd. v. Forwood* (2) ([1901] 1 Ch. at p. 757). As a result there remained no contract by the appellants to serve Levers in a post from which Levers could "dismiss" them. Nor is "dismissal" the term by which their expulsion from office by, or their cessation of office in, the Niger Co. would properly be described. So far as Levers were concerned they were, as the result of their agreement, bound to maintain the appellants in office so long only as they fulfilled their prescribed duties as officers of the Niger Co., devoting the whole of their business hours to the discharge of these duties. So soon as they defaulted in these respects Levers would be justified in stopping any further payments to them, and would be relieved from the obligation of further maintaining them in their offices. But that would be all. For the rest Levers had to rely only on their voting power as shareholders of the Niger Co. Again, so far as the Niger Co. was concerned its powers, never powers of "dismissal," were in no way dependent upon any breach of duty by the appellants. The Niger shareholders, as such, could at any time effectively remove the appellants by special resolution (see art. 46 (2)), even if, in the discharge of every duty they owed to the company, their acts had been beyond reproach or even criticism. D E F G H

To proceed again with the narrative. From July, 1925, the appellants' remuneration, fixed by their agreements with Levers, was paid to them by the Niger Co. direct, and such was the success of their management that the unsatisfactory position of the Niger Co. to which they had succeeded in 1923 was transformed into a state of great prosperity. "Everyone agrees," said WRIGHT, J., speaking of the appellants in his summing up of the case to the jury at the trial, "that their conduct and their work for the company [was] most efficient, devoted, strenuous, and successful." Here reference must be made to a matter which, although only incidental, will be found finally to colour the whole case of the appellants. On the coast, during the appellants' management of the Niger Co., there were three other concerns trading in cocoa—the African and Eastern Trade I

A Corp., Ltd., the Anglo-Guinea Produce Co., Ltd., and Frame & Co., Ltd. In 1925 and 1926 two agreements were come to between these four companies. They are referred to in the proceedings as the pool agreements, and they were entered into for the purpose of protecting the trade of the companies in buying and selling cocoa. By them provision was made for fixing by a committee a pool buying price and a pool selling price of cocoa, and each company was required timeously to
B notify to the others and to the pool committee the quantities and prices of cocoa purchased or sold by it, while, for subsequent division amongst the four constituents according to prescribed percentages, payment was to be made, first, of a "pool tax" on all purchases of cocoa by each of them, and, secondly, of any excess sum over a prescribed amount received on sales by any of them. It is not, however, the precise terms of these agreements that are now directly relevant; their immediate bearing
C upon the case arises from a clause, contained in each agreement, which seeks to associate the directors of every constituent company in the obligations thereby undertaken by that company. The clause in the earlier pool agreement is not a little confused. The clause in the later agreement is, however, free from ambiguity, and it provides that any reference to any company party thereto shall, where the context so admits, include its directors for the time being . . . and that each
D party undertakes that its directors . . . shall be bound by the terms of the agreement so far as respects their respective dealings in cocoa (if any), and that all such dealings shall for all purposes be deemed to be acts of such party thereto done under the terms of the agreement and to be accounted for accordingly.

These pool agreements were, of course, well known to the appellants. Indeed, they were the result of negotiations in which one or both of them took part. The
E first agreement was signed on behalf of the Niger Co. by Mr. Snelling; the second by Mr. Bell. Mr. Snelling was a member of the pool committee, and from time to time attended its meetings. But both appellants said quite definitely and positively that actual knowledge of the existence of what may be called the directors' clause they never had, and that until shortly before the institution of this action and some months after the execution of the agreements of settlement they had no idea that,
F as a result of any operations of their own, the Niger Co. could be involved in any liability to the pool. And I can myself have no doubt that the jury accepted as reliable the evidence of the appellants on this point. It is clear from the answers given by them to the series of questions addressed to them by the learned judge at the trial that the jury regarded the appellants as witnesses of truth. A perusal of the record shows how invariably in these answers the jury accepted the appel-
G lants' recollection when it was in conflict with that of other witnesses. On this present point there was no conflict. From its very nature it was a subject upon which the appellants alone could depose. And their statements are not difficult of acceptance when the agreements themselves and the situation therein of the clauses in question are examined. The acceptance of this statement made by both appellants becomes of importance at different stages in the case, and not least when
H your Lordships approach, as now you must, the task of ascertaining precisely the nature and implications of the transactions of the appellants which lie at the root of the orders under appeal.

It will be convenient to refer to these as the offending transactions. Four in number, they all took place in the short interval between Nov. 4, 1927, and Dec. 14 following. They were transactions in cocoa differences on the appellants' behalf. They were carried through on the market by the Niger Co.'s usual brokers on the instructions of the appellants or one of them, and, as the jury must clearly be taken to have found, with the knowledge of these brokers that they were the appellants' own transactions. Three of them were more or less unprofitable. One only was successful, and the net result of the four was a profit of £1,360. In January, 1928, the transactions were closed and the profit was received from the brokers. And that was the end. Nothing else of the kind happened before or afterwards. None of the transactions in fact caused any damage to the Niger Co., still less to Levers. No use was made by the appellants in the course of them

either of the Niger Co.'s property or of any information obtained by them as directors of the Niger Co. Such must be the description of the offending transactions according to the findings of the jury, who, on this subject also, clearly accepted the evidence of the appellants as the evidence of truth. To this description, however, two things must be added. The first is that these transactions, although the appellants were ignorant of the fact, involved a breach of the directors' clause of the pool agreement for which—if these agreements were not invalid as being in restraint of trade—the Niger Co. might be made responsible to the other companies parties thereto. Apparently, however, no attempt to ascertain the existence or the extent of such responsibility has yet been made. The second is that, although in the end regarded by the jury in the light most favourable to the appellants, these transactions remained at the best most ill-advised. They had to be executed secretly, described by separate letters, lest in the market they should be supposed to be the transactions of the Niger Co. And they were conducted with further secrecy so that they might not be generally known in the office of the Niger Co. itself. Such a procedure, when it is discovered, inevitably arouses suspicion. No transaction of a director open to the least suggestion of association with his company can ever hope to escape censure or even condemnation if it has been carried out in secret. In this instance once again, as so often before, it was the secrecy from Levers practised by the appellants that brought down upon them the charges of dishonesty from which they have escaped only after a sixteen days' hearing before a judge and jury. For, of course, the allegations put forward by the respondents with reference to these transactions made of them something very different. Most grave were the charges of fraud levelled against the appellants in respect of them. That, however, is another story, which will find its place at a later stage of the narrative. As has been said, the cocoa business of the Niger Co. was little more than a minor part of its total activities, and in amount the offending transactions were a mere fraction of the Niger Co.'s current cocoa business. To these considerations, coupled with the view of the transactions taken by the jury, may be attributable the conclusion also reached by them that these transactions did not even remain in the minds of the appellants when the agreements of settlement were made. They were, it must be emphasised, not known in any way to Levers until after these agreements had been completed.

The actual retirement of the appellants from the service of the Niger Co. had no connection with the offending transactions. The necessity for it came about in quite a different way. The Niger Co.'s principal competitor on the coast had always been the African and Eastern Trade Corpn. already mentioned. Amalgamation of the two concerns had in the years prior to 1929 been the subject of negotiation on a basis of the Niger Co. having one-fourth or at best one-third interest in the combine. But by 1929 the position of the Niger Co. had so greatly improved both absolutely and relatively that in that year the amalgamation negotiations were revived on what has been called a fifty-fifty basis. And it is apparent on the record that the higher participation meant for the Niger Co. an increase of many hundreds of thousands of pounds in money's worth, the credit for which is not denied to the appellants. The negotiations for this amalgamation were long and delicate. Mr. Snelling was on the coast while they were proceeding, but Mr. Bell rendered valuable services in bringing them to a successful conclusion—services handsomely acknowledged at the time by Mr. D'Arcy Cooper of Levers, who explained to Mr. Bell that the way in which he had put his personal position aside throughout the negotiations had relieved him of a great deal of difficulty. What Mr. Cooper meant was that Mr. Bell had not stood out for any position in the new company for himself, although he knew full well that, if neither he nor Mr. Snelling were to join that company, the scheme of amalgamation must necessarily involve their retirement altogether from the Niger Co. For by the scheme the assets of both amalgamating companies were with certain reservations to be transferred to the new company, each of the old companies receiving in return equal holdings of fully paid shares in that company. The transfer actually took

A effect on May 1, 1929; and as from its completion the Niger Co. became a mere holding company influencing by means of its voting power the policy and administration of United Africa, Ltd., the new company, but with no outlet within its own constitution for the undivided energies of the appellants, as its chairman and vice-chairman respectively. All this was realised while the negotiations for amalgamation were still only in progress and during that interval steps were taken by Mr. B Cooper acting on behalf of Levers to bring about, after everything had been completed, the termination of the appellants' employment on some agreed terms of payment. And the ensuing negotiations conducted with the appellants separately resulted in the two agreements of settlement with which this litigation has been mainly concerned.

C The agreement of settlement come to with Mr. Bell is embodied in a letter from Mr. Cooper to him of March 19, 1929, in the following terms :

D "Dear Bell,—As promised at our interview to-day I write to record the agreement then arrived at between us, namely, that on the provisional agreement for the amalgamation of the African and Eastern Trading Corp'n. and the Niger Co. becoming effective as from May 1 next you will on that date retire from the boards of the Niger Co. and its subsidiaries, including H.C.B. and its subsidiaries, and in consideration of your so doing Lever Bros., Ltd., will pay you as compensation for the termination of your agreement(s) and the consequent loss of office the sum of £80,000 in full satisfaction and discharge of all claims and demands by you of every nature and kind and howsoever arising against Lever Bros., Ltd., the Niger Co., the H.C.B. and any company, person or firm associated with them or any of them either directly or indirectly. E With regard to the insurance premium payable on the policy of your life with the Yorkshire Insurance Co. it was agreed that Lever Bros. will continue to pay such premium until the policy matures. Will you please let me have your reply confirming the above arrangement. I should like to be allowed to say how deeply the board of Messrs. Lever Bros. appreciate the work that you have done for the Niger Co. during the period that you have been in control.—Yours sincerely, F. D'ARCY COOPER." F

The agreement of settlement come to with Mr. Snelling was on lines similar to that reached with Mr. Bell. Mr. Cooper's letter to him of even date recording its terms is, however, as interesting for its variations from that addressed to Mr. Bell, as it is for its similarity thereto. It is as follows :

G "March 19, 1929,—Dear Snelling,—As promised at our interview to-day I write to record the agreement then arrived at between us, namely, that on the provisional agreement for the amalgamation of the African and Eastern Trade Corp'n. and the Niger Co. become effective as from May 1 next you will on that date retire from the boards of the Niger Co. and its subsidiaries, including the H.C.B. and its subsidiaries, and in consideration of your so doing Lever Bros., H Ltd., will pay you the sum of £20,000 in full satisfaction and discharge of all claims and demands by you under your agreement of employment or in any other capacity whatsoever and whether in respect of salary, commission, bonus, expenses, compensation for loss of office or otherwise. Will you please let me have your reply confirming the above arrangement. I should like to be allowed to say how deeply the board appreciate the work that you have done for the I Niger Co. during the period that you have been in control.—Yours sincerely, F. D'ARCY COOPER."

In due course confirmatory letters were written and the agreements were duly carried out. The appellants received their remuneration and continued in active discharge of their duties until April 30 following. They then formally resigned all their directorships as required by the agreements and received from Levers the compensation arranged. While it is fully accepted that the offending transactions were entirely unknown to and unsuspected by Mr. Cooper when the negotiations were proceeding, there was a serious difference of recollection between Mr. Cooper

and Mr. Bell on the question whether Mr. Bell did not, in order to justify a large payment to himself, expressly say in the course of the negotiations that he had faithfully and honestly served the Niger Co. during his association with that company. Mr. Bell was certain that he made no such statement in any such connection, and the jury, it is clear, accepted his recollection, and, as will be seen later, exonerated him from the charge of fraudulent misrepresentation based upon the allegation that the statement was his. A

With regard to these agreements of settlement there is one matter which may be conveniently dealt with while the agreements themselves are immediately in mind. It is affirmed by the respondents, with reference to them, and the acceptance of the allegation is implicit in the judgments appealed from, that the sole consideration moving from Levers for their agreement to pay Mr. Bell £30,000 and Mr. Snelling £20,000 was the satisfaction of what Levers, still in ignorance of the offending transactions, supposed to be their respective salary rights under enforceable agreements of service with two years and two months of the term in each case unexpired. The suggestion touches an issue of primary importance in the final decision of this appeal. It is, I think, demonstrably incorrect. Although it is true that in the letter to Mr. Snelling commission is actually mentioned, I do not find on an examination of the record that the prospect of any commission being receivable by either appellant was ever of substance, and I feel satisfied that it in no way entered into the adjustment of figures. On the basis of salary to be lost, therefore, the maximum figure in prospect for Mr. Bell was £17,333 6s. 8d. and for Mr. Snelling £13,000. But these sums could not have been recovered even in actions for wrongful dismissal, because allowance must in each case have been made for the fact that the whole sum was being immediately paid and for the further fact that each appellant was being released from his obligation of continued service and was being left free to seek other remunerative employment. And this employment in the case of Mr. Snelling at all events—Mr. Bell, it seems, proposed to return to his farm—was likely to be immediate and on terms perhaps little less favourable than those attached to the post of which he was being deprived. Accordingly even these maxima must on this basis have been subject to serious reduction. Moreover that this sole consideration did not instruct the amounts paid is confirmed when it is found that these sums were not on that footing proportionate (as seems erroneously to have been supposed in the course of the trial). If £20,000 was on this footing the sum claimable by Mr. Snelling, £26,666 13s. 4d. only should have been awarded to Mr. Bell. If Mr. Bell's payment of £30,000 was the standard, Mr. Snelling should have received not £20,000 but £22,500. B C D E F G

This line of reasoning might easily be further pursued, with the result of making it, as I think, clear that, while undoubtedly the claim for unearned salary, amounting at the remote outside in one case to over £17,000 and in the other to £13,000, was a material consideration for the payments agreed to, it was neither on the terms of either letter nor in fact the sole inducing cause. Into that inducement there undoubtedly entered the desire tangibly to recognise the exceptional services rendered to the Niger Co. by each appellant acknowledged in each letter and even now affirmed; still more perhaps to enlist their support of the amalgamation and to have their assistance in carrying it through in all its details to completion; above all to secure on May 1 following the voluntary resignation by each appellant of all his offices—results of value, it may have been of infinite value, to the prospects of a delicate negotiation in the success of which millions of pounds were involved. I

And these last two results could not have been secured if Levers, instead of writing through Mr. Cooper the letters of March 19, 1929, had, with the real offending transactions then disclosed to them, repudiated all further obligations under their agreements with the appellants, and as shareholders in the Niger Co. had sought, in spite of the appellants' opposition—quite effective for a sufficiently long period—to remove them from office. The vital significance of this conclusion, even so far as it can be reached on existing materials, and apart from amplification resulting from further investigation, will later appear. H

A Some two months later, as a result of inquiries made of the appellants with reference to certain cocoa transactions of the Niger Co. of which complaint in arbitration proceedings was being made by other members of the pool, the offending transactions were brought back to the minds of the appellants, and for the first time, as they asserted, they became aware of the directors' clause in the pool agreements. Mr. Bell thereupon informed Mr. Cooper of the facts relating to the

B offending transactions in terms which in effect were those finally found by the jury as above stated. There was immense controversy at the trial as to the details of this conversation with Mr. Cooper, but it does not seem necessary to go more deeply into that matter now, for Levers did not and would not accept from Mr. Bell any innocent explanation of transactions in their view highly improper which until that moment had been completely concealed from them, and on Aug. 7, 1929, they issued

C their writ in this action with themselves alone as plaintiffs and the appellants as defendants. The allegations made by the points of claim were to the effect that the appellants were the servants of Levers; that it was their duty to serve Levers faithfully and honestly and not to act in any way prejudicial to the interests of Levers; that the offending transactions constituted such misconduct on the part of the appellants as to entitle Levers instantly to terminate the service agreements

D with them and to dismiss them without notice, and that had Levers known of the offending transactions they would have in fact dismissed the appellants. Alternatively, it was alleged that the appellants had wrongfully conspired to make secret profits for themselves and that the agreements of settlement were obtained by them respectively

E "falsely and fraudulently concealing from [Levers] that they and each of them had [entered into the offending transactions] and also by falsely and fraudulently verbally representing to [Levers] that they had faithfully and honestly served Levers and/or Niger."

The twenty-sixth paragraph of the points of claim was as follows :

F "Alternatively the said agreements (i.e., the agreements of settlement) and each of them were made and the moneys paid thereunder were paid under a mistake of fact."

Particulars being asked for of the "mistake" it was stated to be

G "that the defendants and each of them had acted honestly in their conduct of the affairs of the Niger Co., Ltd., and had not dealt in cocoa on their own account and/or in so dealing on their own account had not acted contrary to their duty and/or the terms of their respective contracts."

The relief claimed was damages for conspiracy and/or fraudulent concealment, breach of duty, and breach of contract; rescission of the agreements of settlement; an account of all transactions and dealings in cocoa entered into by the appellants and payment by them of the amounts found due on the taking of such account.

H Objections on lines already indicated might very effectively have been taken to the whole scheme of the action, and, in particular, to the relief claimed by Levers for themselves in respect of the offending transactions in a suit to which the Niger Co. was not a party. But none such was in terms taken. Indeed, from the moment when the directors' clause of the pooling agreement was brought to the notice of the appellants, they refrained from any justification of the offending transactions

I as such and were ready to account for all the profit which they had made by them.

"If I had known that [the directors' clause] existed I would not have defended even at the time any of the transactions that I did,"

was one of Mr. Snelling's answers in cross-examination; and in accord with this attitude the £1,360 profit from these transactions had in January, 1930, been duly tendered to the Niger Co. by the appellants and had been refused.

The action came on for trial before WRIGHT, J., and a special jury on March 26, 1930, and it was opened, and evidence was called to prove a case of fraudulent misrepresentation and concealment only. Nothing at all was said about such

things as mistake, or duty to disclose, or fiduciary relation, or uberrima fides. On the fourth day of the hearing Levers closed their evidence, and following, as they stated, information derived from an examination of the brokers' books, they applied for leave to amend their points of claim in order to raise against the appellants further charges of fraud, the nature of which they foreshadowed. The trial had become one of wide public interest, and so soon as these new charges—all of them of the gravest description—were stated in open court the appellants, in the interests of their own reputations, felt, as they said, that they must be met. Accordingly, with no discussion except as to terms, leave to amend, on stringent conditions, was given to Levers, and the hearing, on the amended pleadings, was adjourned until May 13 to be then heard with a new jury. During the interval the opportunity was taken to add the Niger Co. as co-plaintiff, with the appropriation to the Niger Co. of the relief appertaining to the offending transactions. It was apparently taken for granted when the Niger Co. was added as co-plaintiff that its rights in the matter had not as a part of its undertaking passed to United Africa on the amalgamation. Perhaps they did not. The Niger Co.'s title to sue has not been challenged any more than has Levers'; although if Levers did quite justifiably charge against the Niger Co. the compensation paid under the agreements of settlement as they were charging against the Niger Co. the remuneration of the appellants represented by a part of it, even the right to claim rescission of the agreements of settlement may also have passed to United Africa as part of the Niger Co.'s undertaking. But this objection has not been taken. Levers, who made the compensation payments in the first instance, may have been content as between themselves and the Niger Co. to bear them finally, and for other reasons there may be nothing in the point. Accordingly I pass on.

A perusal of the other voluminous amendments shows that the sting of them lay in the new allegation that the offending transactions were all of them in their origin the transactions of the Niger Co., subsequently appropriated to themselves by the appellants through the innocent agency of the company's brokers after it had become clear to them that the transactions would be profitable. But still no case of duty to disclose, or of fiduciary relation or of uberrima fides was made by the amended pleading. The respondents took upon themselves a very grave responsibility in launching at that stage against men who in all other respects had deserved well of them these charges so grave as to be almost criminal in character. I do not doubt that the respondents acted in good faith in making them. But, although persisted in to the end of the long hearing the charges entirely failed: and the appellants are entitled at the least to have that failure remembered on any application by the respondents for further indulgence in this action whether by way of amendment of pleadings or otherwise.

The matters dealt with in the evidence will in the main be found reproduced in the questions left by the learned judge to the jury at its close. To these questions reference has already been made. With the answers given by the jury to each, I now record them:

1. Did the defendant Bell and/or the defendant Snelling fraudulently misrepresent to the plaintiffs Levers that they had faithfully and honestly served Levers and/or the Niger Co. with the object and effect of inducing Levers to make the agreements or either of them of March 19, 1929?—No.

2. Did the defendant Bell and/or the defendant Snelling fraudulently conceal from Levers and/or the Niger Co. that they or either of them had had the dealings complained of with the object and effect of inducing Levers to make such agreements or either of them?—No.

3. Did the defendants or either of them commit breaches of contract or duty towards the plaintiffs in (A) wrongfully appropriating as their own the contracts referred to as C.T.C., R.T.D., G.S.2 [the "offending transactions"] or any of them, being contracts of the Niger Co. and appropriating to themselves the profits on such contracts?—No. (B) entering into the contracts referred to as C.T.C., R.T.D. and G.S.2 o. any of them as private transactions on their own account and for

A their own benefit?—Yes. (C) in wrongfully appropriating to their own use and benefit the sum of £1,000 being moneys of the Niger Co.?—No. (D) If so, what damages, if any, under (A) or (B) or (C)?—(B) £1,360. £5 nominal damages.

4. (a) Were the plaintiffs, Levers, entitled to terminate the contracts of service with the defendants or either of them (i) in January, 1928?—Yes. And (ii) in March, 1929?—Yes. If so, would the plaintiffs, Levers, have elected to exercise
B such right at either of such dates?—Yes. (b) Were the plaintiffs, the Niger Co., entitled to dismiss the defendants or either of them from their positions as chairman and vice-chairman respectively (i) In January, 1928?—Yes. (ii) In March, 1929?—Yes. If so, would the plaintiffs, the Niger Co., have elected to exercise such right at either of such dates?—Yes.

5. When Levers entered into the agreements of March 19, 1929, did they know
C of the acts of either of the defendants in regard to the dealings C.T.C., R.T.D., G.S.2?—No. If Levers had so known would they have made these agreements, or either of them?—No. At the date of the respective interviews prior to these agreements, had the defendant Bell or the defendant Snelling in mind their acts in respect of these transactions?—No.

If these questions are carefully scrutinised it will be found that they are based
D on an acceptance of Levers' view as to the legal position of the parties towards each other under the service agreements. The undue prominence thus conceded to Levers served further to divert attention from the true position, never at any time accentuated, that the claims against the appellants in relation to the offending transactions were claims of the Niger Co. only, and that the validity and extent of these claims depended mainly if not exclusively upon the regulations of Niger. It
E is remarkable that so far as appears on the record these regulations were only once mentioned—and then in the most casual way—during the whole of the proceedings. In the summing up they were never referred to at all. It will be noted also that no question was asked upon the issue of conspiracy—because the learned judge held that there was no evidence to support it. Lastly, with regard to the allegation that the appellants had in carrying out the offending transactions used the property of
F the Niger Co. or utilised information obtained by them as its directors, question 3 (C) was directed to the only matter relevant thereto, which, as a result of the evidence, remained in doubt, and in respect of that remaining matter also the jury, as will be seen, exonerated the appellants. The fifth of the questions was drawn up by the learned judge after counsel had addressed the jury but before the summing up. It was in the Court of Appeal suggested that the question was
G directed to an issue of mutual mistake and that the appellants' counsel should have thus regarded it. I confess that I cannot blame him if he did not. Put at the end of a long hearing dealing only with grave charges of fraud and in the course of which no such issue had been even remotely hinted at, I should myself have thought, as I gather the appellants' counsel did think, that it was directed to the issue of fraudulent concealment, an issue which had throughout bulked prominently
H in the proceedings.

It was agreed that the learned judge was to be entitled to draw necessary inferences of fact upon any question that might arise which had not been put to the jury, and, in the discussion upon the findings and the pleaded case which took place on a later day, counsel for the respondents, after claiming that Levers were entitled to rescission of the agreements of settlement on the ground of unilateral
I mistake, ended by propounding the view that they were so entitled also on the ground of mutual mistake, that issue as they contended having been raised by the points of claim, and found in their favour by the jury in their answers to questions 4 (a) and 5. The learned judge, after argument, holding, as it seems, that the issue was sufficiently raised—for he had previously intimated that he would allow no question to be put to the jury which involved any amendment of the pleadings—finally held that the agreements of settlement must be set aside on the ground of mutual mistake, and he ordered the moneys paid thereunder, including the premiums on Mr. Bell's policy paid by Levers on his behalf, to be repaid. The

learned judge held that all the parties to the agreements of settlement entered into them under the common mistake that the contracts of service were binding, in the sense that they could not at that moment have been got rid of without the appellants' consent. It is, I believe, the view of all your Lordships that the order of the learned judge, in so far as it directed the repayment by Mr. Bell of the premiums referred to, cannot stand. WRIGHT, J., overlooked the fact that, even with the agreements for settlement set aside, the liability for payment of these premiums would still remain on Levers under the original agreement of 1923 because, apart from Mr. Bell's agreement so to do in the rescinded agreement of settlement, there had been no termination of his engagement by himself. This point was discussed at your Lordships' Bar and the respondents offered no objection to its being taken into consideration by the House. Accordingly, in that respect at least, the order of the learned judge must now be corrected. But that is relatively a small matter. The greater questions involved remain in issue. A B C

The appellants appealed to the Court of Appeal. On Nov. 17, 1930, their appeal was dismissed. The lords justices took the same view on mutual mistake as the learned judge had done. They also held that, although this was in no way pleaded, his judgment could be supported on the ground that the appellants during the negotiation with Levers for the agreements for settlement were under a duty to disclose their offending transactions of fifteen months before, and that they were not excused from disclosure by reason of the fact that, as the jury had found, these transactions had passed from their minds. Upon the question of amendment, SCRUTTON, L.J., and LAWRENCE, L.J., were of opinion that the issue of mutual mistake had not been pleaded, but, differing in that respect from the learned judge's view, they saw no sufficient reason why the pleadings should not be treated as amended so that the issue might be decided on existing materials. In LAWRENCE, L.J.'s view the objection of the appellants' counsel to that course being taken was "technical" and "devoid of merit." GREER, L.J., held that the issue of mutual mistake was sufficiently raised by the points of claim. D E

From this the appellants appeal to your Lordships' House, and upon that appeal, and for the purpose, as I assume, of obtaining a decision upon any issue open upon the pleadings, both parties accepted the jury's findings as correct. Upon this three questions at once arise. (i) Is this issue of mutual mistake open to the respondents upon the pleadings? (ii) If not, is this action one in which, without injustice to the appellants, the necessary amendments to raise it could after verdict and on the application of the respondents have been allowed by the learned judge? May these even now on a like application be allowed by this House? And (iii) If such amendments be allowed, are the respondents entitled to judgment upon the issue raised by them? I propose to deal with each of these questions in their order. F G

As to (i), I believe that all of your Lordships are of opinion that this case of mistake is not open to the respondents on the pleadings as they stand. I think no other view is tenable. In its setting, as well as according to its terms, the pleading to me seems quite unambiguous. The case pleaded by the respondents was on the face of it, and from beginning to end, a case of deliberate fraud on the part of the appellants. The points of claim, at great risk to the respondents in the matter of costs, were amended once only that the fraud charged might be more flagrant in character. Even without the particulars of the mistake alleged I should not have thought that its meaning or intent was doubtful. With the assistance of the particulars its meaning becomes, I think, abundantly clear. That it is the state of mind of Levers which is alone being therein described is, surely, shown by the fact that the moneys are only alleged to have been "paid" under mistake. There is no allegation at all that the moneys were "received" under the same mistake. And the particulars appear to me conclusively to show that no such allegation was intended to be made. Further, the pleading, if limited to unilateral mistake induced by the appellants' fraud, is, even although alternative, consistent with all that precedes, but mutual mistake, innocent on the part of the appellants, is so entirely destructive of everything previously alleged against them, that no interpretation of the H I

A pleading involving an assumption of honesty on their part could in the absence of the clearest words properly be placed upon it. Finally, the claim made by the heads of claim is for rescission of the agreements of settlement, relief properly consequent upon a case of voidability either for fraud or unilateral mistake induced by fraud. But if the allegation, even alternative, was that the agreements were entered into under mutual mistake of fact, then these were not voidable, but void ab initio, and no order on that footing is even hinted at in the relief sought. The truth is that the respondents, having decided to charge fraud against the appellants, did so, up to the hilt. Accordingly I am of opinion that the case on which the respondents have succeeded in the courts below was not open to them on the pleadings as they stand. It is clear also as I have said that the learned judge entertained that case only because of his view, which all your Lordships consider erroneous, that no amendment was called for.

(ii) This circumstance makes the second of the above questions of the gravest importance. Are your Lordships in the court of last resort to grant an amendment which the learned trial judge himself would have refused? It is convenient to set forth here the amendment which the respondents formulated and asked for, if amendment was held to be required. It was as follows:

D “Paragraph 26 A. Further and in the alternative the said agreements and each of them were made under a mutual mistake of fact and the moneys paid and received thereunder were paid and received under a mistake of fact.

“Particulars.

E “The plaintiffs Levers and the defendants and each of them were under a mutual mistake fundamental to the said agreements that the said contracts of service and each of them existed as binding obligations upon the said plaintiffs and the defendants respectively and that the said contracts respectively could not be terminated without the assent of the defendants respectively.

“Further or in the alternative the plaintiffs Levers will rely upon the particulars set out under para. 26 hereof.”

F There are of course no limits to the power of your Lordships' House to permit, in proper circumstances, almost any amendment. Nevertheless, the power is not one for arbitrary exercise, and I propose in dealing with the propriety of its exercise now to govern myself by two authoritative statements of relevant principle, one by LORD WATSON and the other by LORD LINDLEY, when Master of the Rolls. My first and second reasons for concluding that leave to amend should in this case be refused are based upon LORD WATSON's judgment in *Connecticut Fire Insurance Co. v. Gavanagh* (3), where the respondent had complained that the case which was being maintained against him before the Judicial Committee was not within the appellants' declaration and that the evidence led at the trial had not been directed to that new case, which ought not to be entertained by the board. Upon that contention, LORD WATSON delivering the judgment of the board said ([1892] A.C. H at p. 480):

I “When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.”

Except that, in that instance, the new case was one of negligence, whereas here the new case is one of innocent mistake, LORD WATSON's observations seem to me to be entirely in point, and I base myself upon them as I proceed. A

My first reason for the conclusion that this amendment should not be allowed is this. It raises, as something quite new, in an action hitherto based on fraud alone, an issue with all fraud eliminated. If the amendment were allowed, the appellants in the discussion of that new issue would find themselves faced with and bound by the answers of the jury to the fourth question. But, on examination of the learned judge's summing up, it appears, as I think, quite clearly that these answers were given by the jury under a direction which, although it might have been allowed to pass as relatively harmless in a case based upon fraud, was one which, as applied to a case from which all fraud has been eliminated, cannot in point of law, as I think, be supported. It is not necessary to suggest—it may not be permissible for me even to speculate—what, under a proper direction, as applied to the new case, the answers of the jury to the questions would, or should, have been. It is enough, for present purposes, to say, as I do, that to allow the respondents to make this new case, with the appellants bound to accept these answers to the fourth question as they stand, would, in my judgment, expose the appellants to a risk of injustice from which they are entitled to claim protection. The answers to that fourth question, of course, depend upon what was the true nature of the liability of the appellants to the Niger Co. resulting from the offending transactions as found by the jury and as already described. Did these transactions as thus ascertained involve on the part of the appellants a breach of their duty to the Niger Co. so serious as, on their discovery by Levers fifteen months later, to be sufficient to justify an immediate disclaimer of all further responsibility under the appellants' agreements of service? That is the question. I have already given my reasons for the view that in the fourth question the real relation between the parties is not properly appreciated. I have also explained why I think it so unfortunate that the learned judge should have directed the jury, as he did, that the answers to question 4 (a) and question 4 (b) should be based upon the same considerations. All this, however, is relatively unimportant here. Even the further direction, to which I am now about to refer, might have been allowed to pass, had the fraud referred to in question 3 (C) been found, for with that fraud brought home to the appellants the action would have really been undefended. But that charge, like all the other charges of fraud, failed and has disappeared, and the precise character in legal responsibility of the offending transactions stripped of fraud becomes of essential importance. Here the point to be noted is that these transactions involved no contract or engagement in which, either for profit or loss, the Niger Co. was at all concerned. The contracts involved were all contracts by which the appellants alone were bound for their own benefit or burden to some outside party exclusive of the Niger Co. altogether. This distinction is vital, because the liability of a director in respect of profits made by him from a contract in which his company also is concerned is quite different from his liability, if any there be, in respect of his profits from a contract in which the company has no interest at all. In the first case, unless by the company's regulations the director is permitted, subject to or without conditions, to retain his profit, he must account for it to the company. In the second case, the company has no concern in his profit and cannot make him accountable for it unless it appears—this is the essential qualification—that in earning that profit he has made use either of the property of the company or of some confidential information which has come to him as a director of the company. B C D E F G H I

Unfortunately, the learned judge here, so far as his observations had precision, directed the jury as if the offending transactions were in the first class, and not, as was the fact, in the second, and he gave his direction without any reference at all to the regulations of the Niger Co. The relevant duties of a director were laid down by him in terms of the following quotation which he read to the jury. Those duties were:

A "So to act as to promote the best interests of the company. No one having such duties to perform can be allowed to enter into engagements in which he has or can have a personal interest which conflicts or may possibly conflict with the interests of those whom he is bound to protect. No question is liable on such occasion to be raised as to the fairness or unfairness of the dealing. It may be impossible to demonstrate how far the interest of the company is affected. No inquiry on that subject is permitted."

B The learned judge did not give the source of his quotation, and I have not succeeded in tracing it. But both from its wording, and also from its close similarity to LORD CRANWORTH'S locus classicus on the subject printed in the headnote to *Aberdeen Rail. Co. v. Blaikie Bros.* (4), I can have little doubt that, like LORD CRANWORTH'S statement, the quotation is concerned with a company's contracts in which, on the other side of the table, a director is interested, and with reference to which the company's regulations are silent. The quotation is not addressed to a director's own contracts in which the company has no financial interest at all. The regulations of the Niger Co. are illuminating with reference to both classes of contracts. Article 47 concedes to its directors in very wide terms, and subject to exceptionally easy conditions, the privilege of being concerned in contracts with the company. And the article also clearly contemplates that a director may be a director of another company and entitled to his privileges as such.

D This brings me to the position of a director in relation to contracts of the second class, with which we are here alone concerned. The principle will be found in the case usually cited in relation to it, although reported only in the WEEKLY NOTES, *London and Mashonaland Exploration Co., Ltd. v. New Mashonaland Exploration Co., Ltd.* (5), where it was held that, it not appearing from the regulations of the company that a director's services must be rendered to that company and to no other company, he was at liberty to become a director even of a rival company, and, it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company, he could not at the instance of that company be restrained in his rival directorate. In the present case that principle is not affected by the agreements of each appellant with Levers to devote all his time during business hours to the Niger Co.'s service. There is no corresponding provision in the regulations of the Niger Co., and it was not because the offending transactions were instructed during the day and not in the evening that they are impugned. It was not suggested that the appellants were in any way precluded by virtue of their engagement from at any time entering into private speculations of their own in outside things, as, for example, stocks and shares. Indeed, any such suggestion was expressly disclaimed by the respondents. Moreover, the respondents did endeavour to establish that in relation to these transactions the appellants did make use of the Niger Co.'s property and information; and question 3 (C) is directed to the only instance alleged which after the evidence remained open, and it was answered in the negative. Accordingly I reach the conclusion that, so far, the appellants in relation to the offending transactions were under no liability whatever to the Niger Co.

H But all this is apart from the pool agreement. There remains the question of the liability of the appellants to the Niger Co. by reason of the directors' clause in that agreement, and, as to this, the appellants, in my judgment, were quite right in recognising, so soon as that clause was brought to their notice, that they could not retain the profit which they had made from these transactions. Instead, therefore, of the direction to the jury on this matter being what it was, that direction, on the supposition that the facts would be found as they have been, should, I think, have been to the effect that in the absence of any proof that the appellants in carrying out the offending transactions had utilised for their own purposes any property of the Niger Co. or any confidential information obtained by them as its directors, they were not, apart from the pool agreement, under liability to account in respect of these offending transactions to the Niger Co., or to Levers, or at all. It was the

directors' clause in the pool agreement alone which left the appellants under any liability in the matter, and it must be taken that the existence of that clause was unknown to them until some months after the agreements of settlement, and many months after the offending transactions. Nor should the renunciation of their profit by the appellants after knowledge of the clause be overlooked in the consideration of the question whether the offending transactions of the appellants would have justified more than a year after the event a repudiation by Levers of further liability under the contracts of service. Upon the actual direction given to the jury it is not surprising that they found in reply to question 4 (a) that Levers, and in answer to 4 (b) that the Niger Co., were respectively entitled to terminate the appellants' contracts of service not only in January, 1928, but also in March, 1929. What would be the answer, to the proper questions, of a jury directed on the lines just indicated? I give no answer, save this, that it would, in my judgment, be unjust to the appellants to expose them to the hazard of this amendment, bound by the answers to question 4 as they stand, for it cannot be affirmed that under a proper direction, applicable to the facts as found, that answer would be forthcoming. And it will not be forgotten that in its absence the whole issue of mutual mistake remains, as an issue, stillborn. Such, then, is my first reason for disallowing this amendment.

My second reason is that the appellants have not had the opportunity of showing by evidence the extent to which Levers received consideration for the settlement agreements over and above their release from liability for the further payments for which, on the hypothesis, it was by all parties assumed that they remained liable. I have already indicated the general nature of the advantages derived by Levers from the settlement agreements, as these appear on the record, but this aspect of the case has not been developed in evidence because in the action as fought it was not either relevant or necessary so to do. It may be, though I am far from saying, that even on the existing record the appellants have not sufficient evidence on this point to displace the new plea altogether. But here again it would, I think, be unfair to leave them exposed to the hazard of the amendment with that answer to it quite undeveloped.

My third reason for disallowing the amendment is based on the principle which I have already foreshadowed. "It would be wrong," SIR HERBERT COZENS-HARDY, M.R., said, in *Nocton v. Lord Ashburton* (6) ([1914] A.C. at p. 963), "to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based" in that instance also upon negligence. The qualification of that statement in this House, in the special circumstances of that case, in no way questioned its essential soundness, and further illustrations of its application will be found in *Halsey v. Brotherhood* (7) and *Noad v. Murrow and another* (8). In my judgment, it applies here with compelling force. The first amendment made by the respondents charging further frauds against the appellants with their failure, after a prolonged hearing, to make any of them good, as I think furnishes, when the services of the appellants to the Niger Co. are remembered, a convincing reason why this complete change of front, after all else has failed, should not be permitted to the respondents. I cannot, therefore, hold with the view that the appellants' objections to this amendment are either technical or destitute of merit. On the contrary, the objections seem to me to be fundamental, and in the interests of fairness in litigation it is, I think, *optimi exempli*, that in such a case as this they should be sustained.

I am prepared, therefore, to allow this appeal on this head solely on the ground that no case other than their pleaded case is open to the respondents in this House and mutual mistake has not been pleaded. But if, contrary to my own notions of the fitness of things, the appellants, bound by the jury's answers to question 4, were to be put at risk by having this question of mutual mistake determined on existing materials, I should not wish it to be supposed that, in my judgment, the appellants would fail. On the contrary, they would, I think, even so handicapped, still succeed on that question. There I find myself in entire accord with the conclusions

A of my noble and learned friends (LORD ATKIN and LORD THANKERTON), whose judgments I have had the advantage of reading. I refrain from adding to a deliverance already too long any further observations on the case so regarded. My noble friends begin where I am content to end. But I follow them also to their goal.

I would add a word on the second ground relied upon by the lords justices in support of the learned judge's order, namely, that it could be upheld for the reason that Levers' unilateral mistake, which was certainly pleaded, resulted from a neglect on the part of the appellants of their duty when negotiating the agreements of settlement to disclose to Levers their offending transactions. I am in entire agreement with the answer given to this suggestion by my two noble friends opposite, made on the assumption that Levers were the employers of the appellants and that the "offence" in their transactions had only temporarily passed from their minds. But if the true position be, as I have tried to show, that the appellants were not in any relevant sense the servants of Levers and that the only reason why their transactions were "offending" was that they involved the Niger Co. in a breach of the directors' clause of the pool agreement, of the existence of which the appellants were not merely forgetful but were in complete ignorance, what then, I would ask, remains of any duty on their part to disclose? In that view of the situation the duty was, I suggest, plainly non-existent. The action therefore, in my judgment, so far as it was contested, entirely fails.

I confess that I arrive without reluctance at this conclusion of the whole matter. It appears to me to accord with a sound view both of justice and of fairness. I should have deemed it unfortunate if the appellants had been left in enjoyment of the profit accruing from the offending transactions and if they had not been required to pay the nominal damage which the jury considered these transactions occasioned to the Niger Co. But that result has not followed. For both the profit and the damage they remain accountable, as is wholesome. Acceptance, however, by your Lordships' House of the orders appealed from would have meant that, after the complete failure of the grave charges of fraud preferred against officials whose ability and services had brought to the Niger Co. advantages of untold value, these officials, the appellants, would have been left exposed to the same consequences as if the charges had all been true. Speaking only for myself, I feel relieved to be able to take a view of equity and procedure which shields the appellants from such a consequence. Nor is it, to my mind, unjust that, their profit accounted for, the appellants should be left in possession by way of remuneration for their services of sums which, while they may seem bountiful to minds disciplined in a school of progressive austerity, would doubtless, by those engaged in great business, be regarded as no more than adequate to the occasion. In the result, the appeal should, I think, be allowed with consequences which I will ask the House to accept after all your Lordships have given judgment.

LORD WARRINGTON.—This is an appeal by the appellants, Ernest Hyslop H Bell and Walter Edward Snelling (the defendants in the action), from a unanimous judgment of the Court of Appeal (SCRUTTON, LAWRENCE and GREER, L.JJ.) dated Nov. 17, 1930, affirming a judgment of WRIGHT, J. (dated June 5, 1930), pronounced upon the trial of the action before himself and a special jury of the City of London. By that judgment certain agreements made between the respondents (Lever Bros., Ltd., and the two appellants respectively) were declared void and I were set aside, and the appellants respectively were ordered to repay to the respondents (Lever Bros., Ltd.) the sums of money paid to them thereunder. The substantial question raised by the appeal is whether in point of law upon certain findings of the jury, and upon such inferences of fact as could properly be drawn from those findings and the evidence, the two agreements were liable to be set aside on the ground of mutual mistake of fact affecting what is alleged by the respondents to be a fundamental assumption accepted on both sides as the basis on which the agreements were made. A minor point of procedure was raised and decided against the appellants in both courts, namely, whether in view of the pleadings

and the conduct of the trial it was open to the learned judge to decide the case on the point referred to above. It is unnecessary for me to repeat the detailed statement of the facts already made; it is quite enough to give a short summary of them in order to explain the conclusions at which I have arrived. A

In 1923 Lever Bros., Ltd., having very large interests in the Niger Co., Ltd. (the respondents of that name), a company trading in cocoa and other produce on the West Coast of Africa, were desirous of obtaining the services of persons of experience and repute in the financial and commercial world to undertake and improve in their interests, as shareholders, the conduct of the affairs of the Niger Co., and with this object approached the two appellants. The result was the making of a service agreement with each of the appellants, that with the appellant Bell being dated Aug. 9, 1923, at a salary of £8,000 per annum, and that with the appellant Snelling being dated Oct. 9, 1923, at a salary of £6,000 per annum. Mr. Bell's agreement was for five years from Oct. 1, and Mr. Snelling's was for five years from Nov. 1, 1923. Each period was subsequently extended to five years from July 1, 1926. By each agreement the appellant concerned agreed to serve the Lever Co. and to devote the whole of his time and attention during business hours to the business of the Lever Co. The sphere of his service was so far defined that in Mr. Bell's case he was to be appointed and maintained as chairman of the Niger Co. during his service with the Lever Co. In Mr. Snelling's case no such specific agreement was made, but he as well as Mr. Bell was appointed a director of the Niger Co., and while Mr. Bell was appointed chairman of the board Mr. Snelling was appointed a vice-chairman. Each of them thus undertook direct obligations towards the Niger Co. as well as those obligations towards the Lever Co. which resulted from his service agreement. The salary of each was borne and paid by the Lever Co. By two letters dated July 1, 1926, signed by Mr. D'Arcy Cooper on behalf of the Lever Co. and addressed in the one case to Mr. Bell and in the other to Mr. Snelling, the then existing service agreements were varied, first by extending the period of service as above mentioned, and, secondly, by giving to each of the two gentlemen a commission on the profits of the Niger Co. as thereby defined in addition to his salary, which continued as before. It is not disputed that the services of the two appellants in their several capacities were of great value to the Lever Co. and to the Niger Co. B C D E F

Early in the year 1929 certain arrangements for the amalgamation of the Niger Co. and another company called the African and Eastern Trading Co. were made, which on their becoming effective on May 1 in that year would involve the termination of the two service agreements before the period fixed for their continuance, namely, July 1, 1931. In these circumstances Mr. D'Arcy Cooper entered into negotiation with each of the two appellants for fixing the amount of compensation to be paid to them respectively for the premature termination of their employment by the Lever Co. These resulted in the two agreements, the subject of this appeal. By each of these agreements the appellant concerned agreed that on May 1, 1929, he would retire from the boards of the Niger Co. and its subsidiaries, and in consideration of his so doing the Lever Co. were to pay him, as compensation for the termination of his agreement and the consequent loss of office, in the case of Mr. Bell, the sum of £30,000, and in that of Mr. Snelling £20,000, in full satisfaction and discharge of all claims and demands by them of every nature and kind and howsoever arising against the Lever Co., the Niger Co. and other companies and persons therein mentioned. In Mr. Bell's case provision was made for the continued payment by the Lever Co. of an insurance premium therein mentioned which will be referred to later on. These agreements were duly carried into effect by the resignation by Mr. Bell and Mr. Snelling of their several offices and by payment to them respectively of the agreed compensation. G H I

I now come to the circumstances giving rise to the present litigation. Between Nov. 4 and Dec. 14, 1927, the two appellants entered on their own behalf into certain speculative transactions in cocoa, referred to in the proceedings at the trial as contracts C.T.C., R.T.D., and G.S.2. These transactions resulted in a net

A profit to the appellants of £1,360. The fact that these transactions had taken place was not disclosed to and was not known by any of the directors or officials of either the Niger Co. or the Lever Co., except, of course, the appellants themselves, until after the conclusion of the agreements now in question, and the payment of the compensation payable thereunder. In or about June, 1929, in the course of certain arbitration proceedings, the particulars of which it is unnecessary to state, the appellants, in answer to inquiries made on behalf of the Niger Co., disclosed the transactions above referred to and their result. In answer to questions put to them by the learned judge, the jury found that the appellants committed breaches of contract or duty towards the respondents by entering into the contracts above referred to as private transactions of their own and for their own benefit. The correctness of this finding is not disputed.

C The present action was commenced by the Lever Co. alone on Aug. 9, 1929. By an amendment made on April 2, 1930, the Niger Co. were added as co-plaintiffs. As ultimately submitted for decision the case of the respondents contained charges of fraudulent misrepresentation and concealment by both appellants with the object and effect of inducing the Lever Co. to make the agreements of March 19, 1929, charges of wrongfully appropriating as their own the contracts above mentioned, D being, as alleged, contracts of the Niger Co. and appropriating to themselves the profits on such contracts and a charge of appropriating to their own use and benefit £1,000, the moneys of the Niger Co. All these charges were negatived by the jury and their findings in this respect are accepted. The points of claim after the allegations of fraudulent misrepresentation and concealment above mentioned contained the following clause :

E "26. Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact,"

and the plaintiffs claimed rescission of the two agreements of March 19, 1929, and repayment of the moneys paid thereunder, and a declaration that previously to the making of such agreements the plaintiffs were entitled to terminate the contracts F of service and to dismiss the defendants without notice by reason of their alleged conduct. The appellants admitted their liability to account to the Niger Co. for the £1,360, the profits on the transactions above mentioned, and this sum was duly paid into court. Ultimately, the case was decided against the appellants on the alternative point above referred to, the mistake there mentioned being treated as a mutual and not as a unilateral mistake.

G The questions material to the issue of mistake as put to the jury and their answers thereto were as follows :

3 (B) Did the defendants or either of them commit breaches of contract or duty towards the plaintiffs in entering into the contracts referred to as C.T.C., R.T.D., and G.S.2 or any of them as private transactions on their own account and for their own benefit? Answer: Yes.

H 4 (a) Were the plaintiffs, Levers, entitled to determine the contracts of service with the defendants or either of them? (i) In January, 1928? Answer: Yes. And (ii) in March, 1929? Answer: Yes. If so, would the plaintiffs, Levers, have elected to exercise such right at either of such dates? Answer: Yes. Similar questions and answers were asked and given as to the position of the Niger Co. in reference to the offices therein held by the defendants respectively.

I 5. When Levers entered into the agreements of March 19, 1929, did they know of the acts of either of the defendants in regard to the dealings C.T.C., R.T.D., G.S.2? Answer: No. If Levers had so known would they have made these agreements or either of them? Answer: No. At the date of the respective interviews prior to these agreements had the defendant Bell or the defendant Snelling in mind their acts in respect of these transactions? Answer: No. The final question was put to the jury at the suggestion of the learned judge, and obviously is only relevant to the issue whether there was a mutual mistake. No objection to it was taken on the part of the appellants. Moreover, it is quite

obvious that an argument founded on unilateral mistake had not the slightest chance of success, and it must have been clear to both parties that the learned judge was going to deal with the case as one of mutual as distinguished from unilateral mistake. I will assume for the present that either on the pleadings as rightly understood, or on the manner in which the case was conducted, or on the assumption that all the evidence reasonably likely to be forthcoming on the point was before the court, the learned judge was entitled to deal with the matter on the footing of mutual mistake, and will consider the case on that footing. A B

The learned judge thus describes the mistake invoked in this case as sufficient to justify a court in saying that there was no true consent, namely,

"Some mistake or misapprehension as to some facts . . . which by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract they did." C

That a mistake of this nature common to both parties is, if proved, sufficient to render a contract void is, I think, established law.

I will refer to two cases only amongst several in which the principle was acted on. The first is one at common law, namely, *Strickland v. Turner* (9). In that case a contract for sale of an annuity, under which the purchase money had been paid, was held to be void at law and the money was ordered to be repaid, on its being discovered that the person on whose life the annuity depended had, without the knowledge of either party, died before the date of the contract of sale. The parties were treated as having intended to contract on the basis of something of value actually existing, and as this proved not to have been the case the contract failed to be binding. The other case, *Scott v. Coulson* (10), is an example of the application of the same principle in a court of equity. A contract for the sale of a policy was set aside on its being discovered that the assured was dead at its date, both parties being in ignorance of that fact. I cite this case for the sake of a passage in the judgment of VAUGHAN WILLIAMS, L.J. He says ([1903] 2 Ch. at p. 252): D E

"If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract if the basis which both parties recognised as the basis is not true." F

This principle, however, is confined to cases in which

"the mistake is as to the substance of the whole consideration, going as it were to the root of the matter": G

Kennedy v. Panama, New Zealand and Australian Royal Mail Co. (11) (L.R. 2 Q.B. at p. 588), and does not apply where the mistake is only as to some point, a material point, it may be, and even one which may have been the actuating motive of one of the parties, an error as to which does not affect the substance of the whole consideration. *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* (11) is a case in which it was held that the error relied on did not affect the substance of the consideration and the contract in question was, accordingly, enforced. The contract was one to take shares in a company. The prospectus on the faith of which the plaintiff had applied for shares contained a representation made in good faith that the company had obtained a valuable contract for the carriage of mails. The representation was intended to, and did in fact, induce the plaintiff to apply for shares. It was untrue, for though when the application for shares was made and accepted there were reasonable grounds for expecting that such a contract would be obtained, it was never in fact concluded. It is to be observed that the error did not affect the shares, themselves the subject of the H I

A contract impeached; they were, notwithstanding the error, the very thing about which the parties were contracting. All that was affected was the prospect of the company's earning profits available for payment of dividends. Accordingly, the plaintiff's action, brought for the purpose of setting aside the contract and obtaining repayment of his subscription, was dismissed. In *Smith v. Hughes* (12) the result was the same, but for a different reason, namely, that there was no sufficient finding that the mistake was mutual. It was alleged that the vendor was intending to sell, and that the purchaser, intending to buy, believed that he was buying old oats, whereas the actual parcel of oats, the subject of the contract, consisted of new oats. The purchaser's claim to be relieved of the contract failed because the learned judge at the trial did not point out the necessity of finding not only that the purchaser believed the oats to be old, but that he also believed that the vendor was selling them as old.

This kind of difficulty does not arise in the present case. It is, in my opinion, clear that each party believed that the remunerative offices, compensation for the loss of which was the subject of the negotiations, were offices which could not be determined except by the consent of the holder thereof, and further believed that the other party was under the same belief and was treating on that footing. The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements that the service contracts were undeterminable except by agreement was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract which they in fact made, or whether it was only a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration. With the knowledge that I am differing from the majority of your Lordships I am unable to arrive at any conclusion except that in this case the erroneous assumption was essential to the contract, which without it would not have been made. It is true that the error was not one as to the terms of the service agreements, but it was one which, having regard to the matter on which the parties were negotiating, namely, the terms on which the service agreements were to be prematurely determined and the compensation to be paid therefor, was, in my opinion, as fundamental to the bargain as any error one can imagine. The compensation agreed to be paid was in each case the amount of the full salary for the two years and a half unexpired, with the addition in Mr. Bell's case of £10,000, and in Mr. Snelling's of £5,000. It is difficult to believe that the jury were not correct in their answer to the second branch of the group of questions numbered 5, namely, that had Levers known of the acts of the appellants in regard to the dealings in question Levers would not have made the agreements now impeached or either of them. It is true that such a finding is not in the strict sense one of fact, but it is an inference which the jury were entitled to draw from the evidence and from all the circumstances of the case, it is one which the learned judge and the Court of Appeal have also drawn, and, if I may say so with respect, it is one that I should draw myself. I also agree with the learned judge that, looking at the matter from the side of the appellants, the existence of an agreement giving them rights which could be compromised only by compensation was in the same way the root and basis of the cancellation agreements.

In my opinion, therefore, on the assumption that the point was open, the appeal on the main question ought to be dismissed. As to the question whether the point was open I agree that it is at least doubtful whether mutual mistake as to a fundamental fact was sufficiently pleaded either in the pleading itself or by the particulars subsequently given, but I have no hesitation in coming to the same conclusion as that arrived at by SCRUTTON and LAWRENCE, L.JJ., namely, that in view of the proceedings at the trial effect ought not to be given to a technical objection such as that in question. No further evidence was, in my opinion, needed or could reasonably be expected to be forthcoming on the question, and no substantial prejudice has been suffered by the defendants. But while I think the appeal ought to be dismissed there is one point which appears to have been overlooked at

the trial, and in reference to which in my judgment there should, if the appeal were dismissed, be a variation in the order. The service agreement with Mr. Bell provided that Lord Leverhulme was to take out in the Atlas Assurance Co., and Lever Bros. were to pay all premiums on, an endowment policy on Mr. Bell's life maturing at the age of sixty or previous death for an amount which would provide £1,500 per annum or £16,200 at his option. This policy was to belong to him, the premiums being paid by Lever Bros., notwithstanding the termination of his engagement unless the same should be terminated by him. The cancellation agreement preserved this obligation on the part of Lever Bros., and if this is set aside the original agreement stands. I cannot think that the conduct of Mr. Bell amounts to a termination by him of the engagement within the meaning of the provision above mentioned, and if the judgment appealed from were to stand provision should be made for the continued payment by Lever Bros. of the premiums, and the repayment to Mr. Bell of any premiums paid by him.

I have purposely avoided dealing with the question whether the appellants were under an obligation as servants to disclose to Lever Bros. their breaches of the service agreements. In the view that I take the question is immaterial. If such an obligation existed it would merely afford a further ground for the termination by Lever Bros. of the service agreements, for which such breaches themselves afforded a sufficient ground. This case seems to me to raise a question as to the application of certain doctrines of common law, and I have, therefore, not thought it necessary to discuss or explain the special doctrines and practice of courts of equity in reference to the rescission, on the ground of mistake, or contracts, conveyances and assignments of property and so forth, or to the refusal on the same ground to decree specific performance, though I think in accordance with such doctrines and practice the same result would follow.

LORD HAILSHAM.—I concur in the judgment of LORD WARRINGTON.

LORD ATKIN.—This case involves a question of much importance in the formation and dissolution of contracts. The facts are not very complicated, though in the course of eliciting them the legal proceedings have undergone vicissitudes which have made the task of determining the issues more difficult than need be. In 1923 the Niger Co., Ltd., was controlled by Lever Bros., Ltd., whom I shall call Levers, who hold over 99 per cent. of its shares. The Niger Co. dealt in West African produce, including cocoa, and at this time appears to have been making trading losses. To restore the position Levers approached the appellant Bell, who had banking experience, and the appellant Snelling, a chartered accountant, with a view to their taking part in the management of the Niger Co.'s affairs. In August, 1923, an agreement was made between Levers and Bell, under which Bell entered the service of Levers for a term of five years from Nov. 1, 1923, on the terms of letters of Aug. 9, 1923, which provided that Bell's salary was to be £8,000 a year. Levers were to pay the premiums on an endowment policy maturing at the age of sixty for a sum of £16,200. Levers were to appoint and maintain Bell as chairman of the Niger Co. during his service. Bell was only to be responsible to the committee of control of Lever Bros. and to the shareholders of the Niger Co. In October an agreement was made between Snelling and Levers whereby Snelling was to be in the service of the company for five years from Oct. 1, 1923, on the terms of a letter of Sept. 12, which provided that Snelling was to serve Levers in regard to its West African interests at a salary of £10,000 per annum to March 31, 1925, and £6,000 for the remainder of the five years. On Sept. 14 both Bell and Snelling were appointed by the Niger Co. directors of the company, and Bell was appointed chairman of the board. In April, 1924, Snelling was appointed vice-chairman. The result of the appointments was a success. The Niger Co. began to prosper, and in July, 1926, the agreements of both Bell and Snelling with Levers were cancelled and new agreements substituted for a further period of five years from July 1, 1926, at the same salaries, but with a commission on the profits of the Niger Co. The Niger Co. continued to prosper, and in March, 1929, arrange-

A ments were concluded for an amalgamation between the Niger Co. and its principal trade competitor, the African and Eastern Trading Corp'n. The terms of the amalgamation appear to have left no room for Bell or Snelling. It was necessary, therefore, to dispose of the agreements between them and Levers. Mr. D'Arcy Cooper, the chairman of Levers, saw both gentlemen and arranged terms with them which are recorded in two letters of March 19, 1929. The compensation was paid
B only on May 1, 1929, on which date the two appellants retired from their service with Levers and from the boards of the Niger Co. and various subsidiary companies to which they had been appointed. Very little attention appears to have been paid at the trial to these subsidiary companies, and there is a scarcity of evidence about them. The position in regard to them may demand further consideration; at present I leave them on one side. The position then is that in March, 1929, the
C two appellants left the service of Levers with substantial compensation in their pockets and mutual expressions of respect and esteem.

In July, 1929, Levers discovered facts which indicated that their expenditure of £50,000 and their expressions of regard had been misplaced. For the years October to October, 1926-27, 1927-28, and 1928-29, the Niger Co., together with three of its trading competitors, including the African and Eastern Trade Corp'n., had been
D parties to what was called "pooling agreements," under which the parties undertook to disclose to one another their dealings in Gold Coast cocoa; agreed not to buy cocoa produced elsewhere without the consent of the pool committee; agreed to fix from time to time buying and selling prices and not to sell without consent below the agreed selling price; and made provision for distributing in agreed proportions the proceeds of the pool. It appears to have been considered necessary
E that the operations of the Niger Co. under the pool should be carried out without excessive publicity; and the brokers' contracts for the Niger Co. were recorded under initials. In November and December, 1927, the two appellants, at a time when the pool committee were lowering the pool purchase price of cocoa, on several occasions sold cocoa short, and closing in a few days at the reduced price made profits. A few days later they bought for the rise and made a small profit.
F Altogether the dealings resulted in a profit of £1,360. The transaction was conducted without the knowledge of Levers or any responsible official of the Niger Co. It was carried out in secrecy; and payment of the profit was made by the brokers at the appellants' request in a draft for American dollars. No defence can be offered for this piece of misconduct. The appellants were acting in a business in which their employers were concerned; their interests and their employers' conflicted; they were taking a secret advantage out of their employment; and without
G any doubt committing a grave breach of duty both to Levers and to the Niger Co. The jury have found that, had the facts been discovered during the service, Levers could and would have dismissed them, and no objection can be taken to this finding. Having made this discovery it naturally occurred to Levers that, instead of spending £50,000 to cancel the two service agreements, they might, if they had known
H the facts, have got rid of the appellants for nothing. They, therefore, claimed the return of the money from the appellants, as well as the amount of the profits made; and on Aug. 7, 1929, issued the writ in the present action, claiming damages for fraudulent misrepresentation and concealment, and an account of the defendants' dealings in cocoa, and repayment of money paid under a mistake of fact. The pleadings were in conformity with the endorsement on the writ. The defendants
I admitted the dealings in cocoa, alleging that they were speculative dealings in differences. They denied that they were wrongful, but pleaded tender of the profit of £1,360, which sum by an amended defence they paid into court. It was not disputed in the Court of Appeal or before this House that the dealings were wrongful; and no question remains on this issue or as to the remedy ordered in respect of it.

The trial began on March 24, 1930, before WRIGHT, J., and a City of London special jury. On the fourth day, on the conclusion of their evidence, the plaintiffs sought and obtained permission to amend their pleadings by alleging a series of

fraudulent dealings in cocoa by the defendants involving misappropriation of the Niger Co.'s funds. At the same time for the first time the Niger Co. were added as plaintiffs. The defendants were eventually acquitted of all the new charges. On May 5, 1930, the trial commenced anew before the same judge and a new jury. At the conclusion of the evidence there was some discussion as to the questions to be put to the jury. The court adjourned for a day or two before the summing up of the judge. There had been some discussion as to the issue raised by the plea of mistake, and when the case was resumed counsel for the plaintiffs [the respondents] suggested an additional question, saying: "Did the plaintiffs in entering into the said agreements for the payment of and in paying the £30,000 and £20,000 respectively act in ignorance of the defendants' conduct (my Lord, that avoids the word mistake to which your Lordship took objection), and was such ignorance due to non-disclosure by the defendants of such conduct?" So far this seems to have been the only reference to the matter of mistake in the proposed questions. The learned judge said: "I have been thinking about that matter; probably yours is better; but what I thought of asking was this: 'When Levers entered into the agreement of March 19, 1929, did they know of the acts of the defendants or either of them in regard to the dealing C.T.C., R.T.D., and G.S.2? If Levers had known would they have made these agreements or either of them? At the date of the respective interviews prior to these agreements had the defendants or either of them in mind their actings in respect of these transactions?'" To the last question counsel for the defendants objected that there was no evidence that they had. Whereupon the judge said: "The point must really arise; that issue of fact will have to be dealt with by the jury when they are considering the question of fraudulent misrepresentation or fraudulent concealment. On the other hand, the verdict of the jury on this point may have some bearing hereafter on the question of mistake." The circumstances in which this last question was admitted are relevant to the complaint of the appellants as to the subsequent admission of any issue as to mutual mistake. They say that the only issue raised by the pleadings was to a unilateral mistake by the plaintiffs; that the question propounded by the plaintiffs shows this; and that it cannot be assumed that the judge, while stating that the plaintiffs' questions might be better, but that he preferred his own, should have asked a question for the purpose of solving an issue as to mutual mistake which was not upon the pleadings and upon which no witness had been examined or cross-examined, and on which no word had been said to the jury by counsel on either side. At present it is unnecessary to say more on the topic.

The questions as finally left to the jury and their answers have been stated to the House, and I need not repeat them. The judge heard argument as to how judgment should be entered. At some stage of the proceedings the parties had agreed that rescission of the agreements must be left to the judge and that on any point left to him he must have leave to draw inferences of fact. Eventually the judge gave judgment for apparently both plaintiffs, for £31,224 against the defendant Bell and £20,000 against the defendant Snelling, on the ground that "there was a total failure of consideration such as to vitiate the bargain" because "the parties dealt with one another under a mutual mistake as to their respective rights." On appeal this judgment was affirmed. The three lords justices accepted the view of WRIGHT, J., that there was a mutual mistake which entitled the plaintiffs to recover. They were also agreed that there was a duty upon the defendants to disclose to the plaintiffs their misconduct as to the cocoa dealings and that the contracts under which the money was paid were in consequence voidable.

Before the Court of Appeal and before this House the appellants contended that no issue as to mutual mistake had been raised by the pleadings, and that it was not open to the learned judge or to the Court of Appeal to determine the case without an amendment of the pleadings and upon an issue of fact which was not submitted to the jury. The lords justices appear to have held varying views on this point. SCRUTTON, L.J., thought that the point was not pleaded, but that it was the practice of the courts to deal with the legal result of pleaded facts, though

A the particular legal result was not pleaded except where to ascertain the validity of the legal result would require the investigation of new and disputed facts which had not been investigated at the trial. Here he thought that there were no such disputed facts, and that the question could be dealt with without amendment. LAWRENCE, L.J., on the assumption that mutual mistake was not pleaded, thought that all the facts relevant to mutual mistake had been fully investigated and ascertained at the trial, and that the objection was a mere technical objection without merits. GREER, L.J., thought that mutual mistake was sufficiently pleaded. I think it is sufficient to say for present purposes that it seems to me clear, when the pleadings and particulars are examined, that the pleading was confined to unilateral mistake. In these circumstances the judge on a trial with a jury has, without consent of the parties, no jurisdiction to determine issues of fact not raised by the pleadings; nor, in my opinion, would a general consent to determine issues not decided by the jury include a power without express further consent after the jury had been discharged to amend pleadings so as to raise further issues of fact. Similarly, the powers of the Court of Appeal which, under Order 58, r. 4, are wider than those of the judge, are limited in the case of trials by jury to determining issues of fact in cases where only one finding by a jury could be allowed to stand. Further, I think that the Court of Appeal cannot without amendment decide a case upon an unpleaded issue of law which depends upon an unpleaded issue of fact. If the issue of fact can be fairly determined upon the existing evidence they may of course amend; but in any such case amendment appears to me to be necessary. In this House in the course of the hearing an amendment was tendered by the plaintiffs which did aver a mutual mistake. In the view that I take of the whole case it becomes unnecessary to deal finally with the appellants' complaint that the points upon which the plaintiffs succeeded were not open to them. I content myself with saying that much may be said for that contention.

Two points present themselves for decision. (i) Was the agreement of March 19, 1929, void by reason of a mutual mistake of Mr. D'Arcy Cooper and Mr. Bell? (ii) Could the agreement of March 19, 1929, be avoided by reason of the failure of Mr. Bell to disclose his misconduct in regard to the cocoa dealings? The rules of law dealing with the effect of mistake on contract appear to be established with reasonable clearness. If mistake operates at all it operates so as to negative or in some cases to nullify consent. The parties may be mistaken in the identity of the contracting parties, or in the existence of the subject-matter of the contract at the date of the contract, or in the quality of the subject-matter of the contract. These mistakes may be by one party, or by both, and the legal effect may depend upon the class of mistake above mentioned. Thus a mistaken belief by A that he is contracting with B, whereas in fact he is contracting with C, will negative consent where it is clear that the intention of A was to contract only with B. So the agreement of A and B for the purchase of a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act, 1893, the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, but I know of no case where a seller has so committed himself. This is a case where mutual mistake certainly and unilateral mistake by the seller of goods will prevent a contract from arising. Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where unknown to the parties the buyer is already the owner of that which the seller purports to sell him. The parties intended to effectuate a transfer of ownership; such a transfer is impossible; the stipulation is *naturali ratione inutilis*. This is the case of *Cooper v. Phibbs* (13), where A agreed to take a lease of a fishery from

B, though, contrary to the belief of both parties at the time, A was tenant for life of the fishery and B appears to have had no title at all. To such a case Lord WESTBURY applied the principle that, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Applied to the context the statement is only subject to the criticism that the agreement would appear to be void rather than voidable. Applied to mistake as to rights generally it would appear to be too wide. Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract, but that the vendor has either committed a breach of a stipulation as to title or is not able to perform his contract. The contract is unenforceable by him, but is not void. Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law. The principles to be applied are to be found in two cases which, so far as my knowledge goes, have always been treated as authoritative expositions of the law.

The first is *Kennedy v. Panamā, New Zealand and Australian Royal Mail Co.* (11). In that case the plaintiff had applied for shares in the defendant company on the faith of a prospectus which stated falsely but innocently that the company had a binding contract with the government of New Zealand for the carriage of mails. On discovering the true facts the plaintiff brought an action for the recovery of the sums that he had paid on calls. The defendants brought a cross-action for further calls. BLACKBURN, J., in delivering the judgment of the court (COCKBURN, C.J., and BLACKBURN, MELLOR, and SHEE, JJ.), said (L.R. 2 Q.B. at p. 586):

"The only remaining question is one of much greater difficulty. It was contended by Mr. Mellish, on behalf of Lord Gilbert Kennedy, that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company bona fide believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. And, if the invalidity of the contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz v. Bartlett* (14) and *Gurney v. Womersley* (15), where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case and void under the stamp laws in the other; in both cases the ground of the decision being that the thing handed over was not the thing paid for. A similar principle was acted on in *Ship's Case* (16). There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in

A substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they
B were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract: *Street v. Blay* (17)."

C The court came to the conclusion in that case that, though there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, it did not prevent the shares from being in substance those he applied for.

The next case is *Smith v. Hughes* (12), the well-known case as to new and old oats. The action was in the county court, and was for the price of oats sold and delivered and damages for not accepting oats bargained and sold. COCKBURN, C.J. (L.R. 6 Q.B. at p. 604), cites STORY ON CONTRACTS as follows:

D "STORY, J., in his work ON CONTRACTS (vol. 1, s. 516), states the law as to concealment as follows:

E 'The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operates as an injury to the party from whom it is concealed. Thus [he goes on to say (s. 517)], although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet under the general doctrine of caveat emptor, he is not, ordinarily, bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee. But [he
F continues (s. 518)], an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract.'

G Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519) that with reference to the latter, the rule is

H 'that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case.'

I In the doctrine thus laid down I entirely agree."

In a further passage he says (L.R. 6 Q.B. at p. 606):

"It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not ad idem; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out

unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound. The cases are exactly parallel."

BLACKBURN, J., said (L.R. 6 Q.B. at p. 606):

"In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

The court ordered a new trial. It is not quite clear whether they considered that if the defendants' contention was correct the parties were not *ad idem* or there was a contractual condition that the oats sold were old oats. In either case the defendant would succeed in defeating the claim.

In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing, whether goods or services, that the other party contracted to take, and, therefore, the contract is unenforceable by the one if executory, while, if executed, the other can recover back money paid on the ground of failure of the consideration.

We are now in a position to apply to the facts of this case the law as to mistake so far as it has been stated. The agreement which is said to be void is the agreement contained in the letter of March 19, 1929, that Bell would retire from the board of the Niger Co. and its subsidiaries, and that in consideration of his doing so Levers would pay him as compensation for the termination of his agreements and consequent loss of office the sum of £30,000 in full satisfaction and discharge of all claims and demands of any kind against Lever Bros., the Niger Co., or its subsidiaries. The agreement which, as part of the contract, was terminated, had been broken so that it could be repudiated. Is an agreement to terminate a broken contract different in kind from an agreement to terminate an unbroken contract, assuming that the breach has given the one party the right to declare the contract at an end? I feel the weight of the respondents' contention that a contract immediately determinable is a different thing from a contract for an unexpired term and that the difference in kind can be illustrated by the immense price of release from the longer contract as compared with the shorter. And I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment of a lease for three years, still less a term for a few months. But on the whole I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the contract had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases; and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way: or that, if he had known the true facts, he would not have entered into the bargain. A buys B's horse; he thinks the horse is sound, and he pays the price of a sound horse: he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound A is bound, and cannot recover back the price. A buys a picture from B: both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of

A representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy: and the position is the same whether B knew the fact or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public thoroughfare: unknown to A, but known to B, it has already been decided to construct a by-pass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy. All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed: and that if parties honestly comply with the essentials of the formation of contracts, i.e., agree in the same terms on the same subject-matter they are bound: and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

This brings the discussion to the alternative mode of expressing the result of a mutual mistake. It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties, namely, that the contract would not be terminated till the end of the current term. The question of the existence of conditions express or implied is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties express or implied. They have agreed, but on what terms? One term may be that unless the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect. With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally accepted as underlying the principle of the frustration cases is contractual: an implied condition. Counsel for the respondents formulated for the assistance of your Lordships a proposition which should be recorded: "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; i.e., it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact." I think few would demur to this statement, but its value depends upon the meaning of "a contractual assumption" and also upon the true meaning to be attached to "basis," a metaphor which may mislead. When used expressly in contracts—for instance, in policies of insurance which state that the truth of the statements in the proposal is to be the basis of the contract of insurance—the meaning is clear. The truth of the statements is made a condition of the contract which, failing the contract, is void unless the condition is waived. The proposition does not amount to more than this, that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry how to ascertain whether the contract does contain such a condition. Various words are to be found to define the state of things which makes a condition. "In the contemplation of both parties fundamental to the continued validity of the contract," "a foundation essential to its existence," and "a fundamental reason for making it," are phrases found in the important judgment of SCRUTTON, L.J., in the present case. The first two phrases appear to me to be unexceptionable. They cover the case of a contract to serve in a particular place, the existence of which is fundamental to the service, or to procure the services of a professional vocalist whose continued health is essential to performance. But "a fundamental reason for making a contract" may with respect be misleading. The reason of one party only is presumedly not intended, but in the cases that I have above suggested of the sale of a horse or of a picture, it might be said that the fundamental reason for making the contract was the belief of both parties that the horse was sound or the picture an old master, yet in neither

case would the condition as I think exist. Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more business-like or more just. The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction; and it appears to me that as to both existing facts and future facts a condition should not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts. Thus in *Krell v. Henry* (18) ([1903] 2 K.B. at p. 754) VAUGHAN WILLIAMS, L.J., finds that the subject of the contract was "rooms to view the procession"; the postponement, therefore, made the rooms not rooms to view the procession. This also is the test finally chosen by LORD SUMNER in *Bank Line, Ltd. v. Arthur Capel & Co.* (19), agreeing with LORD DUNEDIN in *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.* (20) ([1918] A.C. at p. 128), where, dealing with the criterion for determining the effect of interruption in "frustrating" a contract, LORD DUNEDIN says:

"An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted."

We, therefore, get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts? To apply the principle to the infinite combinations of facts that arise in actual experience will continue to be difficult; but if this case results in establishing order in what has been a somewhat confused and difficult branch of the law it will have served a useful purpose. I have already stated my reasons for deciding that in the present case the identity of the subject-matter was not destroyed by the mutual mistake, if any, and I need not repeat them.

It now becomes necessary to deal with the second point of the plaintiffs, namely, that the contract of March 19, 1929, could be avoided by them in consequence of the non-disclosure by Bell of his misconduct as to the cocoa dealings. Fraudulent concealment has been negatived by the jury; this claim is based upon the contention that Bell owed a duty to Levers to disclose his misconduct, and that in default of disclosure the contract was voidable. Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts, expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not the contract is voidable. Apart from special fiduciary relationships contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner. Unless this contract can be brought within this limited category of contracts uberrimae fidei it appears to me that this ground of defence must fail. I see nothing to differentiate this agreement from the ordinary contract of service; and I am aware of no authority which places contracts of service within the limited category that I have mentioned. It seems to me clear that master and man negotiating for an agreement of service are as unfettered as in any other negotiation. Nor can I find in the relation of master and servant when established anything that places agreements between them within the protected category. It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow-servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but when he has stolen is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well-established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years previously he received a

A secret commission from the wine merchant; and, if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase in salary and recover back the extra wages paid? If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, and

B will then be protected by the truth or untruth of the answers. I agree with the view expressed by AVORY, J., in *Healey v. Société Anonyme Française Rubastic* (21) on this point. It will be noticed that Bell was not a director of Levers, and with respect I cannot accept the view of GREER, L.J., that, if he was in a fiduciary relationship to the Niger Co., he was in a similar fiduciary relationship to the shareholders, or to the particular shareholders (Levers) who held 99 per cent. of the shares. Nor do I think that it is alleged or proved that in making the agreement of March 19, 1929, Levers were acting as agents for the Niger Co. In the matter of the release of the service contract and the payment of £30,000 they were acting quite plainly for themselves as principals. It follows that on this ground also the claim fails.

The result is that in the present case servants unfaithful in some of their work

D retain large compensation which some will think they do not deserve. Nevertheless, it is of greater importance that well-established principles of contract should be maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the courts loose powers of introducing into contracts terms which would serve only to introduce doubt and confusion where certainty is essential. I think,

E therefore, that the appeal should be allowed, and I agree with the order to be proposed by my noble and learned friend LORD BLANESBURGH.

LORD THANKERTON.—The detailed facts of this case have been sufficiently stated already by your Lordships. The findings of the jury were accepted by all parties, who were also agreed that the court should have leave to draw inferences

F of fact generally. The two main contentions between the parties are whether the agreements of March, 1929, are liable to be set aside (a) on the ground of mutual mistake or error, or (b) by reason of the non-disclosure of material facts by the appellants, whereby Lever Bros. were induced to enter into these agreements. The judgment of both courts below was unanimously against the appellants on the first point, and, while WRIGHT, J., expressed no opinion, the Court of Appeal was

G also unanimously against the appellants on the second point, though the first point was sufficient for their disposal of the case. The appellants, however, must succeed on both points in order to succeed in their appeal. Both these points raise important questions of principle and I regret to find myself unable to agree with the conclusions of the courts below on either point. In this view, it is unnecessary for me to deal with the two further questions, namely, whether the first point is

H open to the respondents on the pleadings and the course of procedure, and whether the obligation in Mr. Bell's service agreement as to payment by Lever Bros. of the premiums on an endowment policy remains binding, despite the setting aside of the agreement of March, 1929.

The findings of the jury establish that the appellants' four cocoa transactions in

I November and December, 1927, constituted a breach of contract or duty towards the respondents, which would have entitled Lever Bros. to terminate the appellants' contracts of service either in January, 1928, or March, 1929, and that Lever Bros. would have exercised such right at either of these dates. The jury also found that the Niger Co. would have been entitled to dismiss the appellants from their positions as chairman and vice-chairman respectively on either of these dates and would have done so. The jury further found that Lever Bros. entered into the agreements of March, 1929, in ignorance of these transactions of the appellants and that, if Lever Bros. had known of them, they would not have entered into these

agreements. As regards the state of the appellants' mind, the question and answer A
was as follows:

"At the date of the respective interviews prior to these agreements, had the
defendant Bell or the defendant Snelling in mind their acts in respect of these
transactions?"

to which the jury's answer was "No." By their earlier answers the jury had B
acquitted the appellants of inducing Lever Bros. to enter into the agreements of
March, 1929, by fraudulent misrepresentation of faithful and honest service or by
fraudulent concealment of their cocoa transactions.

It will be convenient to deal first with the question whether the appellants had
a duty to disclose their cocoa transactions to Lever Bros. when negotiating the
agreements of March, 1929. If there was such a duty, there is no doubt that the C
failure to disclose—though innocent—amounted to a misrepresentation as to
material facts which induced Levers Bros. to enter into these agreements, and
which would entitle the latter to rescind them. The learned judges of the Court of
Appeal appear to regard the duty to disclose as arising at the time of negotiating
the contract, but I am unable to see that any such duty could arise out of the
circumstances of these agreements. In my opinion, the first question must be D
whether the appellants incurred a duty to disclose these transactions at the time
that they were completed. The failure to account for the profits to the Niger Co.
on which some of the learned judges lay stress, was an integral part of the breach
of duty to that company. The applicants had just as much—or just as little—right
to continue drawing their salaries without disclosure as they had to negotiate two
years later for the commutation of these same salaries. In truth, the negotiations E
in March, 1929, were at arm's length, and not on the footing of the relationship of
master and servant, but for the termination of that relationship, and, if there was
not an already existing breach of an obligation to disclose, I am unable to see how
the circumstances of the agreements of March, 1929, could be held to create such
an obligation. In the absence of fraud, which the jury has negatived, I am of
opinion that neither a servant nor a director of a company is legally bound forth- F
with to disclose any breach of the obligations arising out of the relationship, so as
to give the master or the company the opportunity of dismissal; on subsequent
discovery, the master or company will not be entitled to hold the dismissal as
operating from the date of the breach, but will be liable for wages or salary earned
by the servant during the intervening period. In my opinion, *Healey v. Société*
Anonyme Française Rubastic (21), which was the case of the managing director of G
a company, was rightly decided. There may well be cases in which the conceal-
ment of the misconduct amounts to a fraud on the master or company, but the jury
have excluded that view in the present case. The other cases to which we were
referred relate to a duty to disclose all material facts on formation of a contract,
and form exceptions to the general rule, which does not impose such a duty. The
most familiar of these exceptions is found in the case of policies of insurance, as H
to which BLACKBURN, J., says in *Fletcher v. Krell* (22), "mercantile custom has
established the rule with regard to concealment of material facts in policies of
insurance, but in other cases there must be an allegation of moral guilt or fraud."
Other exceptions are found in cases of trustee and cestui que trust and of a com-
pany issuing a prospectus and an applicant for shares, but the number of exceptions
is limited, and no authority has been cited which extends the exceptions to cover I
a case such as the present. Accordingly, I am of opinion that the appellants had
no legal duty to disclose their cocoa transactions either at the time of their com-
mission or in negotiation for the agreements of March, 1929.

Turning next to the question of mutual error or mistake, I think that the respon-
dents' contention may be fairly stated as follows, namely, that in concluding the
agreements of March, 1929, all parties proceeded on the mistaken assumption that
the appellants' service agreements were not liable to immediate termination by
Lever Bros. by reason of the appellants' misconduct, and that such common

A mistake involved the actual subject-matter of the agreements, and did not merely relate to a quality of the subject-matter. The cases on this branch of the law are numerous, and, in seeking the principle on which they rest, I will at first confine my attention to those which relate to innocent mutual mistake on formation of the contract, as it appears to me that the cases relating to facts arising subsequently to the formation of the contract may be found to rest on a somewhat different principle. But, first, let me define the exact position as at the date of the agreements of March, 1929. The service agreements of both appellants were then existing as binding legal contracts, although it was in the power of Lever Bros., had they then known of the appellants' breach of contract, to have terminated the contracts; but, until the exercise of such power, the contracts remained binding. It is also clear that an essential purpose of the agreements of March, 1929, was to secure the termination of these service agreements. The mistake was not as to the existence of agreements which required termination—for such did exist—but as to the possibility of terminating them by other means. A clear exposition of the principles to be applied in such a case as the present is to be found in the judgment of the Court of Queen's Bench (COCKBURN, C.J., BLACKBURN, MELLOR and SHEE, JJ.), in *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* (11), delivered by BLACKBURN, J., who, as LORD BLACKBURN, re-affirmed this opinion in 1881 in *Mackay v. Dick* (23) (6 App. Cas. at p. 265). In *Kennedy's Case* (11) the plaintiff had taken shares in a further issue of capital by the Panama Co., being induced by a statement in the prospectus that the purpose of the issue was to enable the company to carry out a contract recently entered into with the government of New Zealand for the carriage of mails. That contract had been made with the agent of the New Zealand government, both parties believing that he had authority to make it; but it turned out that he had no such authority, and the government refused to ratify it. Having failed on the charge of fraud and deceit against the directors of the company for making the statements in the prospectus, the plaintiff submitted a second contention, which is stated in the judgment as follows (L.R. 2 Q.B. at p. 586):

"It was contended . . . that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company bona fide believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. And, if the invalidity of the contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz v. Bartlett* (14) and *Gurney v. Womersley* (15), where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of the decision being that the thing handed over was not the thing paid for."

The respondents' contention in the present appeal is in effect the same as the above contention; they maintain that the service agreements surrendered to them are not the service agreements paid for, in respect that they were immediately defeasible by them. BLACKBURN, J., proceeds (L.R. 6 Q.B. at p. 587):

"There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to

enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty."

After referring to the passages in the DIGEST OF CIVIL LAW and the way the question is there mooted, BLACKBURN, J., says:

"The answers given by the great jurist quoted are to the effect, that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. . . . And, as we apprehend, the principle of our law is the same as that of the civil law."

This passage makes clear that it is not enough for the purchaser to prove that the misapprehension was the inducing cause to him and that, if he had known, he would not have entered into the contract. The earlier passage as to the sale of an unsound horse also shows that it is not enough that a grossly excessive price has been paid for a bad article. In that case it was held that the shares obtained by Kennedy in the company were not substantially different things, but that the case was analogous to that of the horse supposed to be sound. It is pointed out in *Kennedy's Case* (11) that, if the directors had known that the contract was not valid, the contract might have been avoided on the ground of a fraudulent misrepresentation. In the present case, there being no obligation to disclose, the appellants, if they had had their misconduct in mind, would have been entitled to say nothing about it, and the respondents, in the absence of fraud, would have been bound by the contracts, even though, if they had known, they would not have entered into the contracts, but would have terminated the service agreements. I have difficulty in seeing how the fact that the appellants did not remember at the time is to put the respondents in a better position. The phrase "underlying assumption by the parties," as applied to the subject-matter of a contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion, it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter. In the present case, however probable it may be, we are not necessarily forced to that assumption. *Cooper v. Phibbs* (13) is a good illustration, for both parties must necessarily have proceeded on the mistaken assumption that the lessor had the right to grant the lease and that the lessee required a lease; LORD WESTBURY says (L.R. 2 H.L. at p. 170):

"the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

In *Scott v. Coulson* (10) it was common ground that at the date of the contract for sale of the life policy both parties supposed the assured to be alive, the result being that the plaintiffs were willing to accept as the best price they could get for the policy a sum slightly in advance of its surrender value and very much below the sum due on the death of the assured. As a matter of fact the assured was dead. It was, therefore, clear that the subject-matter of the contract was a policy still current with a surrender value and that, accordingly, the subject-matter did not exist at the date of the contract. *Couturier v. Hastie* (24), where the cargo sold

A was held not to have existed at the date of sale, and *Strickland v. Turner* (9), where the annuitant was in fact dead at the date of sale of the annuity, were cases where the subject-matter was not in existence at the date of the contract. There are many other cases to the same effect, but I think that it is true to say that in all of them it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract or it was an inevitable inference from the nature of the contract that all the parties so regarded it. In the present case the terms of the contracts throw no light on the question, and, as already indicated, I do not find sufficient material to compel the inference that the respondents, at the time of the contract, regarded the indefeasibility of the service agreements as an essential and integral element in the subject-matter of the bargain. The range of authorities relating to some alteration in circumstances subsequent to the date of the contract do not, in my opinion, raise a question of mutual error or mistake; in them the formation of the contract is complete and binding, but subsequent events arise which critically affect the contract, but whose occurrence has not been provided for in the contract. However it may be stated, when relief from the contract is given, the court, as it appears to me, rests such relief on an implied condition which forms part of a complete and binding contract, but which, on the happening of certain events, terminates the contract. These authorities appear to me, therefore, to have no bearing on the question of error or mistake as rendering a contract void owing to failure of consideration. Accordingly, I am of opinion that the appellants are entitled to succeed in their appeal and that the judgments of the courts below, so far as appealed against by them, should be reversed. I, therefore, concur in the motion to be proposed by my noble and learned friend LORD BLANESBURGH.

Appeal allowed.

Solicitors: *Birkbeck, Julius, Edwards & Co.; Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

C. WILH. SVENSSONS TRAVARUAKTIEBOLAG v. CLIFFE STEAMSHIP CO.

[KING'S BENCH DIVISION (Wright, J.), December 10, 11, 14, 15, 1931]

[*Reported* [1932] 1 K.B. 490; 101 L.J.K.B. 521; 147 L.T. 12;

37 Com. Cas. 83; 18 Asp.M.L.C. 284]

Shipping—Charterparty—Seaworthiness—Warranty—Ship seaworthy at beginning of loading—Cargo lost during loading—Liability of shipowner—"Loading"—Inclusion of stowage—Exception clause—"Accident to hull"—Bulwarks broken during loading—"At charterers' risk"—No exception of negligence.

Under a charterparty the defendants' steamship was to proceed to specified ports and load pit props for delivery at a port on the east coast of England as ordered by the charterers. Under the charterparty a full deck-load of props was to be carried "at charterers' risk, not exceeding what [the ship] can reasonably . . . carry." The exception clause in the charterparty included, inter alia, "accidents to hull . . . even when occasioned by the negligence . . . of the . . . master . . . or other persons employed by the shipowner, or for whose acts he is responsible." There was no exception of unseaworthiness. Loading had proceeded normally until only three or four slings of props had

to be taken on board. When these props had been slung aboard, but stowage of them had not been completed, the ship took a list to starboard, the deck cargo shifted and broke the bulwarks, and part of the cargo was shot overboard and lost. The ship then listed to port and the same thing happened on the port side. In an action by the charterers for damages for short delivery, the learned judge held on the evidence that at the beginning of the loading the ship was seaworthy, and that the loss was due to the negligence of the master.

Held: (i) at the beginning of the loading the ship was seaworthy and the shipowners were not liable if it became unseaworthy before the completion of the loading; loading did not mean simply the reception of the cargo on board, but included the operation of stowage; and in the present case that operation had not been concluded;

(ii) the words in the charterparty, "at charterers' risk," whether read alone or in conjunction with the exception clause, did not in themselves contain any exception of negligence and so were subject to a limitation of negligence; therefore, they could be read with the exception clause, and the effect of so doing was to enable the shipowners to rely on the words "accidents to hull" in the exception clause;

and, therefore, the action must fail.

Notes. Followed: *Argonaut Navigation Co. v. Ministry of Food*, [1949] 1 All E.R. 160. Referred to: *The Stranna*, [1937] 1 All E.R. 458; *Imperial Smelting Corp'n., Ltd. v. Joseph Constantine S.S. Line, Ltd.*, [1941] 2 All E.R. 165.

As to stipulations in a charterparty, see 30 HALSBURY'S LAWS (2nd Edn.) 315 et seq., and as to readiness of ship to load, see *ibid.* 417 et seq. For cases see 41 DIGEST 407 et seq., 443 et seq.

Cases referred to:

- (1) *Reed & Co. v. Page, Son, and East, Ltd.*, [1927] 1 K.B. 743; 96 L.J.K.B. 390; 187 L.T. 77; 43 T.L.R. 272; 17 Asp.M.L.C. 231; 32 Com. Cas. 243, C.A.; 41 Digest 478, 3114.
- (2) *Wade & Sons Co., Ltd. v. Cockerline & Co.* (1904), 21 T.L.R. 54; 10 Com. Cas. 47; affirmed (1905), 53 W.R. 420; 21 T.L.R. 296; 49 Sol. Jo. 313; 10 Com. Cas. 115, C.A.; 17 Digest (Repl.) 305, 1123.
- (3) *Burton & Co. v. English & Co.* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 17 Digest (Repl.) 301, 1082.
- (4) *Thomas Wilson, Sons & Co., Ltd. v. S.S. Galileo (Cargo Ex), The Galileo*, [1914] P. 9; 83 L.J.P. 27; 110 L.T. 614; 30 T.L.R. 86; affirmed, [1915] A.C. 199; 83 L.J.P. 102; 111 L.T. 656; 30 T.L.R. 612; 12 Asp.M.L.C. 534; 19 Com. Cas. 459, H.L.; 41 Digest 376, 2219.
- (5) *Mersey Shipping and Transport Co. v. Rea* (1925), 21 Lloyd, L.R. 375.
- (6) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, 277.
- (7) *Elderslie S.S. Co. v. Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp.M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, 2800.
- (8) *Herbert Whitworth, Ltd. v. Pacific Steam Navigation Co.* (1926), 25 Lloyd, L.R. 573; Digest Supp.

Action in the Commercial List tried by WRIGHT, J., without a jury.

The defendants were the owners of the steamship *Headcliffe*. Under a charter-party dated Aug. 3, 1929, the plaintiffs chartered the vessel, which was described as being of a carrying capacity 1,550 cubic fathoms, 10 per cent. more or less, to "proceed to one or two places in the Skelleftea district as ordered by the charterers," and there load a cargo of pit props and deliver the same at one port on the east coast of England, as ordered. By the terms of the charterparty the vessel was to be

A "provided with a deck-load, at full freight, at charterers' risk not exceeding what she can reasonably stow and carry."

An exception clause, cl. 11, provided:

B "The act of God, enemies, restraints of princes and rulers, and perils of the sea excepted. Also fire, barratry of the master and crew, pirates, collisions, strandings and accidents of navigation, or latent defects in, or accidents to, hull and/or machinery, and/or boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager."

C The vessel loaded part of her cargo at Bjornsholmen and proceeded to Burea to ship the balance of the cargo. At Burea the accident happened whereby a substantial part of the cargo was lost overboard and, being carried out to sea, could not be recovered. At the time of the accident the vessel had an under-deck cargo of 987 cubic fathoms and a deck-load of 514 cubic fathoms. The captain came aboard when the loading was nearly finished, on Sept. 2, 1929. At that time the vessel had a slight list to port—two or three degrees—and the captain was doubtful whether he ought to take in more cargo. There were, however, some props lying alongside which had been rafted down in the ordinary course, amounting to three or four slings of about one ton each which the stevedore asked should be taken aboard and put on the starboard side. The captain acceded to the request and went into his cabin, and, while he was in his cabin, where he had been joined by the chief officer, they heard the sound of timber falling overboard. The ship had taken a list to starboard, possibly hung for an appreciable time, and then the bulwarks in the forward part of the ship, where the loading was being completed, carried away on the starboard side and a large quantity of cargo was shot overboard. The ship then listed to port and the same thing happened on that side, the bulwarks on the port side carried away and cargo shot overboard. The cargo shot overboard was carried out to sea and lost. The charterers claimed for the value of the cargo so lost, and the questions raised were whether the cargo was lost by the unseaworthiness of the vessel, or, in the alternative, by the negligence of the master in the conduct of the loading, and, in either event, what was the position under the charterparty and the charterparty exceptions.

G *Van den Berg, K.C.*, and *H. Atkins* for the charterers.
Le Quesne, K.C., and *Sir Robert Aske* for the shipowners.

H **WRIGHT, J.**, stated the facts, reviewed the evidence, held that the accident was due to the negligence of the captain in the conduct of the loading of the deck cargo, and that the ship was unseaworthy, owing to the deck cargo being excessive, and continued: What, then, are the consequences? In this charterparty there is no exception of unseaworthiness, and, therefore, if my finding that the ship was unseaworthy in the sense that she was at the moment in question unfit safely to load and to carry the cargo which was put on board amounts to a finding that there was a breach of warranty of seaworthiness, the charterers are entitled to recover. But the warranty of seaworthiness is not a continuing warranty. There is no suggestion here that at the beginning of the loading at Burea the ship was not seaworthy. The trouble which arose followed from acts done in the course of loading at Burea, and those acts in no way affected the fulfilment of the initial warranty when the loading began. It is, however, contended that at the moment of the casualty a new stage had begun—namely, the stage which comes on completion of loading—and that the vessel, having entered upon that stage, for this purpose was unseaworthy, because the conditions which I have found to constitute unseaworthiness were in existence at the beginning of that stage, and, therefore, that the charterers must recover. That there are stages of unseaworthiness on a voyage is well established. In particular, it has been held that when a vessel is

loading in port the first stage is on the beginning of the operation of loading, and the vessel must be at that stage fit to receive and hold the cargo under the conditions existing at the place of loading. When the loading is completed a new stage begins. Whether the next stage is one which involves the fitness of the vessel with the cargo on board to proceed on her voyage, or whether before that stage begins there is an intermediate stage at the beginning of which the vessel, though not fit to proceed on her voyage in the open sea, is still fit either to lie in the port or to proceed down some sheltered waters before she enters on the open sea must, I think, depend on the circumstances of the case. If it were necessary here to decide the question, having regard to the fact that this vessel was loading in an open roadstead, which, at least in certain winds, might be very dangerous, and would proceed to sea at once when the loading was completed, it seems to me that the intermediate stage of waiting or of proceeding in sheltered waters ought not to be held to exist, because it appears to me undesirable to multiply unduly stages of unseaworthiness unless the circumstances of the case require it. But there can be no doubt that there is, in a case like this, for the purpose of the warranty of seaworthiness, the stage which begins at the commencement of the loading and ends on the completion of loading, whereupon a new stage for the warranty of seaworthiness will begin.

The latest case on that point is *Reed & Co. v. Page, Son, and East, Ltd.* (1), and an earlier case is *Wade v. Cockerline* (2). In *Wade v. Cockerline* (2), VAUGHAN WILLIAMS, L.J., states the proposition, perhaps tentatively, in this way (10 Com. Cas. at p. 120):

"It may be that there is a warranty of fitness of the ship to receive the cargo, and it may be that, after the goods have been received and have been stowed, before the ship sails away, there is a warranty that the ship is in such a condition as to be fitted safely to hold and keep the goods which have been stowed."

VAUGHAN WILLIAMS, L.J., did not consider it necessary to express a definite conclusion on that point, because, as he went on to say,

"in my opinion it is perfectly plain (in fact it is admitted) that this ship was in a condition which made her perfectly fitted for the reception of this cargo, and in my judgment, the accident which occurred, and which resulted in the loss of part of the timber which was being loaded, was an accident that occurred in this stage of the transaction—that is to say, in the course of the reception of the goods; and it matters not for the purposes of this decision what may be the warranty at the next stage, that is, at the stage when the stowed goods have to be held and taken care of after they have been stowed."

He goes on to say:

"In my judgment it is perfectly plain that she was fitted to receive this cargo. And it is equally plain that the operation of reception had not come to an end, and that we need not, therefore, trouble ourselves as to what warranties would arise at subsequent stages in the transaction."

In *Reed & Co. v. Page, Son, and East, Ltd.* (1), the principles which are stated tentatively in *Wade v. Cockerline* (2) are stated clearly and affirmatively by the Court of Appeal, where it was held, in the words of SCRUTTON, L.J. ([1927] 1 K.B. at p. 743),

"that the barge was unseaworthy as a barge from the time loading finished, unfit to lie in the river, and still more unfit to be towed."

The question here is whether the case falls within *Wade v. Cockerline* (2) or *Reed & Co. v. Page, Son, and East* (1). That depends on the question whether the stage had been reached when the loading was completed. It has been contended very strenuously for the plaintiffs that that stage had been reached because loading for this purpose means simply the reception of the goods on board, and the moment the last parcel of cargo which it is intended to load is placed on the vessel

A the loading is completed notwithstanding the fact that some stowage may be necessary and may commonly be done. I do not think that that is the law. I think that in a case like this, and, indeed, in most cases, the mere reception or dumping down of the cargo on the ship does not involve the completion of loading, because, in my view, the operation of loading involves all that is required to put the cargo in a condition in which it can be carried. In this case the operation of
B stowing the cargo was comparatively simple. The pit props came up from the water in the ship's slings and were slung on to the deck. Then the sling was released, but before it was released it was put in such a position that the props would fall in the proper direction—that is, lying fore and aft—and would more or less fall into their places. Some operation of stowing, however, was necessary in respect of each such sling—some props would not fall in the right position and would have to be straightened out, and the props generally would have to be arranged so that they would lie as closely as possible together with their round sides as neatly in contact as could be achieved. That was a small operation, no doubt, but it was done sling by sling before the next sling could come on board. It might only take one, two, three, or four minutes in respect of each sling load, but it was, in my judgment, a necessary part of the operation of loading. There
D has been some debate in and on the evidence whether that operation had actually been completed. On the whole, I am convinced that the operation of stowing the last sling load had not been performed, and, therefore, that the loading was not completed at the moment the accident happened. Indeed, it would be extremely artificial to hold that this accident occurred after the warranty that the ship was fit to receive and load the cargo had expired because, in my judgment, what caused the accident and all the trouble was the putting of these extra sling loads on board, and, in particular, the last sling load. It was the last straw, and it caused the ship, unstable as she was, to adopt the movement which led to the casualty. It seems to me that that happened, and must have happened, while the operation of loading was still in fieri.

F If it were necessary to decide the matter, but it is not, I should also hold that on the facts of this case the lashing was a necessary part of the operation of loading. The ship, as I have said, was lying in an open roadstead. Though the lashing is done by the crew, it is done immediately after the stevedores have finished their work—the crew were actually engaged in lashing the after-deck cargo when this accident occurred—and I think that it is an integral part of the operation of loading in the case of a vessel situated like this and lying with her deck cargo in an exposed
G roadstead. But it is not necessary to decide this point because I am satisfied that the operation of loading had not been completed, and that the second stage for the purpose of the warranty of seaworthiness had not been reached. I hold, therefore, that there was no breach of the warranty of seaworthiness, and the charterers are not entitled to recover on that ground.

H I have now, therefore, to consider the alternative claim based on the negligence of the officers of the ship. I have found that there was such negligence, and I must decide what effect is to be given to the exceptions in the charterparty. There are two exceptions to be considered. There is the exception "a deck-load at charterer's risk," and there is the series of exceptions contained in cl. 11. Counsel for the shipowners has contended that he is entitled to a wider protection by the former of these exceptions, and has submitted a very careful argument on that point. He relies on certain authorities, in particular on the language used by Bowen, L.J., in *Burton & Co. v. English & Co.* (3), where he says (12 Q.B.D. at p. 222):

"Now the words we have to construe are these: after providing in the earlier part of the charterparty that the 'ship is to load from the factors of the merchant a full and complete cargo,' &c., &c., it states that 'the steamer shall be provided with a deck-load if required at full freight, but at merchant's risk.' Now that is clearly a stipulation in favour of the shipowners, and *prima facie*

it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible."

That is a dictum, because it was not necessary for the decision. The claim in that case was a claim by the charterers against the shipowners for a general average contribution, and it was held by the Court of Appeal that that right of contribution was not affected by those words of exception. But the dictum was, I think, accepted as giving the construction of these words in *Wade v. Cockerline* (2), by KENNEDY, J., who says:

"The true meaning of clauses of this kind in charterparties is always so far open to question that I hesitate to use any expression of strong confidence with regard to my own view, but it seems to me, as at present advised, that if it were necessary, to decide the point there is no reason why I should not hold that the words 'at charterers' risk' cover the loss."

KENNEDY, J., however, goes on to say:

"I am content to rest my judgment upon cl. 7 [which is, substantially, if not entirely, identical with cl. 11 in this case]. It seems to me that this clause, apart from any other provision of the charterparty, affords a complete defence for the defendants."

When the case went to the Court of Appeal there was an elaborate argument on this clause by Mr. Hamilton, as he then was, who contended that cl. 7 did not apply to the deck cargo at all, and that the words "at charterers' risk" had to be construed as subject to a proviso that they were meant only to apply if the ship was not a cause of damage by negligence, especially as negligence was expressly dealt with in cl. 7 of the charterparty. The Court of Appeal do not seem to have given any opinion on this argument, but, like the trial judge, they decided the case on the express terms of cl. 7, which they held applied. The learned reporter in his headnote says: "Semble, the owners were also protected by the words 'at charterer's risk,' " but I think it difficult to find that in the judgments.

The argument of counsel for the shipowners in the present case was based, apart from arguments of principle, on these authorities, where, in no instance, was the opinion expressed necessary to the decision of the case. Before I can accede to the argument I must take into account various authorities in the main, if not entirely, subsequent to these decisions relied on. It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charterer's risk," standing alone and apart from any other exception in the charterparty, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness. That, if it needed authority, is clearly laid down by the Court of Appeal in *The Galileo* (4), and I do not find any reason to qualify that conclusion by anything that I find in the decision of the same case in the House of Lords. The words "at charterer's risk" would clearly also not apply to damage occurring after a deviation. These limitations on the apparent generality of the words are, I think, too clear to need further discussion, and I think that the words, standing by themselves, have also to be read as limited to losses and damage where there has been no negligence on the part of the shipowner or his servants. That is clearly stated by BANKES and SCRUTTON, L.JJ., sitting as a Divisional Court in *Mersey Shipping and Transport Co. v. Rea* (5), and is deduced from the principles well established and laid down in the Court of Appeal in *Price & Co. v. Union Lighterage Co.* (6). Counsel, however, has argued that, though that is so if the clause stands by itself, yet, if there is an exception clause—such as cl. 11 here and

A cl. 7 in *Wade v. Cockerline* (2)—then the principles stated by BOWEN, L.J., in
B *Burton & Co. v. English & Co.* (3) must be applied, and the words must be con-
strued as giving some wider extension to an exception of negligence. For that he
C cites the authorities to which I have referred, and if those authorities were not
simply matters of observation I should feel bound to follow them. But, as they
are matters of observation, it seems to me, applying the principles which I find in
the authorities, I must hold that this argument fails and that the words “at
charterer’s risk,” whether they are found alone or whether they are found in
conjunction with an exception clause, such as cl. 11 here, do not in themselves
contain any exception of negligence. If they were to be construed in their isolation
along with the other exception clause, cl. 11, because the general exceptions of the
charterparty apply to a deck cargo, where, as here, the cargo is carried with
authority either express or by custom. If, on that view, the clauses were to be
construed, the one as containing a wider exception of negligence and the other as
containing a narrower exception of negligence, then, on the principle of *Elderslie*
D *S.S. Co. v. Borthwick* (7), the shipowners would be only able to avail themselves
of the exception which was less beneficial to themselves. On the other hand, if the
words “at charterers’ risk” are to be construed as subject, among other things, to
a limitation of negligence, then I see no difficulty in reading those two clauses
together, because the narrower clause is not cutting down a positive provision, and
the two clauses can be read so that the later clause (cl. 11) receives full effect.
Nor has cl. 11 to be cut down by reason of the fact that the general clause “at
E charterers’ risk” contains no exception of negligence, because that is not a matter
of express language, but merely a matter of implication and the application of the
ordinary rules of construction. It seems to me, therefore, that the true position
here is that the words “at charterers’ risk” have to be read along with cl. 11, and
that the effect of reading the two together is to enable the shipowners to rely on
cl. 11, but that that is the full extent of the exception available for them. That
F is exactly the conclusion arrived at in *Wade v. Cockerline* (2) in the actual decision,
and, therefore, I arrive at the position in which I simply follow that and apply that
notwithstanding the arguments which have been put forward. A similar view has
been adopted by ROCHE, J., in *Herbert Whitworth, Ltd. v. Pacific Steam Navigation*
Co. (8).

G There still remains the question whether cl. 11 protects the shipowners in the
circumstances of this case against the consequences of the negligence of their
servants. The words relied on by counsel for the shipowners here are primarily
“accidents to hull,” and I think he is entitled to succeed on those words. What
happened here, in my judgment, was that the cargo was lost by reason of the
H carrying away, first of the starboard and then of the port bulwarks, as the ship
rolled from side to side. The impact of heavy timber carried away these protec-
tions, and the cargo shot overboard, and it seems to me that there was an accident
to the hull just as there would have been if the cargo had escaped overboard
through an aperture made by a collision. In this case the break in the protecting
fabric of the hull was made by the cargo itself, and was due to the ship heeling
over by reason of the negligent way in which she was being loaded. I hold, there-
I fore, that the shipowners were protected by those words, and, although the present
case is not precisely covered by the decision of the Court of Appeal in *Wade v.*
Cockerline (2), where the same words were held to apply, I think the circumstances
are so analogous as to bring this case within the same principle. The shipowners,
therefore, are protected by those words. That renders it unnecessary for me to
consider further the submission of counsel for the shipowners, which I merely
mention so that, if necessary, it may be open to him, namely, that the words
“accidents of navigation” apply. There is a good deal to be said for that argument,
but, in my judgment, the word “navigation” in this connection ought to be limited

to matters done in the handling of the ship, in what is naturally called navigation, A
that is to say when she is under weigh.

For the reasons I have stated, I think that the charterers are met by the excep-
tion clause, and that the shipowners are entitled to judgment with costs.

Judgment for shipowners.

Solicitors: *Denton, Hall, & Burgin; Botterell & Roche, for Botterell, Roche, &* B
Temperley, Newcastle-on-Tyne.

[*Reported by R. A. YULE, Esq., Barrister-at-Law.*]

ESHUGBAYI ELEKO v. OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER

[PRIVY COUNCIL (Lord Blanesburgh, Lord Atkin and Sir Lancelot Sanderson),
February 3, 5, 6, 9, March 24, 1931]

[*Reported* [1931] A.C. 662; 100 L.J.P.C. 152; 145 L.T. 297]

Colony—Nigeria—Powers of governor—Deportation of deposed chief—Validity of
order challenged—Jurisdiction of court to entertain dispute—Native custom
—Proof—Need to prove recognition in native community—Deposed Chiefs E
Removal Ordinance, No. 59 of 1917 (Laws of Nigeria, 1925, c. 78) as amended
by s. 2 of the Ordinance No. 9 of 1928.

Where the governor of a colony is empowered to deport a deposed chief an
order made by him is not to be taken as equivalent to the order of a court of
competent jurisdiction determining within its powers all matters necessary to
give it jurisdiction. When the governor makes such an order he is acting
solely under the executive powers conferred on him by law and in no sense as
a court. The appropriate court will inquire whether the person ordered to be
deported was a chief and whether he has been deposed and will investigate and
decide the whole of the questions raised.

Per CURIAM: Their Lordships entertain no doubt that the more barbarous
customs of earlier days may under the influences of civilisation become milder
without losing their essential character of custom. It would, however, appear
to be necessary to show that in their milder form they are still recognised in
the native community as custom so as in that form to regulate the relations of
the native community inter se. In other words, the court cannot itself trans-
form a barbarous custom into a milder one. If it still stands in its barbarous
character, it must be rejected as repugnant to natural justice, equity and good
conscience. It is the assent of the native community that gives the custom its
validity, and, therefore, barbarous or mild, it must be shown to be recognised
by the native community whose conduct it is supposed to regulate.

Notes. Nigeria is now a federation and has a governor-general and a governor
for each of the three regions comprised in the federation: see Nigeria (Offices of
Governor-General and Governors) Order in Council (S.I. 1954, No. 1147; S.I. 1955, I
No. 431).

Referred to: *Oke Lanipekun Laoye v. Amao Oyetunde*, [1944] A.C. 170.

As to the powers of governors of colonies, see 5 HALSBURY'S LAWS (3rd Edn.)
556 et seq., and for cases see 8 DIGEST (Repl.) 766 et seq.

Cases referred to:

(1) *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, [1928]
A.C. 459; 97 L.J.P.C. 97; 139 L.T. 527; 44 T.L.R. 632; 72 Sol. Jo. 452,
P.C.; Digest Supp.

- A (2) *Local Government Lands and Settlement Comr. v. Kaderbhai*, [1931] A.C. 652; 100 L.J.P.C. 124; 145 L.T. 265, P.C.; Digest Supp.
- (3) *R. v. Governor of Brixton Prison, Ex parte Sarno*, [1916] 2 K.B. 742; 86 L.J.K.B. 62; 115 L.T. 608; 80 J.P. 389; 32 T.L.R. 717; 14 L.G.R. 1060; 2 Digest (Repl.) 191, 143.
- B (4) *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; 90 L.J.P.C. 236, P.C.; 8 Digest (Repl.) 786, 466.

Appeal by leave from a judgment of the Full Court of the Supreme Court of Nigeria (PETRIDES, BERKELEY and LLOYD, JJ.), affirming a judgment of TEW, J., who ordered a motion by the appellant for a writ of habeas corpus ad subjiciendum remitted to the Supreme Court of Nigeria for re-hearing to be dismissed.

C On Aug. 6, 1925, the officer administering the government of Nigeria made an order under the Deposed Chiefs Removal Ordinance sanctioning the deposal and removal from his office of the appellant, Eshugbayi, a native chief holding the office of Eleko in the colony and ordering him to leave the colony as required by native law and custom within twenty-four hours of the service of the order. The appellant not having left the colony within the specified time, the officer made a further order on Aug. 8, 1925, for the deportation of the appellant. On Oct. 12, 1925, a motion by the appellant for leave to issue a writ of habeas corpus was heard and refused by WEBBER, J., the acting Chief Justice, upon the ground that there was a competent court of law where the applicant was detained which had jurisdiction to deal with the question of the legality of the appellant's detention. On Dec. 4, 1925, the appellant gave a fresh notice of motion for a writ of habeas corpus. This motion was heard before TEW, J., on Dec. 8, 1925, when the Attorney-General took a preliminary objection that a similar application based on the same material had been made by the appellant and had been dismissed by the acting Chief Justice and that in view of that refusal the application could not be entertained. The application was refused. On appeal the decision was affirmed by the full court (SIR RALPH MOLYNEUX COMBE, C.J., VANDER MEULEN, J., and H. S. BERKELEY, acting judge), who held that a judge of the Supreme Court could not entertain an application substantially identical with one which had already been made to and determined by the Supreme Court. On appeal to the Judicial Committee (*Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1)) it was held that, although by the Supreme Court of Judicature Act, 1873, the courts had been combined in the one High Court of Justice, each judge of that court still had jurisdiction to entertain an application for a writ of habeas corpus, and he was bound to hear and determine such an application on its merits notwithstanding that some other judge had already refused a similar application, and the same principle must apply in the case of the judges of the Supreme Court of Nigeria. The case was, accordingly, remitted for re-hearing. The appellant's application again came before the Supreme Court of Nigeria (TEW, J.). The learned judge delivered his written judgment on May 9, 1929, finding on the evidence that the custom relating to a deposed chief was correctly stated in the order made on Aug. 6, 1925, and holding that the orders for the removal of the appellant were made under the ordinance and that he was unable to say that those orders were not valid. That decision was affirmed by the Supreme Court on March 3, 1930. The question raised by the appeal concerned the right of the applicant to the issue of a writ of habeas corpus and the validity of the two orders made by the officer, dated respectively Aug. 6 and 8, 1925, whereunder the appellant was deported.

Sir F. B. Merriman, K.C., Horace Douglas, and W. Wells Palmer for the appellant.

The Solicitor-General (Sir Stafford Cripps, K.C.) and Sydney E. Pocock for the respondent.

March 24. **LORD ATKIN.**—This is an appeal from a decision of the full court of the Supreme Court of Nigeria, which dismissed the appellant's appeal from the judgment of Tew, J., discharging what by consent of the parties was deemed to be a rule nisi for a writ of habeas corpus addressed to the respondents.

The case has an unfortunate history. The applicant was ordered into custody on Aug. 8, 1925, and though within a few hours he took every legal step to question the validity of his detention, the matter is still before the courts, and, as will appear from this judgment, has still to be heard ab initio by the Supreme Court of the colony. The case has already been before this board on a refusal by one of the judges, affirmed by the Supreme Court, to hear an application for a rule nisi for habeas corpus on the ground that a similar application had already been heard and determined by another judge. The board then decided that the well-established rule that applications in habeas corpus may be made to successive judges existed in Nigeria, and remitted the case to the Supreme Court. The early history of the applicant's abortive attempts to establish his right to liberty are narrated in the judgment of this board delivered by Lord HAILSHAM on June 19, 1928 ([1928] A.C. at p. 462), and need not be repeated. The application so remitted was originally made by notice of motion dated Dec. 8, 1925. In pursuance of the Order in Council it came on for hearing before Tew, J., on Jan. 15, 1929, when it was agreed that the motion should be treated as if an order to show cause had been made. Their Lordships have recently had occasion to say in *Local Government, &c., Comr. v. Kaderbhai* (2) that in applications for such writs as mandamus and habeas corpus it is important that the proper procedure should be maintained, and that the actual rule or order asked for or made should be formulated. The rights of the parties are, however, not affected in any way in this case by the departure from strict form.

It is now necessary to state the nature of the applicant's complaint, and the circumstances in which it arose. He is the successor of Docemo, who was the ruling chief of Lagos in 1861, when he by treaty ceded Lagos to Her Majesty Queen Victoria. His precise position at the time of the order of which he complains in August, 1925, is in dispute; but it is plain that in 1901 the Governor of Lagos recognised him as head of the family of Docemo in succession to one Oyekan, and it is also plain that in 1920 the Governor of Lagos regarded him with less cordiality, and by announcement in the *Nigeria Gazette* intimated what would be in future the relation of the applicant to the government. In 1917 there was passed the Deposed Chiefs Removal Ordinance, which as amended in 1925 is so far as is material in the following terms:

"1. This ordinance may be cited as the Deposed Chiefs Removal Ordinance.

2. (1) When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor, whether such deposition or removal shall have been before or after the commencement of this ordinance, the Governor may: (a) If native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office; or (b) If the Governor shall be satisfied that it is necessary for the re-establishment or maintenance of peace, order and good government in such area that the deposed chief or native shall leave such area or any part of Nigeria adjacent thereto, by an order under his hand direct that such chief or native shall, within such time as shall be specified in the order, leave the area over which he had exercised jurisdiction or influence and such other part of Nigeria adjacent thereto as may be specified in the order, and that he shall not return to such area or part without the consent of the Governor. For the purposes of this section the following parts of Nigeria (and no others) shall be deemed to be adjacent to an area over which a deposed chief or native exercised jurisdiction

or influence by virtue of his chieftaincy or office: (I) If the area is situated in the colony: The colony and the provinces of Abeokuta, Ijebu and Ondo. (II) If the area is situated in one of the provinces of Ilorin, Oyo, Abeokuta, Ijebu and Ondo: The colony and all provinces next adjacent to the province in which the area is situated. (III) If the area is situated in any other province: All provinces next adjacent to the province in which the area is situated.

(2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid, as directed by the Governor, or who having left such area or part of Nigeria shall return thereto without the consent of the Governor, shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such order direct.

(3) An order of deportation under sub-s. (2) may be expressed to be in force for a time to be limited therein or for an unlimited time, and shall have the same force and effect as an order of deportation made under the Criminal Code."

By the Interpretation Ordinance, 1923, s. 3:

"In every ordinance, unless there be something repugnant in any subject or context . . . (18) 'chief' or 'native chief' means any native whose authority and control is recognised by a native community."

On Aug. 5, 1925, some of the members of the house of Docemo met together and purported to depose the applicant from his position as head of the house of Docemo. That they were the majority of the house of Docemo, or entitled by native law and custom to depose the applicant, or that the meeting was valid, was, and, apparently, is, contested by the applicant and other members of his house, as appears by a letter of protest, dated Aug. 14, 1925, purporting to record resolutions adopted at a meeting of 150 members of the house held on Aug. 12. However, the validity of the proceedings does not appear to have been regarded as doubtful by the government, for on Aug. 6 the following announcement was made in the "Nigeria Gazette":

"Lagos, Thursday, Aug. 6, 1925.—It is hereby announced for general information that His Excellency the Officer Administering the Government has by the instrument set out below sanctioned the deposition of Eshugbayi from his position as head of the House of Docemo also known as the house of Docemo-Oyekan and has sanctioned his removal from the office of Eleko. It is further notified that His Excellency the Officer Administering the Government by an order made under s. 2 of the Deposed Chiefs Removal Ordinance has ordered Eshugbayi to leave the colony and the provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of the order upon him. His Excellency the Officer Administering the Government has been pleased to direct that a compassionate allowance of £20 a month be paid to Eshugbayi so long as he be of good behaviour.—T. S. A. THOMAS, Acting Chief Secretary to the Government.—Chief Secretary's Office, Lagos. Aug. 6, 1925.

Whereas by a notice dated the 8th day of December, 1920, and published in an Extraordinary Gazette dated the 8th day of December, 1920, His Excellency the Governor announced that as from the 1st day of December, 1920, the government of Nigeria had ceased to recognise Eshugbayi, commonly known as 'Eleko,' as head of the house of Docemo or as holding any position which might entitle him to official recognition from the government or any of its officers; And whereas on the 5th day of August, 1925, a majority of the representative members of the families descended from Addo (hitherto commonly referred to as the house of Docemo or the house of Docemo-Oyekan) deposed Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and removed him from the office of Eleko; And whereas His Excellency the Officer Administering the Government is satisfied

that the persons who have so deposed Eshugbayi and removed him from the office of Eleko are the persons who by native law and custom are entitled so to depose the said Eshugbayi and to remove him from the office of Eleko; Now therefore His Excellency the Officer Administering the Government hereby sanctions the deposition of Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and his removal from the office of Eleko.—By His Excellency's Command, J. DAVIDSON, Acting Administrator.—Lagos, Aug. 6, 1925."

On the same day, Aug. 6, the Acting Governor made the order referred to in the above notice:

"Whereas Eshugbayi, a native chief holding the office of Eleko in the colony, has with my sanction been deposed and removed from his office: And whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said colony and the province of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of this order, and that he shall not return to any of the said areas without my consent.—Given under my hand this 6th day of August, 1925.—(Signed) F. M. BADDELEY, Officer Administering the Government."

On Aug. 8 as the order had not been obeyed, the Acting Governor made the order of deportation under which the applicant is now detained:

"Whereas Eshugbayi, a native chief holding the office of 'Eleko' in the colony was by an order made under my hand on the 6th day of August, 1925, ordered to leave the colony and the provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service upon him of the said order; And whereas the said Eshugbayi has refused or neglected to leave the said colony and the provinces of Abeokuta, Ijebu and Ondo: Now therefore I do hereby order that the said Eshugbayi be deported forthwith to Oyo in the province of Oyo. Given under my hand and the seal of the colony and protectorate of Nigeria at Government House, Lagos, this 8th day of August, 1925.—(Signed) F. M. BADDELEY, Officer Administering the Government."

The applicant contests the validity of both orders, though the main attack is necessarily directed to the first. He says: (i) He was not a native chief, and did not hold an office; (ii) he was not deposed or removed from this office, and the Governor's sanction was, therefore, irrelevant; (iii) there was no native law and custom which required him, or any chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question. He says that these are three conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings. These were, in substance, the contentions of the applicant's counsel on the hearing of the motion. Counsel for the government maintained that the court had no power to enter upon an investigation as to any of these points, but the order of the Governor must be taken as equivalent to the order of a court of competent jurisdiction determining within its powers all matters necessary to give jurisdiction, the order was analogous in its independence of the courts to a committal by the House of Commons for contempt, and in any case the election or deposition of chiefs was an Act of State not cognisable by the courts.

On these contentions the learned judges in Nigeria have taken a variety of views. Tew, J., held that with points (i) and (ii) the court could not deal. He referred to the definition of native chief and thought it would be absurd for a court to attempt to decide whether a person came within this definition. It was within the province of the executive alone to decide what measure of authority or control would be necessary to make a person a chief. The question of native law and custom, he thought, was cognisable by the court, and he proceeded at a further hearing to hear evidence, and eventually he decided that the custom existed

A entitling the Governor to make the order of Aug. 6. Their Lordships will revert to this finding. In the result he discharged the rule with costs as from the time the matter was remitted by the Privy Council. On appeal there was a division of opinion. LLOYD, J., thought that by the ordinance the Governor, whether technically a court or not, was given power to decide whether the necessary conditions had been fulfilled, and he had so decided, and the court could not now inquire whether that decision was right. He quite logically thought on this principle that the trial judge should not have investigated the question of native custom. B BERKELEY, J., appears to have thought that the court could determine, at any rate, the first two questions, for he proceeded to decide that the applicant was a chief and that he had been deposed. What his opinion was as to native custom does not appear from his judgment, for he does not refer to it. C PETRIDES, J., was of opinion that all the questions could be inquired into, but he was satisfied with TEW, J.'s finding as to custom. The appeal was, therefore, in accordance with the judgment of the majority dismissed with costs.

Their Lordships are satisfied that the opinion which has prevailed that the courts cannot investigate the whole of the necessary conditions is erroneous. The Governor, acting under the Deportation Ordinance, acts solely under executive D powers, and in no sense as a court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the E powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in habeas corpus, and that it would be the duty of the courts to investigate the issue of alien or not.

F *R. v. Governor of Brixton Prison, Ex parte Sarno* (3) turned first on the question whether the regulation under which the order was made was ultra vires, which was a question of law. It further turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal, who, it was suggested, was no danger to the State. The court G expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of LOW, J., that, had the matter been in dispute, the court would have had to decide it. A suggestion was made by one of the learned judges that the order in this case was an Act of State. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects H of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the court to inquire into the legality of the act.

I Their Lordships, in view of the importance of the topic, have thought it necessary to call attention to these well-established principles. On the argument of this case they were relieved from a prolonged discussion of them, for the Solicitor-General, on behalf of the respondents, threw over the suggestion that the conditions were not cognisable by the courts. He admitted that they were, but contended that on the inquiry by the courts the evidence of the Governor was conclusive that the facts were as stated. Native chiefs were, he said, appointed and deposed by the Crown. Chieftaincy was either a title of dignity or an office, or it might be both. In either case the Crown gave and the Crown took away, and

evidence by the representative of the Crown that he had either given or taken away was evidence which the court was either bound to accept or ought to consider so strong that no other evidence could reasonably displace it. It was true, he said in substance, that the ordinance referred to deposition or removal from office by or with the sanction of the Governor; but those words amounted to the same thing. If to conciliate native prejudices or for other reasons the government affected to leave the right of appointment or removal to native custom, subject to the sanction of the Governor, that was mere diplomacy. In fact, the Governor appointed and removed in every case, and when he said that he had done so, it was so. A B

It is obvious that contentions such as these may seriously affect the rights of natives in Nigeria. Their validity depends upon the powers of the Crown and the Governor and upon constitutional usage in Nigeria and possibly other African colonies, which have never been investigated in this case in the appropriate original tribunal, the courts of the colony. Their Lordships have a difficulty in finding in the letters patent or the instructions to the Governor any express authority given to the Governor to act on his own initiative as to the appointment or deposition of chiefs, and they see the necessity of reconciling the existence of the suggested powers with the rights of the native communities laid down by LORD HALDANE in giving the judgment of the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)* (4). *Primâ facie* deposition with the sanction of the Governor would appear to point to deposition by some authority other than the Governor which would only become effective when sanctioned by the Governor, in which case it would appear that a valid deposition by the appropriate authority would be necessary as well as the sanction by the approving authority. This appears to be the view adopted by the Crown advisers in the colony so far as one may judge from the affidavits filed by them. It may be, however, that the contention made by the Solicitor-General before their Lordships, if adopted by the Crown advisers in the colony, will on investigation by the courts be found to be correct. It is only necessary for this board to decide that it is the duty of the courts to investigate the whole of the questions raised and come to a judicial decision. It is desirable to add that the first two points involve questions of fact upon which statements made by the executive are by no means conclusive. In particular, their Lordships cannot accept the opinion that the courts of Nigeria are incapable of deciding the question whether the authority or control of a native chief is recognised by a native community. Compared with many judiciable issues with which courts of the Empire are from time to time faced, the question appears simple. The questions whether an office or a dignity exists, whether a person has been appointed to it or removed from it, are all issues which the courts will have to decide after hearing the relevant evidence tendered by either side. C D E F G

It is necessary to include in the further hearing the question raised as to native custom. It seems obvious that it is difficult to ascertain whether there is a native custom applicable to a chief deposed without taking into consideration the manner of the deposition. Native custom may require the departure of a chief deposed according to native custom; but conceivably it may not apply to a chief alleged to be deposed, but in violation of native custom, or deposed by some external power newly brought into existence and never contemplated by native custom. Since the trial judge thought that the fact of deposition was not cognisable by the court the application of the native custom to the actual deposition in this case does not appear to have been investigated, and the whole question must be determined anew. An interesting question arose at the hearing as to the modification of an original custom to kill into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its H I

A barbarous character, it must be rejected as repugnant to "natural justice, equity, and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.

One of the contentions of the applicant their Lordships are able to determine. It was said that it was a condition precedent to the power of the Governor to make a deportation order that the native chief alleged to have disobeyed the withdrawal order should first have been charged and convicted before a magistrate. It was said that this was the construction of s. 18 (9) (d) of the Criminal Code, and that s. 2 (3) of the Deportation Ordinance provides that a deportation order is to have the same force and effect as an order of deportation under the Criminal Code. Whether the section in the Criminal Code has the suggested effect or not, their Lordships do not find it necessary to decide. Here the powers are expressly given by s. 2 (2) of the ordinance, and their Lordships entertain no doubt that the powers of deportation given to the Governor are executive powers quite independent of the question whether the native has committed a criminal offence. This contention of the applicant therefore fails.

The matter should be remitted to the Supreme Court to be heard on the motion of Dec. 4, 1925. Their Lordships think it desirable to indicate the procedure proper now to be adopted. The parties agreed when the case was formerly remitted that it should be heard as though a rule nisi had been granted. The rule should be drawn up and in the circumstances it had better be dated as of Jan. 15, 1929, the day when the agreement was made, being the first day of the hearing, and it should be treated as though argument were directed forthwith. The affidavits to be recited as read will be the affidavits filed by the applicant up to Aug. 29, 1928, not including the affidavits of the Crown and those filed by the applicant in reply. The rule nisi will, therefore, take the following form :

"Tuesday, the 15th day of January, 1929.—In the Supreme Court of Nigeria. —Divisional Court No. 2,—Before His Honour Justice M. L. Tew.—Nigeria.— Upon reading the several affidavits of Eshugbayi Eleko [and others, stating them], It is ordered that this day, the 15th day of January, 1929, be given to the Officer Administering the Government of Nigeria and the District Officer of Oyo to show cause why a writ of habeas corpus should not issue directed to them to have the body of Eshugbayi Eleko immediately before this court at Lagos to undergo and receive all and singular such matters and things as the court shall then and there consider of concerning him in this behalf.* Upon the ground that: 1. The said Eshugbayi Eleko was not on Aug. 6, 1925, or thereafter a native chief and did not hold any office. 2. That the said Eshugbayi Eleko had not on Aug. 6, 1925, or thereafter been deposed or removed from any office. 3. That native law and custom did not require that the said Eshugbayi Eleko should leave any area over which he exercised influence by virtue of any office or at all. 4. That by reason of the premises the order under the hand of the Officer Administering the Government, dated the 6th day of August, 1925, and the order under the hand of the said officer and seal of the colony and protectorate of Nigeria dated the 8th day of August, 1925, concerning the said Eshugbayi Eleko, are invalid. Upon notice of the said order given to the said Officer Administering the Government and the said District Officer by their counsel this day. Upon the motion of Mr. Wells Palmer.

The rule may be modified if necessary to adjust the formal terminology, and the applicant is to have liberty to modify or add to the grounds if so advised. Their Lordships give no directions as to the judge by whom the rule is to be heard; this will be decided by the Supreme Court in accordance with its practice. The affidavits filed are to be treated as in evidence; the court will give such directions as it thinks fit as to the production of other evidence, whether written or oral, and by cross-examination of deponents or otherwise. The oral evidence already given to

the court will not be available unless and to the extent that both parties consent. A
It was given originally when the issue as to deposition and the nature of it was not
before the court. On the argument of the rule counsel for the respondents to the
motion should show cause, and counsel for the applicant should then, if required,
reply in support of the rule.

In the result, therefore, the appeal should be allowed and the judgments of
Tew, J., of Feb. 5, 1929, and May 9, 1929, and the judgment of the full court dated B
March 3, 1930, should be discharged, and the case remitted for hearing to the
Supreme Court, in accordance with the directions given above and their Lordships
will humbly advise His Majesty accordingly. The respondents must pay to the
applicant his costs of this appeal and the appeal to the full court. The costs of the
hearings before TEW, J., will be reserved to the court which re-hears the rule nisi,
and, failing such re-hearing, to the Supreme Court. C

Appeal allowed.

Solicitors: *E. F. Hunt; Burchells.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re HYDE. SMITH *v.* JACK

[CHANCERY DIVISION (Maugham, J.), October 15, 1931]

[Reported [1932] 1 Ch. 95; 101 L.J.Ch. 95; 146 L.T. 255;
75 Sol. Jo. 781]

*Will—Trust in favour of son's "children or reputed children"—Illegitimate
children born after date of will—Validity—Public policy.*

By his will, the testator directed that the income of his residuary estate
should be paid to his son for life, and after his death be divided in such shares
as the son should by his will or any codicil appoint among his "children or
reputed children." The son had two legitimate children, one of whom pre-
deceased him and the other was expressly excluded by the testator's will from
benefiting under the power of appointment. The son also had three illegitimate
children. By his will he appointed that the trustees of the testator's will
should stand possessed of the testator's residuary estate in trust for two of the
illegitimate children, who were described as "children or reputed children" of
the son. On a summons to determine, *inter alia*, whether the trusts in favour
of "children or reputed children" were void as being contrary to public policy
as regards (a) reputed children of the son living at the date of the testator's
will, and (b) reputed children of the son born after the date of the testator's
will,

Held: the power of appointment in the testator's will was valid, and the
son's exercise of it in favour of his "children or reputed children" was a proper
exercise of it.

Notes. As to the capacity of illegitimate children to benefit under a will, see
34 HALSBURY'S LAWS (2nd Edn.) 49-51, paras. 54-56; and for cases on the subject
see 44 DIGEST 222-225, 470-501.

Cases referred to:

- (1) *Hill v. Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.;
44 Digest 233, 476.
- (2) *Occleston v. Fullalove* (1874), 9 Ch. App. 147; 43 L.J.Ch. 297; 29 L.T. 785;
38 J.P. 196; 22 W.R. 305, L.C. & L.J.J.; 44 Digest 224, 487.

- A (3) *Re Goodwin's Trusts* (1874), L.R. 17 Eq. 345; 43 L.J.Ch. 258; 38 J.P. 500; 22 W.R. 619; 44 Digest 224, 488.
- (4) *Metham v. Duke of Devonshire* (1718), 1 P.Wms. 529; 24 E.R. 502, L.C.; 44 Digest 224, 482.
- (5) *Re Loveland, Loveland v. Loveland*, [1906] 1 Ch. 542; 75 L.J.Ch. 314; 94 L.T. 336; 22 T.L.R. 321; 44 Digest 225, 491.
- B (6) *Re Hastie's Trusts* (1887), 35 Ch.D. 728; 56 L.J.Ch. 792; 57 L.T. 168; 35 W.R. 692; 44 Digest 224, 489.

Originating Summons.

By his will dated April 19, 1898, the testator, John Hyde, who died on Sept. 13, 1898, directed his trustees and executors to pay the income of his residuary estate, subject to an annuity, to his son Fred Hyde for life, and after his death

- C "in trust for the children or reputed children of the said Fred Hyde (other than Emily Hyde) . . . in such shares . . . upon such conditions and in such manner as the said Fred Hyde shall from time to time by will or codicil appoint,"

and in default of and subject to appointment as in the will mentioned.

- D Fred Hyde was twice married, and there was issue one child by each marriage; the first predeceased him, and the second was Emily Hyde (at the date of this summons Emily Spencer). Fred Hyde was also the father of children of two women to whom he was never married, namely, Mona Jack, the daughter of Emma Sunderland, born on July 2, 1892, and Freda Steggles and Florence Steggles (or Hyde), born respectively on May 9, 1914, and April 25, 1918. Fred Hyde died on
- E Oct. 19, 1925, having made his will on Aug. 12, 1925, by which he purported to appoint that the trustees of the testator's will should, after his death, stand possessed of the testator's residuary estate in trust for Freda and Florence Steggles (in the will called Hyde) in equal shares, and devised and bequeathed his real and personal estate to Freda and Florence Hyde in equal shares. The will of Fred Hyde was never proved, but from 1918—when the trustees of the testator's will
- F were appointed—to 1929, portions of the income were paid by the solicitors acting for the trustees to the solicitor acting for the mother of Freda and Florence Steggles.

- The present summons, dated Aug. 25, 1931, issued on the application of the trustees of the testator's will, asked, *inter alia*, whether the trusts of the residuary estate of the testator after the death of Fred Hyde contained in the will in favour of "the children or reputed children of the said Fred Hyde (other than Emily
- G Hyde)" were void as being contrary to public policy as regards (a) reputed children of Fred Hyde living at the date of the testator's will; (b) reputed children of Fred Hyde born after that date.

J. M. Easton for the trustees of original will.

- Preston, K.C.*, and *H. C. Easton*, for Mona Jack, referred to *Hill v. Crook* (1), *Occleston v. Fullalove* (2), *Re Goodwin's Trusts* (3), and *Metham v. Duke of*
- H *Devonshire* (4).

P. I. Bell, for Freda and Florence Steggles, referred to *Re Loveland* (5) and *Occleston v. Fullalove* (2).

MAUGHAM, J., stated the facts and continued: Having regard to the terms of the wills of the testator and of Fred Hyde, no legitimate child has any claim.

- I There is no gift to illegitimate children *eo nomine*. The power is a power to appoint in favour of the "children or reputed children" of Fred Hyde. As to the exercise of the power, if it be valid there is no question, as it was exercised in favour of Freda and Florence, described as "children or reputed children of Fred Hyde." I should here observe that the decisions in a number of the reported cases dealing with illegitimate children are to be explained by the fact that the court declines to inquire into the actual parentage of a man's alleged offspring. The most that can be done in the case of a gift to the illegitimate children of a male in a will describing the children in that way is—in a proper case—to construe it as a

gift to children who have acquired, before the date when the will becomes effective, the reputation of being the children of the supposed father. There is no objection to the court's inquiry, not into the parentage, but into the reputation of persons described as "the reputed children of" a particular male. There may be a difficulty in regard to public policy, which I must consider later, but there is no difficulty in ascertaining who are the reputed illegitimate children of a particular person, and there is never any difficulty in inquiring who are the illegitimate children of an unmarried female: *Re Hastie's Trusts* (6), *Re Loveland, Loveland v. Loveland* (5). In the case of a gift to the reputed children of a man by a particular woman there is, again, no difficulty in ascertaining who are those reputed children. *Occleston v. Fullalove* (2) was a case of a gift by a testator who had gone through a form of marriage with his deceased wife's sister, by whom he had two daughters, a third being born after the date of the will. The form of the gift was for two named reputed children, and all other children whom he might have, or be reputed to have, by that lady, then born or thereafter to be born, and it was held that there was no objection to the validity of such a gift.

In the present case, as a matter of construction, it is not in dispute that the testator intended by his will to give to Fred Hyde a power of appointment by will or codicil by which he could benefit all of his reputed children who came into existence before his (Fred's) will became operative. That power cannot be confined to the reputed children of Fred in existence at the date of the testator's death: the reputed children of Fred at any time can be ascertained.

The only question remaining is whether it is contrary to public policy that a testator should, by his will, create a power enabling a third person to provide by will or codicil for the future reputed children of the third person. It is true to say that objections to gifts of this kind on the ground of their being contrary to public policy are not quite so strong now as they were a century ago. Modern legislation, for example, the Legitimacy Act, 1926, which provides for the legitimization of those born out of wedlock by the subsequent marriage of their parents, goes to show that the view of the legislature is that no useful purpose is served by penalising illegitimate children, and that the true interests of public policy do not require innocent persons to be punished in that manner. But I must agree that it is settled by authority that, in general, future illegitimate children cannot be provided for by deed, such gifts being *contra bonos mores*, as tending to encourage immorality; and the same observation is true as to bequests to the illegitimate children of a third person to be begotten after the death of the testator: *Occleston v. Fullalove* (2).

In the present case, I have to decide whether the creation of this power by the testator in favour of Fred Hyde means that the testator was intending to encourage immoral connection and to discourage marriage, and whether I ought, therefore, to treat the power as bad from its inception. I am very unwilling to enlarge the ambit of the rule as to public policy. The testator could clearly have given a far wider power exercisable in favour of future illegitimate children, namely, a general power to appoint by will. I am not prepared to say that the power under the will of the testator purported to encourage immorality. Reading the power and the will exercising it together, there is a gift to named existing persons in equal shares. I hold, accordingly, that the power was validly created and properly exercised.

Solicitors: *Stow, Preston, & Lyttelton*, for *Waddington & Son*, Burnley; *Bentleys*, for *Henry G. W. Cooper*, Burnley.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

LATCHFORD PREMIER CINEMA, LTD. v. ENNION

[CHANCERY DIVISION (Bennett, J.), July 23, 1931]

[Reported [1931] 2 Ch. 409; 100 L.J.Ch. 397; 145 L.T. 672;
47 T.L.R. 595]

Company—Director—Resignation—Article providing that office of director ipso facto vacated if by notice in writing to the company he resigned his office—Oral resignations of directors accepted by company—Validity.

By a company's articles of association, it was provided that the office of a director should ipso facto be vacated if, by notice in writing to the company, he resigned his office. Directors of the company orally tendered their resignations as directors at the annual general meeting, and their resignations were accepted by a resolution passed at the meeting. They thereafter claimed the right to continue to act as directors on the ground that, as their resignations had to be made by notice in writing, their oral resignations were invalid.

Held: the directors' oral resignations were valid since there was no ground in law for saying that, where a written contract for service had been made which required written notice on either side before it could be terminated, it could not be terminated orally by mutual agreement between the parties.

Notes. As to resignation of company directors, see 6 HALSBURY'S LAWS (3rd Edn.) 321, para. 634; and for cases on the subject, see 9 DIGEST (Repl.) 551-552, 3634-3648.

Cases referred to:

- (1) *Glossop v. Glossop*, [1907] 2 Ch. 370; 76 L.J.Ch. 610; 97 L.T. 372; 51 Sol. Jo. 606; 14 Mans. 246; 9 Digest (Repl.) 551, 3634.
- (2) *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; 73 L.J.Ch. 198; 89 L.T. 694; 52 W.R. 249; 48 Sol. Jo. 84; 11 Mans. 95; 9 Digest (Repl.) 354, 2264.
- (3) *Morris v. Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 398, 3086.
- (4) *Barlow v. St. Mary Abbots, Kensington, Vestry* (1886), 11 App. Cas. 257; 55 L.J.Ch. 680; 55 L.T. 221; 50 J.P. 691; 34 W.R. 521; 2 T.L.R. 452, H.L.; 26 Digest 505, 2116.

Motion by the plaintiff company asking for an injunction restraining the defendants from acting as directors of the company.

By art. 34 of the company's articles of association, it was provided that the office of director should ipso facto be vacated if he became bankrupt, or if by notice in writing to the company he resigned his office. On Feb. 10, 1931, at the annual general meeting of the company, the defendants, who were directors of the company, orally tendered their resignations as directors. Their resignations were accepted by a resolution passed at the meeting. On Feb. 12, 1931, and on subsequent dates, the defendants attended meetings of the board of directors and claimed the right to continue to act as directors on the ground that, as art. 34 provided that their resignations had to be made by notice in writing, their resignations on Feb. 10, 1931, were invalid.

Alexander Grant, K.C., and *P. Vos*, for the plaintiff company, referred to *Glossop v. Glossop* (1), *Re Bodega, Ltd.* (2), and *Morris v. Baron and Co.* (3).

Ackroyd, for the defendants, referred to *Glossop v. Glossop* (1) and *Barlow v. St. Mary Abbots, Kensington, Vestry* (4).

BENNETT, J.—This is a motion in an action of the plaintiff company for an injunction to restrain the defendants from acting, or purporting to act, as directors of the company, and for judgment in the action until further order. The answer given on behalf of the defendants to the motion is that the resignation by word of mouth and the acceptance by resolution is inoperative, because art. 34 requires,

before a director shall cease to be a director, that he shall give notice in writing to the company that he resigns. In my judgment, the answer based on art. 34 is not a good one. I see no reason in law why the contract of service between the company and its directors should not be terminated by the same means as that by which the contract of service between two individuals may be terminated, and I see no ground in law for saying that, where a written contract has been made for service which requires a written notice on either side before it can be terminated, it cannot be terminated by word of mouth by mutual agreement between the parties. That is all that has happened in this case, and, in my judgment, the offices of the defendants were vacated when, on Feb. 10, 1931, they verbally offered to resign, and their offers were accepted by the resolution of the company. Accordingly, there should, in my judgment, be an injunction in the terms of the notice of motion.

Solicitors: *William Charles Crocker*, for Wood, Lord & Co., Manchester; *Lewis & Dunkerley*, Warrington.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Re BOROUGH COURT ESTATE

[CHANCERY DIVISION (Maugham, J.), November 19, 1931]

[Reported [1932] 2 Ch. 39; 101 L.J.Ch. 316; 147 L.T. 476;
75 Sol. Jo. 830]

Settled Land—Improvement—Application of capital money—Retrospective order—Property sold before application for order—Cost of drainage allowed—Costs of improvements now within Part 2 of Sched. 3 to Settled Land Act, 1925, not allowed—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 87, Sched. 3, Part 2.

In 1920 the tenant for life of a mansion-house and land, without the approval of the trustees or the court, made improvements to the settled property, including drainage, some of which improvements were not authorised by the Settled Land Act, 1882, and paid the cost thereof. In 1923 the greater portion of the land was sold, and in 1929 the remainder and the house. On a summons taken out asking that, pursuant to the Settled Land Act, 1925, s. 87, the trustees might be directed or authorised to raise out of capital moneys and pay the tenant for life such sum as represented authorised improvements,

Held: having regard to the provisions of ss. 84 and 87 of the Act of 1925 the jurisdiction to make the order which was sought was not excluded by the fact that the property improved no longer formed part of the settled estate; the cost of the drainage would be allowed as the expenditure on it had, no doubt, gone to enhance the value of the mansion-house when it was sold; but, having regard to the great probability that the applicant knew that sums expended by him on improvements now coming under Part 2 of Sched. 3 to the Act of 1925 could not be recovered under the law as it stood when he carried out such improvements and that he must have expected to pay for them out of his own pocket, no order would be made for the repayment to him of expenditure on improvements of that kind.

Notes. Applied: *Re Duke of Northumberland*, [1950] 2 All E.R. 1181.

As to improvements authorised by the Settled Land Act, 1925, see 23 HALSBURY'S LAWS (3rd Edn.) 381 et seq., and for cases see 30 DIGEST (Repl.) 317 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

A Cases referred to:

- (1) *Re Lord Sherborne's Settled Estates*, [1929] 1 Ch. 345; 98 L.J.Ch. 273; 141 L.T. 87; 30 Digest (Repl.) 318, 82.
- (2) *Re Jacques' Settled Estates*, [1930] 2 Ch. 418; 99 L.J.Ch. 534; 144 L.T. 103; 30 Digest (Repl.) 319, 86.
- (3) *Re Hotchkin's Settled Estates* (1887), 35 Ch.D. 41; 56 L.J.Ch. 445; 56 L.T. 244; 35 W.R. 463; 3 T.L.R. 401, C.A.; 30 Digest (Repl.) 332, 225.
- (4) *Re Tucker's Settled Estates*, [1895] 2 Ch. 468; 64 L.J.Ch. 513; 72 L.T. 619; 43 W.R. 581; 39 Sol. Jo. 502; 12 R. 320, C.A.; 30 Digest (Repl.) 318, 69.
- (5) *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318; 61 L.J.Ch. 651; 66 L.T. 845; 40 W.R. 490; 36 Sol. Jo. 427; 30 Digest (Repl.) 312, 14.

B

C Adjourned Summons.

In 1920 the applicant, who was tenant for life, had, without submitting a scheme for the court or the trustees, carried into effect repairs and improvements to the settled property at his own cost, some being authorised by the Settled Land Acts then in force, and some not. In 1923 the greater part of the land was sold by him, and in 1929 he sold the mansion and the remainder of the land. He took out this summons asking that the trustees might be directed or authorised to raise out of the capital moneys and pay to him the amount which was authorised by the Settled Land Acts in force at the time when the works were executed at his cost, notwithstanding the absence of a scheme submitted for approval of the trustees or the court.

D

Turnbull, for the applicant, referred to *Re Lord Sherborne's Settled Estates* (1) and *Re Jacques' Settled Estates* (2).

E

L. W. Byrne for the trustees.

H. S. G. Buckmaster, for the remainderman, cited *Re Jacques' Settled Estates* (2), *Re Hotchkin's Settled Estates* (3), and *Re Tucker's Settled Estates* (4).

F

MAUGHAM, J.—Two facts must be noticed in limine—first, that the expenditure was incurred over ten years ago, and, secondly, that the property which was the subject of it no longer forms part of the settled estate. It is also to be observed that, although capital moneys were available in 1923, the tenant for life did not apply for recoupment of any part of the expenditure. Although the present application is for recoupment of expenditure which was incurred in respect of improvements before the Settled Land Act, 1925, came into force, many of which improvements were not authorised by the Settled Land Acts, 1882 to 1890, the court can order repayment of sums properly coming under the Settled Land Act, 1925, since they are now authorised under that Act. The authority for that is *Re Lord Sherborne's Settled Estates* (1). It is, therefore, clear that there is jurisdiction in the court, and the question that arises is whether that jurisdiction ceases when the property is no longer part of the settled estates. In the course of his judgment in *Re Hotchkin's Settled Estates* (3) (35 Ch.D. at p. 42), *COTTON, L.J.*, said:

G

H

"I feel great doubt whether the [Settled Land Act, 1882] empowers us to authorise the trustees to pay out of capital money the expense of improvements on lands which are no longer in settlement."

I

In my opinion, having regard to the provisions of ss. 84 and 87 of the Settled Land Act, 1925, it would be wrong to come to the conclusion that the jurisdiction of the court ceases when the property which has been improved is sold. The effect of so holding would be that, when a tenant for life wished to sell the property or was advised to do so, he would be faced by the difficulty that, if he did sell, he would be depriving himself of his right, under the Settled Land Act, 1925, to apply to the court for recoupment of money paid for improvements. That conclusion would be directly contrary to the policy of the Act, and, in my opinion, under the present law, having regard to the fact that the court has jurisdiction to order the repayment of sums paid in the past by the tenant for life, the right conclusion is that the jurisdiction continues after the property is sold.

I must now consider whether I ought to exercise the jurisdiction in the present A
case. I accept as a sound guidance the statement made by EVE, J., in *Re Jaques'*
Settled Estates (2) ([1930] 2 Ch. at p. 420). The learned judge there says :

"Speaking for myself, I think that the opinion expressed by NORTH, J., in *Re*
Ormrod's Settled Estates (5) is a very salutary one to bear in mind in connec- B
tion with applications of this nature. He had there to deal with the question
of recouping a tenant for life for certain expenditure he had incurred without
having submitted antecedently a scheme of his proposals to the trustees, and
the learned judge, who was prepared to assume that s. 15 of the Settled Land
Act, 1890, authorising the recoupment of expenditure incurred without a
scheme, was retrospective, nevertheless refused to allow recoupment, on the
ground that the tenant for life had deliberately done the work with the object, C
no doubt, of benefiting the estate, but with the full knowledge that the money
expended could not be recovered from capital, and that in these circumstances
he must be presumed to have intended to make the expenditure his own, and
not to cast it upon the corpus of the estate. I think that is a precedent to be
borne in mind when applications are made under the present Act for the
retrospective exercise by the court of its discretion in favour of tenants for
life. I can imagine a large number of improvements, especially those which
do not cost much individually, but which in the aggregate may amount to a
large sum, with respect to which the court would not exercise its discretion
by giving a retrospective effect to the legislation of 1925, but would leave the
tenant for life who had incurred those expenses without any idea of getting
them back in the position in which he must have known himself to be when
the expenditure was incurred." D
E

The Settled Land Act, 1925, deals with the matter in a way different from that
in which the Settled Land Acts, 1882 to 1890, deal with it, and there is given,
in Part 2 of Sched. 3 to that Act, a list of improvements the cost of which the
trustees of the settlement or the court may require to be replaced by instalments,
and in Part 3 a list of improvements, the cost of which they must require to be so
replaced. In a case in which the application for recoupment is made long after
the work has been done, if the improvements are within Part 2 or Part 3 there
is strong ground for so exercising the discretion that *prima facie* the costs of the
improvements or a portion of them will be thrown upon the tenant for life, that is,
he should be treated as if he had been required to pay the costs by instalments as
from the date when the improvements were made. The court clearly ought not
to regard the application of a tenant for life more favourably when he has abstained
from formulating a scheme, and the same proposition is true if he has incurred
most of the expenditure at a time when there was no power to order that it should
be recouped. F
G

In the present case it is clear that that part of the work which consisted of
drainage was properly attributable to capital moneys under the Settled Land Acts, H
1882 to 1890, and in 1923 application for recoupment might have been made under
those Acts. I think that, to that extent, this application should in the circum-
stances be allowed. But if I were now to exercise the jurisdiction of the court to
order the repayment to the applicant of the costs incurred in carrying out improve-
ments which now come under Part 2 of Sched. 3 to the Settled Land Act, 1925,
the right course would be to require him to replace the whole of the costs of those
improvements by instalments, treated as commencing as from the date when the
work was done. It is true that, if that jurisdiction had been exercised earlier, the
court might have required the money to be repaid by instalments over a period
extending beyond the present time, but, having regard to the great probability that
the applicant knew that sums expended by him on improvements which now come
within Part 2 of Sched. 3 to the Settled Land Act, 1925, could not be recovered
under the law as it stood at the date when he carried out those improvements, and
that he must have expected to pay those sums out of his own pocket, I do not think I

A that he will be suffering any injustice if the court does not order that they be recouped to him.

In regard to the drainage, it would be fair to allow a proper sum to be recouped to the applicant, as the expenditure has, no doubt, gone to enhance the value obtained upon the sale of the mansion-house.

Solicitors : *Rider, Heaton, Meredith, & Mills; Burch & Co.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re HEALTH PROMOTION, LTD.

[CHANCERY DIVISION (Maugham, J.), July 17, 1931]

[Reported [1932] 1 Ch. 65; 101 L.J.Ch. 58; 146 L.T. 211;
[1931] B. & C.R. 97]

Company—Winding-up—Copyright—Books—Royalties—Sale by liquidator of assets—Right of liquidator to sell books—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 60—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 262.

A publishing company entered into agreements with two authors for the exclusive right of printing and publishing certain books written by them. The copyright in some of the books was to vest in the company and in others to remain in the authors, and royalties were payable to the authors. The company became insolvent and went into voluntary liquidation. The liquidator sold its assets, which included copies of the books written by the authors. On a summons to determine (i) whether, where the copyright, or some interest in the copyright, in the books was vested in the company at the date of the resolution for its voluntary winding-up, the sale was subject to the Bankruptcy Act, 1914, s. 60, and (ii) whether, where the copyright in the books was not vested in the company, the sale could take place without the consent of the authors,

Held: section 262 of the Companies Act, 1929, did not incorporate s. 60 of the Bankruptcy Act, 1914, and, therefore, s. 60 of the Act of 1914 did not apply to the rights of the authors.

Henham v. Alston Rivers, Ltd. (1) (1916), Macgillivray, Copyright Cases 1911-1916, 330, distinguished.

Notes. Section 262 of the Companies Act, 1929, has been replaced by s. 317 of the Companies Act, 1948.

As to the application of bankruptcy rules to the winding-up of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 658-661, paras. 1305-1309; and for cases on the subject, see 10 DIGEST (Repl.) 982-984, 6761-6779. For the Companies Act, 1948, s. 317, see 3 HALSBURY'S STATUTES (2nd Edn.) 698, and for the Bankruptcy Act, 1914, s. 60, see 2 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

- (1) *Henham v. Alston Rivers, Ltd.* (1916), Macgillivray, Copyright Cases 1911-1916, 330; Digest Supp.
- (2) *Re Grant Richards, Ex parte Warwick Deeping*, [1907] 2 K.B. 33; 76 L.J.K.B. 643; 96 L.T. 712; 23 T.L.R. 388; 14 Mans. 88; 4 Digest 256, 2436.

Originating Summons.

Health Promotion, Ltd. (hereinafter called "the company"), printers and publishers, had entered into agreements with J. J. Warshaw and W. M. Gallichan for the exclusive rights of printing and publishing certain books of tours, in which it was provided that the company should have the sole right of publishing and should

publish at its own expense and risk. Some of the agreements provided that the company should pay to the author, or his heirs or assigns, a royalty of a fixed amount on every copy sold, and that, subject to the agreement, the whole right, title and interest in the manuscript and the copyright of the book should remain in the author. Others provided that the copyright should remain in the publishers, and one that royalties should not be payable to the author on the first ten thousand copies sold. The company became insolvent and, by a resolution passed at a meeting of the shareholders on July 25, 1930, H. L. Gray was appointed liquidator in the voluntary liquidation. On the same date he was appointed liquidator of Lutterworths, Ltd., printers and publishers. By an assignment of Sept. 11, 1930, between the company and Lutterworths, Ltd., of the first part, the liquidator of the second part, and L. Jackson of the third part, in consideration of £1,100 paid by Mr. Jackson to the liquidator, he assigned the whole business of the company and the business of Lutterworths, Ltd., to Mr. Jackson. The £1,100 was apportioned as between the company and Lutterworths, Ltd., as to £800 in respect of the assets sold by the company and as to £300 in respect of the assets sold by Lutterworths, Ltd. Certain printed and bound copies of books written by Mr. Warshaw and of others written by Mr. Gallichan, which on Sept. 11, 1930, formed part of the stock-in-trade of the company, were delivered to Mr. Jackson in accordance with the terms of the agreement. By a supplemental agreement of Jan. 20, 1931, between Mr. Jackson and the liquidator, it was provided that nothing therein contained should prejudice the rights of Mr. Jackson to sell or otherwise dispose of the copies of the books which he had acquired under or by virtue of the assignment.

This summons was issued on the application of the liquidator for the decision of the questions: (i) Whether, in any case in which by agreement with the respondents, Warshaw or Gallichan, or either of them, the sole right of printing and publishing any of certain works mentioned in the schedule to the summons was vested, together with the copyright or some interest in the copyright of that work, in the company at the date of the resolution for its voluntary winding-up, the liquidator was entitled to dispose of the benefit of that agreement, and that copyright or interest in copyright and copies of the work to which that agreement related free from, or only on and subject to, the terms of s. 60 of the Bankruptcy Act, 1914; and (ii) Whether, in any case in which under any such agreement as aforesaid the sole printing and publishing rights of any work were vested in the company at that date without there being vested in the company the copyright in the work to which that agreement related, the liquidator was entitled to assign the benefit of that agreement to a purchaser so as to confer the benefit of it on that purchaser without the consent of the respondents, Warshaw and Gallichan.

By the Bankruptcy Act, 1914, s. 60:

"Where the property of a bankrupt comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorise the sale of, any copies of the work, or to perform or authorise the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt was liable to pay."

By the Companies Act, 1929, s. 262:

"In the winding-up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for

A the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section."

Braund for the liquidator.

Buckmaster, for the respondent authors Warshaw and Gallichan, referred to *Henham v. Alston Rivers, Ltd.* (1) and *Re Grant Richards, Ex parte Warwick Deeping* (2).

Gallop for the respondent Jackson.

C MAUGHAM, J., stated the facts and said: I shall not trouble counsel further in this matter, in which I think that I must decide that s. 262 of the Companies Act, 1929, does not, according to its true construction, incorporate s. 60 of the Bankruptcy Act, 1914. Counsel for the authors has said all that can properly be said in favour of the view that the section of the Bankruptcy Act is incorporated; but, when I look at the words of s. 262 of the Companies Act, 1929, I am quite unable to see how s. 60 of the Bankruptcy Act can be incorporated. To my mind, D s. 60 is a limitation of the trustee's powers, and confers, except so far as benefits may be gained by such a limitation, no direct benefit on any author at all. In substance it provides as follows: that, where the property of a bankrupt comprises copyright or interest in some copyright, and payment for the copyright was to be made by payment to the author of royalties, the trustee in bankruptcy is not to be entitled to sell any copies of the work except on terms of paying to the author the sums by way of royalty which would have been payable by the bankrupt. Secondly, E it provides that, in such case, he shall not, without the consent of the author or of the court, be entitled to assign the copyright or to transfer the interest in the copyright or to grant any interest in the copyright by way of licence except on terms which would secure to the author the royalties for which he had stipulated. All those provisions are restrictions on the right of the trustee, and, accordingly, F I think that it is true to say that s. 60 is not a section which confers a right on an author as a creditor or as an unsecured creditor of the bankrupt. It is clear, then, to my mind, that the phrase, "with regard to the respective rights of secured and unsecured creditors and to debts provable," in s. 262, is not wide enough to incorporate s. 60 of the Bankruptcy Act, 1914; nor do I think that the section can possibly come within the words by reason of a reference to future and contingent G liabilities. There are no future or contingent liabilities in regard to which s. 60 can be fairly described as a rule relating thereto. I should add that the section, from the time when it was first introduced in the Act of 1875, has been strictly construed, and anyone who looks at BUCKLEY ON THE COMPANIES ACTS (11th Edn. at p. 533) will see how numerous are the cases in which it has been held that the section does not introduce into a winding-up bankruptcy rules in relation to a number of matters.

H Counsel for the authors has relied on *Henham v. Alston Rivers, Ltd.* (1). It is, however, to be noted that that was a case which came before the court on a motion for judgment in default of appearance on the defendant's behalf, and that, although s. 60 of the Bankruptcy Act is referred to, I can find no reference whatever to the incorporating section in the Companies Act then in force, namely, s. 207 of the Companies (Consolidation) Act, 1908; nor do I find that the learned judge ever dealt with or considered that matter. Accordingly, I cannot accept the statement I in *Henham v. Alston Rivers, Ltd.* (1) as authority for the view that s. 60 of the Bankruptcy Act is a rule applicable to the winding-up of an insolvent company. I am constrained to hold that the rights of the parties in the matter referred to in the summons are to be decided without reference to s. 60 of the Bankruptcy Act, 1914.

Solicitors: *Field, Roscoe & Co.; Lazarus, Son, & L. A. Hart; Forsythe & Kerman.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

CONSETT IRON CO., LTD. v. DURHAM (NORTH-WESTERN AREA) ASSESSMENT COMMITTEE

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Dunedin, Lord Warrington, Lord Thankerton and Lord Russell), February 23, 24, 1931]

[Reported [1931] A.C. 396; 100 L.J.K.B. 242; 144 L.T. 649; 95 J.P. 98; 47 T.L.R. 301; 29 L.G.R. 231; [1926-31] 1 B.R.A. 308]

Rates—Assessment—Depressed industry—Consideration of expectation of better trade.

The appellants were rated as occupiers of coal mines in the area of the respondent assessment committee, the gross and rateable values of their hereditaments, as entered in the valuation list, being substantial sums. At the material time the coal industry was very depressed, and it was clear that so long as the prevailing conditions of trade continued none of the appellants' properties could be worked except at a loss, and that no one would have entered into a tenancy of the properties or any of them at any rent whatever if he had expected that the conditions of trade then prevailing would not improve to a substantial extent during his tenancy. The appellants contended that on these facts the rateable values of their hereditaments ought to be reduced to nil, or to a nominal sum, there being in fact no rent which a hypothetical tenant would give for the year for which the rate was made.

Held: there might be circumstances which prevented the occupier of a coal mine from using it for the purpose of producing coal and he might then be entitled to have excluded from consideration, in fixing the amount of the assessment, the expectation that at some future time the circumstances would change so as to allow him to use the mine for production, but where, as in the present case, a colliery was actually being worked by the occupier for the production of coal, the expectation of better trade subsequent to the year of assessment was a consideration which must be taken into account in arriving at the true assessment, and, therefore, the contention of the appellants was wrong.

Staley v. Castleton Overseers (1) (1864), 5 B. & S. 505, distinguished.

Notes. Under the Local Government Act, 1948, ss. 33, 41, 49, and the Lands Tribunal Act, 1949, ss. 1 (3) (e), 3, valuation lists are now prepared by valuation officers of the Commissioners of Inland Revenue, and proceedings on proposals for the alteration of lists come before local valuation courts, from which there is an appeal to the Lands Tribunal, whose decision is final, subject to an appeal on a point of law to the Court of Appeal.

For definition of "gross value," see now Rating and Valuation Act, 1925, s. 68 (1).

Referred to: *Tounley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585; *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*, [1937] 2 All E.R. 298; *Port of London Authority v. Essex Rivers Catchment Board*, [1944] 2 All E.R. 507.

As to the basis of assessment outside the Metropolis, see 27 HALSBURY'S LAWS (2nd Edn.) 383 et seq., and for cases see 38 DIGEST 518 et seq.

Cases referred to:

- (1) *Staley v. Castleton Overseers* (1864), 5 B. & S. 505; 4 New Rep. 561; 33 L.J.M.C. 178; 28 J.P. 710; 10 Jur.N.S. 1147; 12 W.R. 911; 122 E.R. 920; sub nom. *R. v. Castleton Overseers*, 10 L.T. 606; 38 Digest 525, 725.
- (2) *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 49 W.R. 610; 17 T.L.R. 444, H.L.; 38 Digest 526, 735.
- (3) *Hoyle and Jackson v. Oldham Poor Law Union Assessment Committee and Oldham (Churchwardens, etc.)*, [1894] 2 Q.B. 372; 63 L.J.M.C. 178; 70

L.T. 741; 58 J.P. 669; 10 T.L.R. 315; 38 Sol. Jo. 286; 9 R. 287; Ryde & K. Rat. App. 124, C.A.; 38 Digest 525, 727.

(4) *Harter v. Salford Overseers* (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 11 Jur.N.S. 1036; 13 W.R. 861; 122 E.R. 1313; 38 Digest 525, 726.

(5) *Great Eastern Rail. Co. v. Haughley (Churchwardens, etc.)* (1866), L.R. 1 Q.B. 666; 7 B. & S. 624; 35 L.J.M.C. 229; 14 L.T. 548; 30 J.P. 438; 12 Jur.N.S. 596; 14 W.R. 779; 38 Digest 521, 705.

Appeal from a decision of the Court of Appeal (SCRUTTON, GREER, and SLESSER, L.JJ.) on a Case stated by Durham Quarter Sessions.

The appellants, the Consett Iron Co., Ltd., appealed against two general rates for the half year, Oct. 1, 1927, to March 31, 1928, one made by the Lanchester Rural District Council as the rating authority for the Lanchester Rural Rating Area in the No. 5 or North-Western Area of the county of Durham, and the other by the Benfieldside Urban Rating Area in the same assessment area. The appellants, in each case, were assessed as occupiers of certain hereditaments, described as "coal mines," at substantial sums for gross estimated rental and rateable value. The total assessments were several thousand pounds. The appeals were respited to the next sessions, and on Jan. 30 and 31, 1929, the following facts were admitted or proved.

The appellants were lessees of the said properties under a number of long leases (several in respect of each colliery) of varying dates and for varying terms of years. The royalty rents payable under these leases varied, but averaged about 7d. per ton of coal worked. Many of these leases were renewals of earlier leases. Certain of the leases contained provisions entitling the appellants to determine them by giving notice for that purpose. On the determination thereof, fixed plant, and, in some cases, workmen's houses, on which the appellants had expended money, would become the property of the lessors without payment to the appellants, who would also be obliged to spend money in payment for permanent land damage. In certain cases, where properties were not held under the original leases, plant had already reverted to the lessors, but the appellants still had use of it under the existing leases. In the valuation lists on which the rates appealed against were based, the rateable values were arrived at by multiplying the average annual output of coal from each property, based on two years to Dec. 31, 1926, by a number of pence per ton varying with the thickness of the seam, according to a scale known as the Lanchester scale. The collieries were idle from July 3, 1925, to April 18, 1926, because of a local strike, and from May 1 to Dec. 20, 1926, by reason of the national coal stoppage. At the time when the rates appealed against were made, the collieries had been worked at a loss ever since the middle of 1925, and were still being so worked. The conditions of the coal trade in September, 1927, were so bad that the trade would be ruined if those conditions continued indefinitely, and there was then no indication that they were likely to improve within a year. So long as the then prevailing conditions continued, none of the appellants' properties could be worked except at a loss. The Case contained a table showing the profit or loss made by the appellants' collieries in each month from Jan. 10 to October, 1927. No one would have entered into a tenancy of any of the properties in or about September, 1927, at any rent whatever if he had expected that the conditions of trade then prevailing would continue and would not improve to a substantial extent during his tenancy. On May 10, 1928, the appellants entered into a new lease for a term of twenty years at a royalty rent of 6½d. per ton of part of the area included in one of the properties, the earlier lease of that area having expired. The only basis on which anyone could have been found to enter into a tenancy of any of the properties at that date would have been that his tenancy would continue for a term of years, with the hope that conditions of trade would so improve that he would be on the right side on the average of the whole period.

The appellants contended that on these facts the rateable values of the properties at all material times were nil or nominal amounts, and that the assessments should

be reduced accordingly. The respondents contended that the rates appealed against should be confirmed, and relied inter alia on the fact that the appellants had entered into a new lease on May 10, 1928, of part of the properties, reserving a royalty rent exceeding the average tonnage rent on which they had been assessed, and that they had refrained from giving notice to determine any of the leases where they had the right to do so. Quarter sessions did not accept the appellants' contention, but decided that they were entitled to some relief, and that the Lanchester scale should be reduced by 1½d. per ton throughout, and that the rateable values should be reduced accordingly. The Court of Appeal held, affirming the decision of the Divisional Court, that the tribunal, in order to arrive at the annual value of the hereditaments, had to find what was the rent at which the same might reasonably be expected to let from year to year free of all deductions and other expenses, if any, necessary to maintain them in a state to command such rent in accordance with s. 1 of the Parochial Assessments Act, 1836. The question of the amount of that rent was a question of fact for the tribunal from whose finding there was no appeal, provided that the tribunal, in arriving at its finding, had not taken into account matters which it ought not to have taken into account, and had not excluded matters which it ought to have taken into account. In this case the tribunal, or the justices, in arriving at the amount of that rent, were entitled to take into account changes which might happen after the year of assessment but during the possible or probable period of the tenancy from year to year which they had by the statute to consider. Having taken such matters into account the result at which they had arrived was not a matter for appeal. That was substantially the view of the Divisional Court, and the amount of the rate which had been assessed could not be interfered with and the appeal must be dismissed. The Consett Iron Co. appealed.

Comyns Carr, K.C., and Frederick Grant for the appellants.

Walter Hedley, K.C., and Arthur Morley for the respondents.

LORD SANKEY, L.C.—This is an appeal from an order of the Court of Appeal consisting of SCRUTTON, GREER, and SLESSER, L.J.J., dated Jan. 22, 1930, dismissing an appeal by the appellants from an order of the King's Bench Division consisting of LORD HEWART, C.J., AVORY, J., and SWIFT, J., dated Nov. 12, 1929, whereby an appeal by the appellants upon a Special Case stated by the court of quarter sessions for the county of Durham was dismissed, and the decision of quarter sessions was affirmed. The question for decision on this appeal, shortly stated, is whether the appellants, the Consett Iron Co., Ltd., who are the occupiers of certain coal mines in the county of Durham, are entitled to have the rateable values of the said coal mines for the purposes of general rates for the half-year ended March 31, 1928, reduced to nil, or, alternatively, to nominal amounts. The learned counsel, who opened the appeal on behalf of the appellants, said that he felt that he had the weight of judicial opinion against him—the judgment of the King's Bench Division was unanimous, the judgment of the Court of Appeal was unanimous, and, in addition, quarter sessions were presided over by a distinguished county court judge, now unfortunately no longer with us.

What, then, are the facts stated in the Special Case, for it is upon the basis of those facts that the decision must ultimately depend. I need not go into all of them, but I will draw attention to those which are important for the determination of the case. The rate was made on Oct. 6, 1927, for the half-year from Oct. 31, 1927, to March 31, 1928, and was based on valuation lists then in force for the respective parishes concerned. In the valuation lists the rateable values were arrived at by multiplying the outputs from each of the various mines or drifts for one year based on the average of the outputs for the two years ending Dec. 31, 1926, by a number of pence per ton according to a scale known as the Lanchester scale, Lanchester parish being one of the parishes in which these mines were situated. There is no objection to that method of ascertaining the rateable value; it is a method which has very frequently been employed in the rating of colliery

A properties. The difficulty with regard to rating such properties has been a familiar one for many years, and is due to the fact that the words of s. 1 of the Parochial Assessments Act, 1836, make it difficult to apply the words of Parliament to a colliery. That section reads :

B “No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants’ rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.”

C That raises the question on what principles and in what way have the courts to apply s. 1 of that Act to hereditaments which are never let, but which still, for rating purposes, have to be dealt with as if they were lettable from year to year. In the lapse of almost a century which has followed the Act, all sorts of various methods have been adopted by rating surveyors and approved by the courts for ascertaining the rateable value of different sorts of property.

D Paragraph 5 (11) of the Special Case finds :

“The conditions of the coal trade in September, 1927, were so bad that the coal trade would be ruined if they were to continue indefinitely and there was no indication in or about September, 1927, that they were likely to improve within a year.”

E The succeeding paragraph sets out the losses which were sustained in the trading results for the whole of the collieries in the county of Durham in 1927, from the month of January to the month of October, the greatest being in April, 1927, when it was over 6½d. per ton. The case proceeds to find that it was clear that in or about September, 1927, and so long as the conditions then prevailing continued, none of the appellants’ said collieries could be worked except at a loss. Sub-paragraph (14) says :

G “No one would have entered into a tenancy of the said properties or any of them in or about September, 1927, at any rent whatever if he had expected that the conditions of trade then prevailing would continue and would not improve to a substantial extent during his tenancy. The appellants on May 10, 1928, entered into a new lease for a term of twenty years in respect of an area forming part of one of the said properties at a royalty rent of 6½d. per ton, the appellants’ earlier lease of the said area having expired.”

The only other sub-paragraph with regard to the facts which I need read is sub-para. (15), which says :

H “The only basis on which anyone could have been found who might have entered into a tenancy of the said properties or any of them in or about September, 1927, would have been on the assumption that his tenancy would continue for a term of years”

—I do not think that means twenty years, or fifteen years, or a term of years in that sense, but I think it means a tenancy from year to year, which, as has been admitted, may continue until put an end to by due notice—

I “and in the hope that conditions of trade would improve during that period so that he would be on the right side on the whole on the average of the whole period of his tenancy.”

The learned counsel for the appellants put a construction upon that sub-paragraph which he says ought to induce the court to decide the case in his favour; but, in order to see what the construction really is, it is important to observe what the contention of the appellants was, and what view the court of quarter sessions took upon it. Paragraph 7 of the Case says :

"It was contended on behalf of the appellants: (i) That on the admitted or proved facts the rateable values of the properties referred to in para. 1 hereof and each of them at all material times on a true construction of s. 1 of the Parochial Assessments Act, 1836, were nil or, alternatively, nominal amounts and that we were bound in law to reduce the rateable values of the said properties and each of them to nil or alternatively to nominal amounts."

That being the contention of the appellants, it is necessary to see what the court of quarter sessions accepted with regard to it. Paragraph 9 of the Case says:

"We did not accept the appellants' first contention, but we decided that the appellants were entitled to relief and that for the purpose of the present appeals the Lanchester scale should be reduced by 1½d. per ton for seams of all thicknesses and that the rateable values appealed against be reduced accordingly."

What is the meaning of their findings and what is the meaning of sub-para. (15)? I agree with what GREER, L.J., said in the Court of Appeal. He read out para. 7 and then proceeded (143 L.T. at p. 13):

"Now I take that to mean that the court of quarter sessions if it was open to them so to decide, came to the conclusion upon the facts before them that the rateable value of this property had not been reduced to nil; that is to say, they came to the conclusion that what had been called the hypothetical tenant, even on the facts they had themselves found in the course of their findings in the case, would agree to pay some rent for the premises."

If that is the correct interpretation, no court of appeal, whether the King's Bench or the Court of Appeal or your Lordships' House, has anything to do with the quantum. It is a question of fact purely for the consideration of the court of quarter sessions, and, in my view, they have found that the mines in question might reasonably be expected to let from year to year at a rent subject to the statutory deductions which shows a rateable value. If that is the finding, this appeal is an appeal upon a pure question of fact, which is inadmissible, but in deference to the argument which has been addressed to us, and the cases which have been cited, I proposed to add a few words.

It is important to remember that the mine in question was still a going concern. Coal was still being worked. There is no suggestion that it had been shut down, as appears in some of the decided cases. There is no suggestion that it had come to any end, even temporarily. The colliery was—I do not like to use adjectives, and I will not say in full working order—but, at any rate, the colliery and all the mines were working. Now, what ought to be the guiding principle to a court of appeal in a matter of this kind? It is, in my view, to be found stated with the greatest simplicity and the greatest accuracy in the judgment of LORD HALSBURY, L.C., in *Mersey Docks and Harbour Board v. Assessment Committee of Birkenhead Union* (2). He says ([1901] A.C. at p. 183):

"Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included."

The learned counsel for the appellants in the present case complained that the second limb of that sentence had been contravened, and that something had been included by the court of quarter sessions in coming to a determination which by law ought not to have been included.

He relied for that proposition upon *Staley v. Castleton Overseers* (1), in which case the decision of BLACKBURN, J., to which any lawyer would naturally pay the greatest possible attention, has been frequently quoted in rating cases of this character. The headnote reads:

"A cotton mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive. Held, that the occupiers were

A rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value."

If it were necessary to distinguish that case—and I hardly think it is, because I am of opinion that none of the cases which have been cited has very much to do with the case now before your lordships—it appears at once that there is all the difference in the world between it and this one, for it starts by finding that the cotton mill was no longer worked as a cotton mill, but was maintained as a factory with its machinery in a fit state for working when the trade should revive. In the present case, the mines in question are still being worked as a going concern. But there is one sentence in the judgment of BLACKBURN, J., to which our attention

C has been repeatedly called, where the learned judge said (5 B. & S. at p. 513):
 "The facts are that under existing circumstances, the hypothetical tenant hiring it as a cotton mill would not give anything for it, because, working it as a cotton mill in the current year, he would be out of pocket."

I should feel great personal hesitation in criticising any statement of law made by BLACKBURN, J., and I should prefer his opinion to my own, but I think that he is there stating something which was for the decision of the court of quarter sessions. If that were the finding of sessions, I can see the reason for the decision, and if, on the other hand, the sessions found that there was some chance of the cotton mill being opened again very soon and assessed the rateable value taking that into consideration, I think equally their decision would be upheld, so it is important to look at the arguments which were advanced. In my view, the learned judge was referring to the argument which had been advanced by Mr. Joseph Kay (5 B. & S. at p. 510):

"Considering the uncertainty of the cotton trade the test is what a tenant would give for the mill if it was let out for a reasonable term of years."

The learned judge was really dealing with those words "a reasonable term of years," and was pointing out that there was no such phrase in the Act of 1836. If I am wrong in putting that interpretation upon the sentence, I cannot help adding that what SCRUTTON, L.J., said about the passage to which I have referred appeals to me:

"I personally have very grave doubts whether that is right, and, if it were necessary, I should be prepared to say that it is wrong; but in the present case it appears to me that no question arises as to a house not being occupied or of a factory in which no trade is being carried on. In the present case the trade was being carried on during the whole year of assessment; the benefit derived by the occupier was whatever benefit would be derived from carrying on the trade as a colliery."

GREER, L.J., said very much the same thing (143 L.T. at p. 14):

H "In the course of that [judgment] he appears to have left out of consideration the question whether at the time when the rate was made any proposing tenant would take the premises as a cotton factory in the expectation that the American War would soon end and that while still in occupation he would be entitled to make money out of it as a cotton factory."

SLESSER, L.J., in distinguishing the case, referred to the judgment of the Divisional Court in *Hoyle and Jackson v. Oldham Poor Law Union Assessment Committee and Oldham (Churchwardens, etc.)* (3), where LAWRENCE, J., says ([1894] 2 Q.B. at p. 377):

I "The circumstances in the present case are different from those which existed in *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (4), for in those cases the business had actually ceased, and the buildings had been turned from mills into warehouses for machinery and as far as the ability of the tenants to carry on business was concerned, they were in no better position than if their mills had been burned down."

The true principle to be applied in these cases is that laid down by COCKBURN, A.C.J., in *Great Eastern Rail. Co. v. Haughley (Churchwardens, etc.)* (5), where the learned judge says (L.R. 1 Q.B. at p. 679):

"But I think it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account. It may be that the circumstances are such, that it is worth his while to deal with the stock as though he were certain that his tenancy would not be put an end to at the expiration of the year. He is to calculate for himself how much his stock will be depreciated and what it is worth his while to give, having taken that matter sufficiently into consideration. Now that seems to me to be a question of fact for the sessions. . . . I do not think there is anything in the statute that makes it necessary or incumbent upon us to say, that if the sessions or the arbitrator have found that fact in a particular way, they must necessarily be wrong."

It is unnecessary to deal with the further cases, but the correct statement of the law may be put as follows. There may be circumstances which prevent the occupier of a coal mine from using it for the purpose of producing coal, and if there are such circumstances he may be entitled to have excluded from consideration, in fixing the amount of the assessment, the expectation that at some future time circumstances will change so as to allow him to use it for that purpose. But, where, as in this appeal, a colliery is actually being worked by the occupier for the production of coal, the expectation of better trade subsequent to the year of assessment is a consideration which may be taken into account in arriving at the true assessment. That is what, as it seems to me, the court of quarter sessions have not only purported to do, but what, in fact, they have done. They have left nothing undone which they ought to have done, and they have not done anything which they ought not to have done.

In my opinion, the judgment appealed from is correct, and this appeal should be dismissed.

LORD DUNEDIN.—I concur and I have only one sentence to add, and that is about the case of *Staley v. Castleton Overseers* (1). Counsel for the appellants admitted that the sheet anchor of his argument was BLACKBURN, J.'s opinion in that case. I do not think it necessary to say what I think of what SCRUTTON, L.J., said, namely, that he doubted whether the *Castleton Case* (1) was rightly decided. I see no reason to think that it was wrongly decided. I do not for a moment see why, if a thing is no longer really used as a mill, but is used as a storage factory, you should not rate it as a storage factory. But what might have been of the greatest service to the argument of learned counsel was one sentence of BLACKBURN, J., in which he, speaking of the question of using the hereditament as a mill and not as a storage factory, said (5 B. & S. at p. 513):

"The facts are that under existing circumstances, the hypothetical tenant hiring it as a cotton mill would not give anything for it."

If he had stopped there, there would not have been very much wrong, but he went on, "because, working it as a cotton mill in the current year, he would be out of pocket." The point, of course, that would be of infinite service to learned counsel would be that expression, "in the current year." I agree with my noble friend on the Woolsack that one does not easily say that BLACKBURN, J., was mistaken, but I do not mind doing so when I find that COCKBURN, C.J., and many others have said the opposite, and I agree that one may take as the canon that what was said by COCKBURN, C.J., in *Great Eastern Rail. Co. v. Haughley (Churchwardens, etc.)* (5) (L.R. 1 Q.B. at p. 679):

- A "It is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account."
- B That, of course, is not the same view as in that sentence of BLACKBURN, J., which I read, "because, working it as a cotton mill in the current year, he would be out of pocket"; but that is the view which has prevailed in many cases since, and that is the view that the assessment committee have taken here, and, taking that, it is a question of fact and nothing else.
- C **LORD WARRINGTON.**—I agree with the judgment delivered by the Lord Chancellor, and I also agree with what has just been said by my noble and learned friend LORD DUNEDIN in reference to the judgment of BLACKBURN, J., in *Staley v. Castleton Overseers* (1). I do not think that the decision of the court in *Staley v. Castleton Overseers* (1) can be successfully attacked, but that one sentence in BLACKBURN, J.'s judgment may be read as not giving true effect to the words of the Parochial Assessments Act, 1836, which are, "let from year to year," which is not a tenancy for a year certain. The sentence in BLACKBURN, J.'s judgment seems to indicate that the only term which is to be considered is the current year, that is to say, one year certain. I think the true view is very well put by GREER, L.J., in his judgment in the present case, where he says (143 L.T. at p. 14):

- E "It does not follow that, because during the first year of the tenancy there is very little prospect of any profit, it is not worth while for the proposing tenant to say to himself: 'Though my landlord at the end of six months may give me six months' notice he is very unlikely to do so, and, if he does not do so, I will have the right to occupy for eighteen months, and though at the end of eighteen months from the beginning of the tenancy he may still give me six months' notice, judging by the probabilities and the way business is conducted
- F in matters of this sort, at any rate judging by the probabilities, I do not think he will give me six months' notice, but will let me go on a little longer.' "

That seems to me to be the right view of the Act on that point, and in all other respects I entirely concur in the opinions that have been delivered.

LORD THANKERTON.—I agree.

- G **LORD RUSSELL.**—I agree. There is, in my opinion, no reasonable doubt as to the meaning of the Case Stated. I will take one concrete instance, namely, the coal mine, Humber Hill Drift. The statements in the Special Case involve a finding by the justices upon the facts before them to the following effect—that the Humber Hill Drift mine might reasonably be expected to let from year to year at a rent which, after taking into account the various matters specified in the first section of the Act of 1836, will result in a rateable value of £1,822. That is a finding of fact which we cannot disturb unless the justices have taken into account something which they ought not to have taken into account, or have omitted to take into account something which they ought to have taken into account. I cannot see that the justices have done either, and I, accordingly, agree that this appeal
- I should be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Cooper & Jackson*, Newcastle-on-Tyne;
Ward, Bowie & Co., for *Longden & Mann*, Sunderland.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

R. C. HAMMETT, LTD. *v.* CRABB. SAME *v.* BELDAM

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Acton, JJ.), July 21, 1931]

[Reported 145 L.T. 638; 95 J.P. 180; 47 T.L.R. 623; 29 L.G.R. 515;
29 Cox, C.C. 364]

Food and Drugs—Proceedings against third party—"Due diligence" of employer—Question of fact—Liability of employer to conviction—Right of appeal to quarter sessions—Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 12 (5).

Where an employer who is charged with an offence against the Sale of Food (Weights and Measures) Act, 1926, brings before the court, under s. 12 (5) of the Act, another person whom he charges as the actual offender, the question whether the employer has used due diligence to enforce the execution of the Act is one of fact and not of law; and where the commission of the offence has been proved, but the employer has satisfied the court that he has used due diligence, the result, under s. 12 (5), is that both the employer and the other person should be convicted, but the other person only is liable to a penalty.

Per AVORY, J.: *Quære*, whether in a case where the employer has been convicted and the justices have refused to convict the actual offender, the employer has a right of appeal to quarter sessions.

Notes. Considered: *R. C. Hammett, Ltd. v. London County Council* (1933), 49 T.L.R. 209.

As to defence open to an employer charged with an offence against the Weights and Measures Acts, see 33 HALSBURY'S LAWS (2nd Edn.) 704, para. 1265; and for cases on the subject, see 25 DIGEST 121–122, 434–439. For the Weights and Measures Act, 1926, s. 5 and s. 12, see 26 HALSBURY'S STATUTES (2nd Edn.) 1297, 1302.

Case referred to:

(1) *Walking, Ltd. v. Robinson* (1930), 99 L.J.K.B. 171; 143 L.T. 105, 106; 94 J.P. 73; 46 T.L.R. 151; 28 L.G.R. 88; 29 Cox, C.C. 131; Digest Supp.

Case Stated by justices for the Newington Petty Sessional Division of the County of London.

On Feb. 11, 1931, an information was preferred by the respondent, Henry Crabb, an inspector of weights and measures under the London County Council, under the Sale of Food (Weights and Measures) Act, 1926, against the appellants, R. C. Hammett, Ltd., charging them that, on Jan. 16, 1931, at 10, New Cut, Lambeth, they unlawfully delivered or caused to be delivered to a purchaser butcher's meat without a legible statement of the net weight on which the purchase price was based, the meat not having been weighed in the presence of the purchaser, contrary to the Sale of Food (Weights and Measures) Act, 1926, s. 5 (2). On Feb. 17, 1931, the appellants preferred an information under s. 12 (5) of the Act charging the respondent, Sydney Joshua Beldam, the manager of the appellants' branch at 10, New Cut, Lambeth, as the actual offender in respect of the offence alleged against the appellants. The informations were jointly heard on March 5, 1931.

The following facts were proved or admitted at the hearing: (i) The respondent Crabb was an inspector of weights and measures attached to the Public Control Department of the London County Council. (ii) The appellants carried on business as butchers at nearly 200 shops in and around London, including the shop at 10, New Cut, Lambeth. (iii) The respondent Beldam was the manager of that shop and was employed by the appellants. (iv) On Jan. 16, 1931, the respondent Beldam served one J. Skelton, the chauffeur of the respondent Crabb, at 6.55 p.m., with a leg of lamb bearing two tickets, one marked 10½d. and the other 3s. 2d., the former being the price per lb. and the latter the price of the joint. (v) The joint was not weighed in the presence of Skelton. (vi) The respondent Beldam had

A been employed as manager of the shop for several years and had had no previous complaints made against him and was a satisfactory servant. (vii) The respondent Beldam was aware of the regulations and knew at the time that he was committing an offence. (viii) The appellants employed district superintendents whose duty was (inter alia) to see that their managers knew of the various regulations affecting their shops and to superintend the observance in the appellants' shops of the provisions of the Sale of Food (Weights and Measures) Act, 1926, and other statutes. B One such superintendent, who was in charge of some twenty shops, was in the habit of visiting the shop on an average two or three times a week, but had not up to Jan. 16, 1931, personally brought the printed regulations in question to the notice of the respondent Beldam. (ix) The appellants had also from their head office circulated letters to the managers of their shops drawing attention to the regulations under the Act. C (x) The appellants had caused a notice to be placed in a prominent part of the shop, the first paragraph of which was: "All meat must be weighed in the presence of the customer, whether priced or not."

It was contended on behalf of the appellants that: (i) They had used due diligence to enforce the execution of the Sale of Food (Weights and Measures) Act, 1926, the respondent Beldam had committed the offence without their consent, connivance, D or wilful default, and should be convicted and they should be exempted from any penalty under the said Act, and, further, that there was no evidence on which it could be held that they had failed to exercise due diligence or that they were guilty of wilful default; (ii) Even if it were held that, on the facts found, the appellants had failed to exercise due diligence or had been guilty of wilful default and were convicted, the respondent Beldam, the manager, the actual offender, E should also be convicted, and, although he was summoned under s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, he was, in fact, summoned in respect of an offence contrary to s. 5 (2) of the Act.

It was contended on behalf of the respondent Crabb that: (i) On the facts as proved the appellants had not in law discharged the burden cast on them of proving that they had used due diligence and that the offence had been committed without F their wilful default; (ii) The respondent Beldam, the manager, was summoned only under s. 12 (5) of the Act, and he could only be convicted providing he were the actual offender and the court were also of opinion that the appellants had exercised due diligence and that the offence had been committed without their consent, connivance or wilful default.

G The justices were of opinion that the facts proved by the appellants did not in law constitute due diligence and that there was evidence of wilful default on their part, and they were further of opinion that they had no jurisdiction to convict the respondent Beldam, having decided that the appellants had failed to exercise due diligence and had been guilty of wilful default. They accordingly convicted the appellants and fined them £30 and five guineas costs, and dismissed the information preferred by the appellants against the respondent Beldam.

H The questions on which the opinion of the court was desired were: (i) whether there was evidence on which the justices could hold that the appellants had failed to exercise due diligence or had been guilty of wilful default; (ii) whether the justices on the facts proved or admitted were right in law in holding that the appellants had failed to prove that they had exercised due diligence; (iii) whether I the justices were right in law on the facts proved in convicting the appellants; and (iv) whether the justices, having found that the respondent Beldam was the actual offender, and having also held that the appellants had failed to exercise due diligence and had been guilty of wilful default, were wrong in law or acted in excess of jurisdiction in refusing to convict the respondent Beldam under s. 5 (2) of the Act.

By the Sale of Food (Weights and Measures) Act, 1926 :

"Section 5 (2). A person shall not deliver or cause to be delivered to a purchaser any butchers' meat without a legible statement of the net weight on

which the purchase price is based unless delivery is made to the purchaser on or at the premises of the seller immediately after the meat has been weighed in the presence of the purchaser. . . ."

"Section 12 (5). Where an employer or principal is charged with an offence against this Act, he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the court . . . and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty."

A. S. Comyns Carr, K.C., and S. Seuffert for the appellants.
Engelbach for the respondent Crabb.

The respondent Beldam was not represented.

LORD HEWART, C.J.—This is a very difficult case arising under s. 5 (2) and s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926. I need not re-read the whole of the Case, but among the facts which were proved were these; that the respondent Beldam had been employed as the manager of the shop for several years and had had no previous complaints made against him; that he was a satisfactory servant; and again, that he was aware of the regulations and knew at the time that he was committing an offence; and yet again, that the appellants employed district superintendents whose duty it was (inter alia) to see that the manager knew of the various regulations. One such superintendent, who was in charge of some twenty shops, was in the habit of visiting the shop on an average two or three times a week, though he had not up to Jan. 16, 1931, personally brought the printed regulations to the notice of the respondent Beldam; and finally, the appellants had, from their head office, circulated letters to the managers of their shops drawing their attention to the regulations under the Act, and had caused a notice to be placed in a prominent part of the shop the first paragraph of which was: "All meat must be weighed in the presence of the customer, whether priced or not."

When one looks at the Case and at the opinion expressed, the recurrence of the words "in law" is manifest, although I think that the question whether the appellants (the employers or principals) had used due diligence to enforce the execution of the Act was really one of fact. Nothing has been suggested that the appellants omitted to do, and I cannot help thinking that, if the justices had approached the question as one of fact, they must have come to the conclusion that due diligence was proved. They do not say that the facts did not constitute due diligence; they say they did not "in law" constitute due diligence. I have come to the conclusion, therefore, that the questions which have been asked us ought to be answered as follows: (i) Whether there was evidence on which the court of summary jurisdiction could hold that the appellants had failed to exercise due diligence or had been guilty of wilful default. Answer—No. (ii) Whether, on the facts proved or admitted, the court of summary jurisdiction were right in law in holding that the appellants had failed to prove that they had exercised due diligence and that the offence had been committed without their wilful default. Answer—No. (iii) Whether the court of summary jurisdiction were right in law on the facts proved in convicting the appellants. Answer—Yes, but not in imposing the penalty (see s. 12 (5), and *Walkling, Ltd. v. Robinson* (1)). (iv) Whether the court of summary jurisdiction, having found that the respondent Beldam was the actual offender, and having held also that the appellants had failed to exercise due diligence and had been guilty of wilful default, were wrong in law and acted in excess of jurisdiction in refusing to convict the respondent Beldam of an offence under s. 5 (2). The answer is, I think, that, having found that the respondent Beldam was the actual offender, the court of summary jurisdiction ought to have

A convicted him, and the final words of s. 12 (5) of the Act apply: "The said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty." I think the case ought to go back to the justices for that purpose.

B **AVORY, J.**—I am of the same opinion, although I have been much troubled by consideration of the point which has been made by counsel for the respondent Crabb, that this was really a question of fact for the justices, and that it is difficult for this court to come to a different conclusion of fact if there was any evidence to support the finding of the justices. If this Case is read as a finding of fact, I agree that there was no evidence on which the justices could in fact come to the conclusion that the appellants had not used due diligence to enforce the execution of the Act, and that there was no evidence on which they could find that the offence in question had been committed by the wilful default of the appellants. The difficulty, as my Lord has pointed out, arises from the fact that, instead of stating this Case as a question of fact which they decided, the justices over and over again say they were of opinion that the facts proved did not "in law" constitute due diligence. Now that expression, I think, is meaningless, because there is no legal definition of due diligence for the purpose of this statute. It is a question of fact in every case whether what the principal has done constitutes due diligence on his part to enforce the execution of the Act.

D I only wish to add that I reserve my opinion on the question which I have more than once asked during the progress of this case, namely, whether the employer or principal has not a right of appeal to quarter sessions in a case where the justices have convicted the principal and have refused to convict the employee or manager. E In my view *Walkling, Ltd. v. Robinson* (1), which counsel for the appellants relied on in answer to that point, is not an authority that precludes employers in such cases from appealing to quarter sessions on a question of fact, because in that case it was expressly found that the manager or employee had not, in fact, committed the offence, and he had been acquitted by the justices. The difficulty that was F pointed out in that case was that the appellants could not appeal to quarter sessions against their own conviction without saying that the manager had been improperly acquitted, and it was not open to them to say that he had been improperly acquitted. For that reason, I do not think that case is any authority, and to avoid the difficulties which have arisen in this case I only wish to reserve, as I have said, my opinion whether the proper procedure, instead of stating the Case as if it were G a question of law, would be an appeal to quarter sessions on the facts. I agree with the result, that the case should be sent back to the justices with the directions which my Lord has intimated.

ACTON, J.—I agree.

Appeal allowed.

H Solicitors: Chas. H. Wright & Tracey; S. A. R. Preston-Hillary.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

SAMUELSON *v.* PRODUCERS' DISTRIBUTING CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 13, 14, 15, 1931]

[Reported [1932] 1 Ch. 201; 101 L.J.Ch. 168; 146 L.T. 37;
48 R.P.C. 580]

Copyright—Passing off—Dramatic work—Alteration and additions by person other than original author—Cinematograph film made—Passing off film as screen version of work.

The author of a literary work for the purposes of copyright is the person who actually writes or composes the work in question, and that may be so although the work as originally written is altered or added to by another person. In deciding this question the substance of the matter has to be regarded.

The owner of the copyright in a dramatic work can restrain the producer of a cinematograph film representing to the public, contrary the fact, that the film is a version of the dramatic work notwithstanding that there is no existing film of the work.

The plaintiff wrote a sketch to which G.C., a comedian, who was to play in the sketch, made extensive alterations, but retained eight distinguishable passages written by the plaintiff and also the dramatis personæ and the mise-en-scène. In 1928 the sketch was played for five months as part of a revue, in 1929 it was played on the variety stage, and in 1930 it was one of the items at a Command Performance. The defendants made a film which in fact did not follow the lines of the sketch, but they published a notice in the newspapers: "The man who made the Queen laugh, George Clarke, in 'His First Car.' Come and see the talking version. A P.D.C. Picture." The writ was then issued by the plaintiff claiming damages for passing off and an injunction, and the defendants paid £5 into court in satisfaction of all claims. On a motion in the action the defendants undertook not to repeat the advertisements until trial, and shortly afterwards they announced at a trade performance that their film had no connection with the sketch. The plaintiff had parted with the performing rights of the sketch for five years from 1928.

Held: in substance the sketch was the production of the plaintiff, who was entitled to the copyright in it; there had been an attempt to pass off and the action was rightly made a passing off action, and, though by what had taken place at the trial an injunction had become unnecessary, the plaintiff was entitled to go to trial; no inquiry as to damages was necessary, however, as the £5 paid into court was sufficient, having regard to the fact that the plaintiff had parted with his film rights for five years and that there had appeared shortly after the advertisements an account in the newspapers of the interlocutory proceedings, and having regard to the announcement made at the trade show.

Notes. The Copyright Act, 1911, was repealed by the Copyright Act, 1956 (see 36 HALSBURY'S STATUTES (2nd Edn.) 67).

Referred to: *O'Gorman v. Paramount Film Service, Ltd.*, [1937] 2 All E.R. 113; *Illustrated Newspapers, Ltd. v. Publicity Services (London), Ltd.*, [1938] 1 All E.R. 321; *R. J. Reuter Co. v. Ferd Mulhens*, [1953] 2 All E.R. 1160.

As to persons entitled to copyright, see 8 HALSBURY'S LAWS (3rd Edn.) 404 et seq., and for cases see 13 DIGEST 182 et seq. As to passing off, see 32 HALSBURY'S LAWS (2nd Edn.) 648 et seq., and for cases see 43 DIGEST 281 et seq.

Case referred to:

(1) *Levy v. Rutley* (1871), L.R. 6 C.P. 523; 40 L.J.C.P. 244; 24 L.T. 621; 19 W.R. 976; 13 Digest 184, 198.

Appeal by defendants from an order of LUXMOORE, J.

The facts appear in the judgment of LORD HANWORTH, M.R.

A *Morton, K.C.*, and *Macgillivray* for the defendants.
Bayfus for the plaintiff.

LORD HANWORTH, M.R.—This appeal raises a number of somewhat intricate points. The action is brought by Mr. Morris Laurence Metzenberg Samuelson, whose professional name is Mr. Laurie Wylie, who is a playwright. He wrote a sketch which was first produced under the name of "Washing a Car." He produced that sketch at the invitation of, I think it was Mr. Harry Day, who invited him to write a revue in conjunction with Mr. Harold Simpson. Mr. Laurie Wylie then had a conception for this sketch, which was based on a certain *mise-en-scène*. He thought that he could make a sketch, the central feature of which was a motor car, in respect of which there would be a certain amount of what is technically known as "business." He placed the motor car in the garden of a suburban villa and he introduced as the *dramatis personæ* a man, his wife and a child. Having written the script of "Washing a Car," he sent it to Mr. George Clarke. When Mr. Clarke read the sketch he thought that he could improve upon it, and he did write a different script, but that script embodied, we are told, eight phrases or passages from the script which had been originally produced by the plaintiff, however. It is important to observe that, whatever was said or proposed to be said by these *dramatis personæ*, the *mise-en-scène* remained the same; the motor car and the garden and the actors were those which had been conceived by Mr. Laurie Wylie. It was then determined that Mr. George Clarke should be the central figure, the practised comedian, who was to present this sketch, and he did so. The sketch was put on the stage on July 23, 1928, and it ran until Dec. 10 of that year, and then stopped. In the course of the run it had become called "The New Car." The reason for that was that in the "business," which was Mr. Clarke's invention, he dwelt, not upon the washing of the car, but upon some romp with the car whereby the car was made to, what is called, buck, going backwards and forwards and jumping about, with the result that the washing of the car, which had been a feature of the plaintiff's proposal, went into the background when the sketch was produced by Mr. Clarke. In 1929, from February to August, "The New Car" was produced as a sketch by itself. (In 1928, "Washing a Car" or "The New Car" had appeared as a part of a revue or entertainment called "Vogues and Vanities.") In 1929 "The New Car" had got sufficient attraction to stand upon its own feet, and so it was produced and ran as a vaudeville sketch. It was not produced in 1930, but on May 22 of that year there was a Command Performance at which Their Majesties the King and Queen were good enough to attend. At that performance Mr. George Clarke appeared in "The New Car," with the result that it caused amusement to Their Majesties, and there was a paragraph written in the "Daily Telegraph" on May 23 which ran in this way:

H "The King's Enjoyment. The evening showed us other triumphs of ability. But mainly it was an evening of laughter—laughter whole-hearted, irresistible, and at times uproarious. And nobody in the vast audience seemed to enjoy the fun more than the King and Queen. It was George Clarke, in Laurie Wylie's capital sketch, 'The New Car,' who first set the fun going at high speed."

I It is quite clear that the critic or reporter of the "Daily Telegraph"—only to mention that one paper—in mentioning Mr. George Clarke recognised that he was appearing in the sketch of Laurie Wylie's, and he was right. Up to that time there had been no claim made by Mr. Clarke that the sketch was his own creation, but there had been a payment to Mr. Laurie Wylie for the scenic rights of his sketch. There was no joint-authorship within the meaning of the Copyright Act between Mr. Laurie Wylie and Mr. George Clarke. Therefore, the matter stands in this way, that, unless we are to treat the sketch that Mr. Clarke appeared in as wholly an independent creation on his part, the evidence and the facts all point to there being a recognition that what was being put upon the music-hall stage was the creation of the plaintiff.

I do not want in any way to lay down any principles as to how far a person might, by adding a new scene to an existing play, or by re-writing portions of it, make a new play of which he or she should be the author. What we have got first of all to determine is this: Was this sketch, re-named "The New Car," Mr. Laurie Wylie's sketch or not? Our attention has been called to a number of cases. Some of them have some observations which are helpful, such as *Lacey v. Hallow* (1), in which the observations of *MONTAGUE SMITH, J.* (L.R. 4 C.P. at p. 139), may be pointed to; but I do not find any real guidance on this matter, still less in the rules that are laid down which must necessarily be followed; and it comes back to being a question of substance and of fact whether or not the sketch "The New Car" was Mr. Laurie Wylie's sketch or not. As joint authorship is eliminated by the terms of the statute to which our attention has been called [Copyright Act, 1911, s. 16 (now Copyright Act, 1956, s. 11 (3)], as the mis-en-scènes and the dramatic persons are the same in the script produced by Mr. Clarke, and as he himself did not, apparently, purport to be starting off on his own, I think the evidence all points in one direction, namely, that we should hold, as the learned judge did hold, that in substance this sketch, re-named "The New Car," was the production of Mr. Laurie Wylie, and that he was the author entitled to the copyright in it. I think some importance must be attached to the general recognition of all persons at that time that it was Mr. Laurie Wylie's work. When this had been produced before Their Majesties there were obviously potential further rights than the mere producing it on the stage. Reproduction by mechanical means is referred to in the Copyright Act, 1911. By s. 35 (1) of that Act performance means

"any acoustic representation of a work and any visual representation . . . made by means of any mechanical instrument."

In other words, there are film rights which are attached and belong to the author of the play.

At this point something occurred which has been the basis of the action. The defendants made a film. It is true that the film they produced did not in fact follow the lines of or embody the action of "The New Car," but they sent notices to various newspapers and periodicals in which they said—I take the exhibit from "The Cinema" of May 28:

"The Man who made the Queen laugh. George Clarke in 'His First Car' Come and see the talking version. A.P.D.C. Picture"

—P.D.C. being the initial letters of the defendant company. There are two passages which purport to be excerpts from the "Daily Express" and the "Daily Telegraph," but they are not true excerpts from those papers because they leave out the name of Laurie Wylie. They say this: "It was George Clarke in 'His First Car' who first set the fun going at high speed." It will be observed from what I have read that what was really said was: "It was George Clarke, in Laurie Wylie's capital sketch 'The New Car,' who first set the fun going at high speed." It is plain, however, especially having regard to the picture that illustrates the announcement, that the intention was to refer to the sketch played by George Clarke before Their Majesties at this Command Performance, and one draws a somewhat sinister inference from the fact that these excerpts had been modified so as to make a reference or apparent reference to "His First Car," the "talking" version of a P.D.C. picture in respect of which an attempt is made to appropriate to it the applause and success that "The New Car," in Mr. George Clarke's hands, obtained at a Command Performance. When these notices had been issued a writ was issued. Leave to serve notice of motion with the writ was obtained from CLATSON, J., and when the motion came on an undertaking was at once given, in accordance with which the defendants took advantage of an opportunity for withdrawal which was presented by a gathering for a trade performance on Sunday, May 30. At that performance they made this announcement

A "Producers' Distributing Co., Ltd., beg to announce that their film entitled 'His First Car' has no connection with a variety sketch by Mr. Laurie Wylie entitled 'Washing a Car' or 'The New Car.' "

I agree with the learned judge that that is not an announcement couched in generous terms, nor does it appear intrinsically to show much regret, certainly not contrition on the part of the defendants, and it may be that their attitude in making that announcement in the form in which it appeared is well expressed in their letter of May 29, which says this :

B "In order to preserve the position until the case is again heard on Wednesday next, June 4, as part of an undertaking given by us to the court, we undertook to use our best endeavours to procure you to make an announcement to clearly distinguish our film from the sketch entitled 'Washing a Car' or 'The New Car,' of which Mr. Laurie Wylie claims to be the author."

C It is quite clear that what they were trying to do was to go no further than their undertakings at the moment compelled them to do, and that they were not going absolutely and for ever to give an undertaking or to make a withdrawal such as the plaintiff was entitled to, because I think it is quite plain upon the facts that there was an effort made to take advantage of the merits attributed to Mr. Laurie Wylie's "The New Car" by the moulding of the advertisement in a manner which would apply to the defendants' film production of "His First Car." When the case came to trial LUXMOORE, J., held that the plaintiff was entitled to succeed and that he was entitled to something more than merely nominal damages and there should be an inquiry as to damages. The defendants have appealed on both those points, and they have asked that judgment should be entered for them—appealing, that is to say, both on the right of the plaintiff to bring this action and his right to have an inquiry as to damages.

E On the question of his right to recover, the defendants say this is not what it purports to be—a passing off action; there was no passing off at all. What do you mean by passing off? It is said that there could be some action in the nature of slander of title, but that an action for passing off is one where some representation is made whereby other persons are induced to believe that the goods or the production of the defendants are the goods of the plaintiff. In KERBY ON TRADE MARKS (6th Edn., p. 544), "Passing off" is rightly defined as follows :

F "It is an actionable wrong for the defendant to represent for trading purposes that his goods are those, or that his business is that, of the plaintiff, and it makes no difference whether the representation is effected by direct statement or by using some of the badges by which the goods of the plaintiffs are known or any badges colourably resembling these."

G It appears to me quite idle to say that this is not a passing off. What was the purpose of what I have described as a moulding of the observations contained in the "Daily Telegraph"? To leave out Laurie Wylie and refer to "His First Car" and not "The New Car." "His First Car" was the title of the film of the defendants, and they were adducing this success as appropriate to and belonging to their film "His First Car," when, in truth, and in fact, it belonged to the plaintiff and his sketch "The New Car." That seems to me to amount to a notice of invitation : "Come and see our film, and when you have seen our film you will have seen the sketch which has been spoken of in the manner which is stated in the passages which appear in the advertisement." It appears to me quite clear that this was an attempt to pretend that the defendants' sketch was the same as the sketch which had made Her Majesty the Queen laugh. I, therefore, reject the last point argued by counsel for the defendants. It seems to me that it is not tenable. This is a passing off action, and the ground on which I think the plaintiff is entitled to complain is that, in substance, he remains the author of this sketch whether it is called "Washing a Car" or "The New Car," and if he was entitled to the authorship and the copyright, and to the right to reproduce his sketch, the defendants

have attempted to pass off the sketch, and to make use of the atmosphere which belonged to the plaintiff, in favour of their production. A

The next question comes: How far was the plaintiff entitled to proceed? Was it necessary for him to go to trial? The attitude of the defendants was that, while denying all liability, they paid a sum of £5 into court, and said that sum was sufficient to satisfy the plaintiff's claims. It will be observed that the defence does not contain an absolute undertaking that they will in no sense infringe or trespass upon the plaintiff's proprietary rights. The undertaking that has been given and indicated in the letter to which I have already referred lasted, I think, till the trial or further order. The plaintiff sought to have an injunction, and I think he was entitled to proceed to trial in order to have his rights firmly established. The learned judge seems to take that view too, because, while I quite recognise that the directors of the defendant company, when called before the learned judge, took up the attitude which one would have expected gentlemen to take and expressed their regret for what had been done by this advertisement, the learned judge says that it was at the trial that that was done, and it was at the trial that counsel repeated at the Bar that there was no intention or likelihood of the advertisement being repeated. But there was no undertaking embodied in the defence, and I think the learned judge is quite correct—I need hardly say I should be slow to differ from him on a point of this sort—when he says: B C D

“I agree that there is no necessity now for any injunction, but in the absence of any explanation of the circumstances in which the advertisements complained of were framed, and in view of the alterations made in the Press notices relating to the performance of the sketch ‘The New Car’ so as to adapt them for use in connection with the film ‘His First Car,’ I cannot assume that the servant [of the defendants] responsible was acting innocently.” E

In other words, the learned judge held that the plaintiff was entitled to come to court although by what had taken place at the trial, and not before, the necessity for an injunction did not prevail. Therefore he did not grant an injunction, but he ordered an inquiry as to damages. On the appeal, therefore, on the question: “Was the plaintiff entitled to assert his right and to continue the assertion of his right down to the trial?” we agree with the learned judge. It seems that his rights were trespassed upon, and there was the necessity to go as far as the trial in order to secure the sure foundation that his rights should not be injured in the future. F

Then comes the question whether there should be an inquiry as to damages. That raises, of course, a very difficult question, and one which may involve considerable expense upon both sides. What are the damages? The plaintiff, as I have already said, would have had the right to have a film made of his sketch, but it is pointed out that there were difficulties in his proceeding in that course by reason of the fact that by a letter of July 7, 1928, there was an agreement by him to assign the world's performing rights for five years from July 23, 1928. These performing rights might certainly have militated against any success of the film. Perhaps it would have been impossible for the two to co-exist, but it is not impossible that there should have been a film made of “The New Car.” The defendants' film, as I have already said, was not a presentation of “The New Car,” but the court ought not to order an inquiry as to damages unless it is satisfied that there is some question of sufficient importance to justify the time of the court and the expenditure on the part of the parties which would result. Here we have evidence given us by the plaintiff himself and by a witness, and that evidence I will shortly refer to. The plaintiff was asked this: “(Q.) Now assume for a moment that somebody gets George Clarke to make a film with that driving business in it, and that film is produced. Do you think there would be any value in your sketch for filming purposes? (A.) Very little.” “(Q.) What I suggest to you is that, these events having happened, the value of the sketch ‘The New Car’ for the purposes of being produced as a film was nothing. Do you agree with that? (A.) I certainly think G H I

A it discounts the value of my sketch as a talkie. For one thing, I would like to have done my sketch with George Clarke."

A witness, Mr. Heilbron, says that he has negotiated the sale of hundreds of film rights. The question is put: "(Q.) How often have you sold the film rights and nothing but the film rights of a play?" and the answer is: "About four or five times." "(Q.) Have you ever in your life sold the film rights of a music-hall sketch?" "No."

B On that I have to consider what is the probability, on an inquiry as to damages, of a substantial sum being awarded to the plaintiff. I think the learned judge is right in saying that one can come to the conclusion that there was merely nominal damage. As I have said, it will generally be assumed in a case where there is passing off, that the plaintiff is thereby prevented from selling as many of the goods as he otherwise would, and I should have thought that if the plaintiff had been minded to sell or to engage in producing a film of "The New Car," these notices and the withdrawal on May 30 would all have had a rather negative effect upon the trade at large as to the production of this film. At the same time, I do not think it lies in the defendants' mouth to say that the damages were absolutely nominal. We have to form some estimate of what was the value of the chance, C postponed it may be for a certain time, but what was the value of the chance to the plaintiff of securing a film which would be profitable in the trade. While I feel unable to say that the damages are merely nominal, I think it is plain, after the evidence given, that they could not be of any great substance, and I think the £5 that has been paid into court is sufficient to cover it.

D In these circumstances, one comes to the conclusion that the plaintiff is right; E that, although it is a passing off action it is a right form of action in which to establish his right, that he had to go to trial in order to make the establishment of his right certain, and, therefore, his right to commence and to proceed with this action is established, but that the inquiry as to damages is unnecessary and would be merely an expenditure of time and money, and the court ought not to order an inquiry. Therefore, on appeal we agree with the learned judge in the result that F he has come to favourable to the plaintiff, but we hold that the inquiry as to damages is unnecessary. The appeal of the defendants is wrong in asking that judgment should be entered for the defendants, but they have succeeded in showing that the inquiry as to damages is unnecessary. There were two issues at the trial—(i) whether the plaintiff was entitled to succeed, and (ii) if he was entitled to succeed, what was the quantum of damages? The payment into court was made G with a denial of liability. The plaintiff has just succeeded on one issue and the defendants have succeeded on another. It is true that the plaintiff did not call all his evidence as to damages, but he called sufficient to indicate what the nature of his damages could be. The usual course, where there are issues on one of which one party is successful and not on another, would be to direct that the costs of those issues should follow the event as decided by the court and to make a set off. H We, however, think that that would be a cumbrous mode of proceeding and that it would be extremely difficult for the taxing master to separate the costs of these issues, and we think the right course will be to say that the plaintiff is entitled to succeed and to have two-thirds of his costs as taxed by the taxing master. The result is that on the defendants' appeal they have in part failed and in part succeeded, and we, therefore, order that there should be no costs of this appeal.

I **LAWRENCE, L.J.**—I agree. The defence put forward by the defendant company that the plaintiff is not the author of the sketch entitled "The New Car" is devoid of merit. The advertisement complained of in the action was most misleading and quite indefensible, whoever may have been the real author of the sketch. Further, prior to the date of the appearance of the advertisement in the trade papers, there had been no question in the minds of the parties immediately concerned, that is to say, Mr. Harry Day, Mr. George Clarke and the plaintiff, as to who was the real author of the sketch. The plaintiff had from the first been

accepted and put forward to the public by Mr. Harry Day and Mr. George Clarke as the author of it; he had received royalties as author, and his permission had been sought and obtained by Mr. George Clarke to the Command Performance. In these circumstances, I approach with some suspicion the defence of the company, which does not itself claim to have any interest in the copyright, but has, on the other hand, endeavoured to obtain the benefit of the reputation acquired by the sketch owing to the Command Performance, without the slightest justification, that Mr. George Clarke is the owner of the copyright and therefore the plaintiff is not entitled to bring an action to protect it. The facts as to how the sketch came to be written are not in dispute and I do not propose to repeat them. My conclusion upon these facts is the same as that arrived at by the Master of the Rolls and by the learned judge, and, I may add, the same as that arrived at by Mr. Harry Day and Mr. George Clarke. The sketch depended for its success mostly upon the "business" which Mr. George Clarke, as the chief performer, could introduce into it during its performance. This "business" was left by the author entirely to the performer, and was, of course, not the subject-matter of any copyright. Having read and considered the script as originally written by the plaintiff and as revised or amended by Mr. George Clarke, I have come to the conclusion that in substance the sketch remains the work of the plaintiff and that the alterations made by Mr. George Clarke were only such as would afford him a somewhat wider scope for the "business" which was left to him to introduce. In the result, I am of opinion that the plaintiff was the owner of the copyright of the sketch and was entitled to prevent the defendant company from passing off their film as a film version of that sketch.

Turning now to the question of damage, I have come to the conclusion that the plaintiff has not succeeded in establishing that he has suffered damage beyond the £5 paid into court by the defendants. On this question, therefore, I have come to a different conclusion to that arrived at by the learned judge. It has to be borne in mind that the advertisement complained of was an advertisement inserted in the trade papers and in connection with a show which was to be given for trade purposes. Before that show was actually given, the writ had been issued and an undertaking had been given not to repeat the advertisements for a time, and an announcement was made before the show, on the screen, that the film to be shown was not a version of the plaintiff's sketch. Therefore, as a matter of fact, the defendant company never did represent on the screen a film which they stated was a film version of the plaintiff's sketch. They had by their advertisements led people to believe that they were going to see such a film, but as a matter of fact the film was announced as not being such a film. Nevertheless the attempt made to pass off the film as and for a film version of the plaintiff's play has, I think, been proved to have resulted in some damage. It is true that that damage is minimised by two matters. First of all there is the fact that the plaintiff has parted with the film rights of the play for a certain period which would prevent him, without the consent of his licensees or assignee, making a film version of his sketch, and, secondly, the damages have been minimised by the fact that there appeared, very shortly after the advertisement, an account in the newspapers of the interlocutory proceedings. But in spite of those two matters, I think still there was some damage proved or provable owing to the fact of the advertisement, which I think is sufficiently covered by the £5 which has been paid into court. I have, therefore, come to the conclusion, agreeing with the Master of the Rolls, that the order of the learned judge in the court below ought to be varied by omitting the direction for an inquiry as to damages. On the question of costs, I agree entirely with what the Master of the Rolls said, and I concur with the order which he has suggested.

There only remains one matter more upon which I should like to say a few words, and that is this. It has been contended in this court that the action is not a passing off action at all, and ought, on that ground, to have been dismissed. It is said that there was no passing off here, because the plaintiff had not yet made a film version of his sketch, and, therefore, he had no goods which could have been

A represented by the defendants as being his. The plaintiff and his licensees had the exclusive right of making a film version of the sketch, and the defendant company, in effect, by the advertisement, said that their production was a film version of the plaintiff's sketch, thereby misleading the public concerned into the belief that the defendants' production was a production which was one which the plaintiff alone could have produced, in other words, that it was the plaintiff's production. To put
 B it in other words, they were passing off on to the public their film production as being a film production of the plaintiff's sketch. After all, as pointed out by ROMER, L.J., in the course of the argument, an injunction against passing off is only one of the remedies which a court of equity will grant with a view to protecting property from irreparable damage, and, in my judgment, this is essentially a case in which that protection ought to have been granted and the plaintiff was not bound
 C to wait until special damage had accrued to him, which might by that time have made the damage quite irreparable, before bringing an action. I think he was justified in bringing the action at the earliest possible moment, directly an attempt was made, as I have put it, to pass off the defendants' film version as a version of the plaintiff's play.

D For those reasons, I think that the contention that the plaintiff is not entitled to maintain the action on the ground that this is not a passing off action, is one that fails.

ROMER, L.J.—I agree with all that has fallen from the Master of the Rolls and LAWRENCE, L.J. The first question that arises on the appeal is whether the plaintiff in the action was the author of a sketch called "The New Car." That is
 E not a question which, in my opinion, can be determined, or ought to be determined, by counting the lines of dialogue written by the plaintiff and counting the lines of dialogue written by Mr. George Clarke. The matter has to be regarded, I think, as a matter of substance, and, so regarded, I agree, for the reasons that have been given by the Master of the Rolls, that the author of "The New Car," looking at it as a whole, was the plaintiff, and no one else. It is true
 F that "The New Car" contains lines that have been written by Mr. George Clarke and not by the plaintiff. But the author of a work may have a copyright, and does have a copyright, of the work as a whole, without having the copyright or being the author of every single passage in the work. The author of a book may, and frequently does, place in the mouth of one of his characters a long quotation, say, from Shakespeare. The author does not thereby acquire a copyright in that passage
 G from Shakespeare; he has, nevertheless, copyright in the work as a whole. In my opinion, the plaintiff is entitled to the copyright in the sketch "The New Car," regarding that sketch as a whole.

H The next question that arises is whether, by reason of the advertisements that were inserted on behalf of the defendants in the trade papers in May, 1930, the plaintiff acquired any cause of action against the defendants. It is said that there has been no passing off. It is true there has been no passing off in fact, or, indeed, perhaps, threatened, in the sense in which the word "passing off" is used in what are popularly known as passing off actions—that is to say, the defendants have never contended that the film which they were producing or going to produce was a film prepared or made by or on behalf of the plaintiff. But the cases in
 I which the court has restrained passing off in the popular and usual sense are merely instances of the application by the court of a much wider principle, the principle being that the court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property. In the present case, if, as we hold to be the case, the plaintiff was entitled to his copyright in "The New Car," he was, by virtue of the Copyright Act, entitled to the sole right of producing the sketch in film form. That was an item of his property, and how it can be said that these advertisements might not cause irreparable damage to that property of the plaintiff, passes my comprehension.

The only other point upon which I think it is necessary to say anything is as to

the plaintiff's right to an injunction, that is to say, to proceed with his action, so far as it related to the establishment of his right to an injunction, after the matter had come before the court on interlocutory motion. I cannot help thinking there is a little misapprehension about that. When a man's legal rights are infringed, he is entitled to come to the court as of right and get an injunction, although in some cases the court will exert pressure, it may be, to induce him to accept an undertaking from the defendants instead of an injunction. But he is entitled to an injunction or undertaking as a matter of right and he is not obliged to accept a statement by the defendants, even though made by counsel in a formal manner, that they do not intend to repeat the act complained of. Very often, as happened in this case, when the case comes on for trial, evidence is given and the circumstances are such as to show that it is not necessary for the protection of the plaintiff, that an injunction shall be granted; but in such a case it is usual—and I think it would have been better if that course had been pursued in this case—while indicating that an injunction is not necessary and will not be granted at the moment, to give to the plaintiff liberty to apply for an injunction if and when the occasion for it should arise. On the question of damages, I do not desire to add anything to what has fallen from the other members of the court.

Appeal dismissed.

Solicitors: *Cardew, Smith, & Ross; Judge, Hackman, Meyer, & Judge.*

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

PAIN v. COBB AND OTHERS

[KING'S BENCH DIVISION (Swift and Charles, JJ.), July 16, 17, 1931]

[Reported 146 L.T. 13; 95 J.P. 201; 47 T.L.R. 596; 29 L.G.R. 623]

Rent Restriction—Statutory tenant—Death of widow of tenant—Daughter then living with widow—No right of daughter to occupy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (1) (g).

The Rent Restriction Acts do not give a statutory tenant any right of property. He cannot assign or bequeath his right or dispose of it in any way. He is clothed with it as part of his personalty, and when he dies it dies with him, except for the provision, in s. 12 (1) (g) of the Act of 1920, that, if he has a wife or a member of the family living with him at the date of his death, that person is to have his personal right.

D. was the statutory tenant of certain premises within the Rent Restriction Acts and at the time of his death his wife was living with him. The widow continued in occupation under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The widow died and at the time of her death a daughter was living with her in the premises. The landlord claimed possession from the daughter who set up a defence that she was protected by the above enactment.

Held: the Rent Restrictions Acts conferred no right of property, but merely the right of personal occupation; the right to occupy the premises passed to the widow by virtue of s. 12 (1) (g), but she was not the tenant and was not able to pass on her right of occupation to her daughter; and, therefore, the landlord was entitled to possession.

Notes. Approved: *Summers v. Donohue*, [1945] 1 All E.R. 599. Referred to: *Phillips v. Welton*, [1948] 2 All E.R. 845.

As to the position of statutory tenants, see 23 HALSBURY'S LAWS (3rd Edn.) 809, 810; and for cases see 31 DIGEST (Repl.) 658 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Appeal from Poole County Court.

The landlord, Mrs. Pain, was the owner of a cottage, No. 4, Hill View Cottages, Parkstone, Dorset, to which the Rent Restrictions Acts applied. One, Douch, had been the statutory tenant. He died, and at the time of his death his wife was living with him. As his widow she became the statutory tenant. She died, and at the time of her death a daughter, Mrs. Richards, was living with her. The landlord claimed possession of the cottage, the county court judge dismissed the action, and the landlord appealed. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935), s. 1, provides:

"Section 12 (1) (g): . . . the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or where the tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

The landlord in person.

G. Cohen for Mrs. Richards.

SWIFT, J.—In this action, as it was started in the county court, Mrs. Pain claimed possession of the dwelling-house, 4, Hill View Cottages, Uppleby Road, Parkstone, Dorset, against Mrs. D. E. Cobb, of 3, Hill View Cottages. She also claimed against Mr. and Mrs. Curtis, who resided at 4, Hill View Cottages. When the matter came before the learned county court judge, it appeared that neither Mrs. Cobb nor Mr. and Mrs. Curtis were in fact the occupiers of No. 4, but that Mrs. Richards was the occupier of the house. The county court judge, after hearing evidence, came to the conclusion that Mrs. Richards was in occupation of the premises as a statutory tenant, and he dismissed the action. From that decision Mrs. Pain appealed to this court. As matters originally stood, this appeal must fail, because neither Mrs. Cobb nor Mr. and Mrs. Curtis are in possession of the house. Mrs. Richards is in possession of the house, but Mrs. Richards has consented to being joined as a party to the action and appeal.

Up to May, 1930, Mr. Douch, the father of Mrs. Richards, was the tenant of 4, Hill View Cottages. He died in that month, and his widow, Mrs. Douch, who was living with him at the time of his death, continued in possession. Her possession was protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) of which provides that the expression "tenant" shall include the widow of a tenant, dying intestate, residing with him at the time of his death. She was, therefore, statutory tenant of the house. Mrs. Richards for some years lived in that house with Mrs. Douch, and Mr. and Mrs. Curtis were also living with Mrs. Douch. Mrs. Douch then died. Mrs. Pain knew nothing of Mrs. Richards being in the house. After Mrs. Douch's death, it is said, one payment of rent was made by Mrs. Richards. There is no evidence whatever that Mrs. Pain knew that Mrs. Richards was paying the rent as tenant and not as representative of Mrs. Douch, and there is nothing to show that Mrs. Pain knew that Mrs. Douch was dead. It would not, therefore, be right or proper to assume a tenancy by Mrs. Richards from that payment. Mrs. Pain then discovered that Mrs. Richards was in occupation and wanted to become the tenant of the house. Mrs. Pain refused to accept her as tenant. Mrs. Pain wanted possession of the house and brought an action against (it must now be assumed) Mrs. Richards. It was contended on behalf of Mrs. Richards that she was a person who was entitled to remain in the house because she had the protection of the Acts. It was said that the word "tenant" is defined in s. 12 (1) (g) as including the widow of a person who was residing with him at the time of his death, or where a tenant leaves no widow or

is a woman, such member of the tenant's family so residing as may be decided, in default of agreement, by the county court. It has been contended that Mrs. Richards was a member of the tenant's family so residing at the time of the tenant's death. A

I do not think that that contention is sound. The Rent Restrictions Acts do not confer on the occupier of a house any right of property. They give the actual occupier of a house who comes within the conditions of the Acts a personal protection. No order can be made against him for possession, nor can he be ejected from the house, save on the conditions of the Acts. So long as he is a person who is the tenant of a house who, having ceased to be a tenant at common law, is a statutory tenant, they give him the right of non-ejectment. The Acts do not give a statutory tenant any right of property. He cannot assign or bequeath his right or dispose of it in any way. He is clothed with it as part of his personalty and when he dies it dies with him, except for the provision that, if he has a wife or a member of the family living with him at the time of his death, such person is to have the personal right of the tenant. Here Mr. Douch was the tenant. He could not be ejected and he could not assign his right. Section 12 of the Act of 1920 provides that the protection should be given to his widow. She could not be evicted, but she was not in fact the tenant of the house. Mr. Douch was the tenant, and his statutory right was passed on to his widow. She was there as statutory tenant, and the question is whether, when she died, the right passed on to anybody else. I do not think that it did. Mrs. Richards claimed to be entitled, but I do not think that that is right. If it were, there is no reason why the house should not be handed to the Douch family for ever. Mrs. Richards' daughter might then claim and her granddaughter might claim, each saying: "I was living with my mother when she died." I do not think that the legislature ever intended to create a personal right which should continue in perpetuity in this manner. They intended that the widow living in the house should not be dispossessed at once. In these circumstances, the appeal must be allowed and an order must be made in favour of Mrs. Pain for possession within two months from this day. The judgment of the county court judge will be set aside, but there will be no costs of the county court proceedings or of the appeal. B C D E F

CHARLES, J.—I agree.

Appeal allowed.

Solicitors: *Walmsley & Stansbury*, for *E. W. Marshall Harvey*, Bournemouth.

[Reported by *R. A. YULE, Esq., Barrister-at-Law.*] G

A

HOMES v. NEWMAN

[CHANCERY DIVISION (Lord Tomlin, sitting as additional judge), March 5, 6, 1931]

[Reported [1931] 2 Ch. 112; 100 L.J.Ch. 281; 145 L.T. 140]

B

Evidence—Admissibility—Written statements by deceased person against proprietary interest—Charge on land by deposit of title deeds.

C

The plaintiffs, who were the personal representatives of Mary Ann Inett who died in 1928, claimed to be entitled to a charge for £300 with interest on a farm known as "Watkins." The defendant, who was in possession of "Watkins," denied that it was subject to the charge claimed. In proof of their claim, in the absence of direct evidence, the plaintiffs relied on a memorandum proved to have been signed in 1902 by Mary Ann Inett, her sister, and William Homes, who was the executor of the will of Mary Ann Inett's father. The memorandum stated the facts of transactions whereby William Homes appropriated the charge on "Watkins" to Mary Ann Inett as part of her share in her father's estate. It also contained a statement by Mary Ann Inett whereby she accepted the charge on "Watkins" in partial satisfaction of her share in her father's estate. On the question of the admissibility in evidence of the memorandum,

D

Held: the memorandum was signed in connection with, and was sufficiently contemporaneous with, the transaction sought to be established; the statement in the memorandum by Mary Ann Inett acknowledging the appropriation of the charge was a declaration by a deceased person against her proprietary interest; the memorandum and acknowledgment were closely interconnected and explanatory; and, therefore, they were admissible in evidence.

E

Notes. As to incidents forming part of the *res gestæ*, see 15 HALSBURY'S LAWS (3rd Edn.) 280-281, para. 509; and for cases on the subject, see 22 DIGEST (Repl.) 50-52, 316-331.

F

Cases referred to:

- (1) *Pinney v. Jones* (1894), 42 Am. St. Rep. 209.
- (2) *Taylor v. Witham*, *Witham v. Taylor* (1876), 3 Ch.D. 605; 45 L.J.Ch. 798; 24 W.R. 877; 22 Digest (Repl.) 98, 768.

Witness Action.

G

By his will, James Thomas Mutlow, who died in 1876, devised a farm known as "Watkins" to Ann Inett for life and after her decease to her daughter, Mary Ann Inett, for her life with remainder to her eldest son. In the event of the death of Mary Ann Inett without issue, the residue of the estate was devised to Ann Morgan. Mary Ann Inett died without issue in 1928, and the plaintiffs, who were her personal representatives, claimed, *inter alia*, that they were entitled to a charge for £300 with interest on "Watkins." They sought to prove their claim mainly

H

on the ground that Mary Ann Inett, together with her sister, Mrs. E. M. Homes, and William Homes (who was the executor and trustee of the will of Thomas Inett, Mary Ann Inett's father), had, in March, 1902, signed a memorandum whereby it was stated, *inter alia*, that "Watkins" was bought by James Thomas Mutlow in 1851, and that in 1855 he deposited the title deeds of "Watkins" and other properties with one Parker to secure £900, the balance of £1,500 advanced by Parker in

I

1855, and that the balance with interest thereon was owing at Mutlow's death in 1876; that William Homes had advanced £300 out of the estate of Thomas Inett to Mutlow's executors to pay off £300, namely, the sum which, being the rateable proportion of the £900, had been allocated to "Watkins," and that the title deeds of "Watkins" had been consequently deposited with William Homes. The memorandum also contained the statement by Mary Ann Inett, whereby she accepted the charge of £300 on "Watkins" as in partial satisfaction of her share in the estate of her father Thomas Inett. The defendant Newman at the time of the action was in possession of "Watkins," to which she claimed she was entitled

through Ann Morgan, and she denied that "Watkins" was subject to the £300 A charge claimed by the plaintiffs. The question to be settled was whether the evidence afforded by the memorandum was admissible.

Manning, K.C., and *A. C. Nesbitt* for the plaintiffs.

Sir Herbert Cunliffe, K.C., and *H. J. H. Mackay* for the defendant.

LORD TOMLIN.—A preliminary question arises for my determination in this B action; it is whether the memorandum which was signed in March, 1902, is admissible in evidence in support of the plaintiffs' case. The position from the point of view of the plaintiffs is as follows: under the will of James Thomas Mutlow, who died in 1876, the property called "Watkins" was devised to Ann Inett for life, and after her decease to Mary Ann Inett for her life with remainder to her eldest son. C In the event which happened—of the death of Mary Ann Inett without issue—one Ann Morgan became absolutely entitled to "Watkins" under the residuary devise contained in the will. The case put forward by the plaintiffs is that, at the date of Mutlow's death, the title deeds relating to various properties belonging to the testator, including "Watkins," were in the possession of one John Parker to secure £900, and that after the testator's death, on the advice of counsel, the debt of £900 D was allocated rateably between the various properties comprised in the security according to their respective values, the sum of £300 being the amount treated as charged against "Watkins." It was also said that, in order to provide the £300 required to redeem the charge on "Watkins," £300 was advanced by William Homes, the personal representative of Thomas Inett, the deceased husband of Ann Inett, out of assets forming part of Thomas Inett's estate and that, accordingly, the title deeds of "Watkins" were deposited with William Homes by way of E equitable security for that sum. Then it was further said that, in the year 1900, on the death of Ann Inett, who was tenant for life of the estate of Thomas Inett as well as tenant for life of "Watkins," the estate of Thomas Inett, of which the £300 charge formed part, became divisible between Ann Inett's two daughters, Mary Ann Inett and Mrs. Elizabeth Mutlow Homes, in equal shares; that, in the course of administration, William Homes appropriated to Mary Ann Inett the F £300 charge on "Watkins" in part satisfaction of her share in her father, Thomas Inett's estate, and that, in pursuance of that appropriation, the title deeds of "Watkins" were handed over to Mary Ann Inett as security for that sum, she being then also tenant for life of "Watkins."

That briefly is the plaintiffs' case; and, in the absence of any direct evidence in support of it, they tender in evidence the memorandum of 1902, which was signed, G as has been proved, by William Homes and by Mary Ann Inett and by her sister Mrs. E. M. Homes. The first question I have to decide is whether the memorandum is admissible in evidence at all in support of the plaintiffs' case. [His Lordship, after observing that the memorandum was headed in the matter of hereditaments known as "Watkins," read the several statements contained in it, and continued:] There is no question that the title deeds relating to "Watkins" are in H the actual possession of the plaintiffs as the personal representatives of Mary Ann Inett. The principal fact in issue which the plaintiffs are seeking to prove is that those deeds came into the hands of Mary Ann Inett, deceased, as part of a transaction whereby William Homes, as executor and trustee of Thomas Inett's will, in the course of administering that testator's estate transferred to her a particular I asset forming part of that estate, namely, the equitable charge for £300 on "Watkins." First, it is said that the facts stated in the memorandum constitute *res gestæ* as explaining the principal fact which I have to determine, namely, how the deeds came into the hands of Mary Ann Inett. The statements in the memorandum, if admissible, prove that, on the death of Ann Inett in 1900, the deeds were handed over to William Homes as security for £300 advanced by him as the personal representative out of the estate of Thomas Inett, deceased, for the purpose of enabling the personal representative of James Thomas Mutlow to redeem Parker's charge on "Watkins" and that the £300 charge was appropriated in course

A of administering the estate of Thomas Inett to Mary Ann Inett in part satisfaction of her share in that testator's estate.

What is meant by saying that a document or act is admissible because it is part of *res gestæ* has never, so far as I am aware, been explained in a satisfactory manner. I suspect it of being a phrase adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied. At any rate, in my judgment, this memorandum is admissible, and admissible not only in proof of the fact of delivery of the deeds to Mary Ann Inett but of the circumstances which led up to that delivery. The memorandum itself was executed contemporaneously to record the principal fact, and the statements or declarations contained in it were made as part of and throw light on and explain that principal fact, namely, the handing over of the deeds to Mary Ann Inett: see TAYLOR ON EVIDENCE, 11th Edn., vol. 1, para. 583, p. 401; and *Pinney v. Jones* (1).

It was objected on behalf of the defendant that the memorandum, having been signed in March, 1902, ought not to be treated as contemporaneous with the handing over of the deeds to Mary Ann Inett, because Ann Inett had been dead for eighteen months. There is nothing startling in this lapse of time, and I see no ground for regarding the memorandum otherwise than as a contemporary document.

D The plaintiffs also rested their case on another ground, namely, that the statement in which Mary Ann Inett acknowledged the appropriation to her of the £300 charge constituted a declaration by her against her pecuniary or proprietary interest. I think on this ground also the plaintiffs succeed. It was plainly more to Mary Ann Inett's interest to be paid a sum of £300 as part of her share in the estate than to take over a mere charge for that amount; and, further, seeing that she was tenant for life of "Watkins" under Mutlow's will, her acknowledgment of the existence of the charge on "Watkins" was in disparagement of her interest in "Watkins" under that will: see *Taylor v. Witham* (2). Nor, on this basis, do I think that the acknowledgment can be separated from the other statements in the memorandum. They are all closely interconnected and explanatory, and the whole are, in my view, admissible.

F [The further hearing of the action proceeded, and, after further argument, LORD TOMLIN held that the memorandum, coupled with the other documentary evidence above referred to, was sufficient to establish the plaintiffs' claim to the charge, and he made a declaration as asked and an order for foreclosure or sale in the form appropriate to the case of a charge by deposit of deeds.]

G Solicitors: Stow, Preston, & Lyttelton, for Waddington & Son, Burnley; Bentleys, for Henry G. W. Cooper, Burnley.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Re HALL. HALL v. HALL

[CHANCERY DIVISION (Maugham, J.), December 10, 1931]

[Reported [1932] 1 Ch. 262; 101 L.J.Ch. 129; 147 L.T. 33]

Will—Grandchildren—Bequest to “grandchildren of any degree”—Lawful descendants other than children.

By his will, the testator, who had five children, gave a fourth part of his estate to his son J., and by a second codicil he directed his trustees, on the death of the survivor of his son J. and J.'s wife, to divide the one-fourth part “into as many parts as there may be grandchildren of any degree of mine then living, and to give each one a part, part and part alike.” J. predeceased his wife, there being no issue of the marriage. At the date of the death of J.'s wife there were living many grandchildren, great-grandchildren and great-great-grandchildren of the testator. On a summons asking, *inter alia*, whether the words “grandchildren of any degree of mine then living” included lawful grandchildren and remoter descendants of the testator living at the death of J.'s wife,

Held: the words “grandchildren of any degree” meant all the testator's lawful descendants (other than children) living at the date of the death of J.'s wife.

Hussey v. Dillon (1) (1763), 2 Amb. 603, and *Earl of Orford v. Churchill* (2) (1814), 3 Ves. & B. 59, applied.

Notes. As to description by relationship, see 34 HALSBURY'S LAWS (2nd Edn.) 296–298, para. 348; and for cases on the subject, see 44 DIGEST 818, 6697–6699.

Cases referred to:

- (1) *Hussey v. Lady Dillon*, Amb. 603; sub nom. *Hussey v. Berkeley* (1763), 2 Eden, 194; 28 E.R. 872, L.C.; 44 Digest 822, 6725.
- (2) *Earl of Orford v. Churchill* (1814), 3 Ves. & B. 59; 35 E.R. 401; 44 Digest 822, 6726.

Originating Summons.

By his will, the testator gave a fourth part of his residuary estate to his son John Hall, and, by a second codicil, directed his trustees after his son's death to pay to Ellen, his son's present wife, should she survive him, one-half of the amount paid to his son during his life, and at his death, in the event of her not surviving him, or if she did so, at her death, to divide the one-fourth part, together with accumulations of interest, if any,

“into as many parts as there may be grandchildren of any degree of mine then living, and give to each one a part, part and part alike, and take receipt, which receipts shall be their discharge.”

The testator had five children, one of whom predeceased him leaving no issue. The other four had lawful issue other than John, who had none. John died in 1925, and his widow Ellen in 1931. There was said to be an illegitimate daughter of John, but it was not known whether she survived Ellen. At her death there were many grandchildren, great-grandchildren, and great-great-grandchildren of the testator then living. This summons was taken out by the sole trustee of the testator's will, asking (*inter alia*) whether the words “grandchildren of any degree of mine then living” included lawful grandchildren and remoter descendants of the testator living at the date of the death of Ellen Hall.

Gamon for the summons.

Blease for a grandchild.

Stafford Crossman for a great-grandchild.

MAUGHAM, J.—In this case I have to decide what is the right meaning to be put on the words “grandchildren of any degree.” I exclude at once the possibility

- A of their referring to illegitimate grandchildren. It is, in my opinion, a sound rule that, in an English will, the word "lawful" must be presumed to exist before such words as "children," "grandchildren," and "issue," and that illegitimate persons cannot be included in a gift otherwise than nomination or by description sufficient to identify them. The alternatives before me are that the phrase "grandchildren of any degree" refers to grandchildren of any stirps, that is, to children of one of the five children of the testator, or that it refers to descendants of the testator, to be ascertained at the date mentioned in the codicil, in any of the steps of descent from the testator, using the word "degree" in the not at all uncommon meaning of a step in the direct line of descent. The word "grandchild" has a somewhat curious history, and the same observation applies to the words "grandson" and "granddaughter." A perusal of the OXFORD DICTIONARY shows that the word
- C "grand" is properly used, after the French example, to denote the second degree removed in ascent of relationship as grandfather, grandmother, and so on; and is, by a false analogy—not following the French, who use the words *petit-fils* and *petite-fille*—used to denote the second degree removed in descent of relationship, as grandson, granddaughter, and so on. A number of examples are given in the dictionary, and I think that it may be said that the examples all tend to show that
- D the words "grandson," "granddaughter," "grandchild" and "grandchildren" are generally used to indicate descendants of the second degree, that is, children of children. It should, however, be observed that examples of that kind do not necessarily prove that the word "grandchildren" is incorrect as applied to great-grandchildren, because comparatively few persons live to associate with, or to see, their great-grandchildren. If, for instance, it is said that a man was out walking
- E with his grandchildren and he has no great-grandchildren or none who could walk, the word is plainly used in its narrower sense.

There have been two references to the matter in decisions which have been reported, and a judge may, perhaps, express his regret that those who collaborated in the production of the OXFORD DICTIONARY did not extend their researches to the law reports in which they would have found much material of value. The first of the two cases is *Hussey v. Dillon* (1), in which the then Lord Chancellor, LORD HENLEY, said in his judgment (Amb. at p. 604):

"Grandchildren is a word of large extent, and, in common parlance, takes in everybody descended from the testator, and will have that effect, unless the intention appears to the contrary."

- G I do not rely on that statement as a binding decision that the word "grandchildren" takes in everybody descended from the testator unless anything appears to the contrary, but at least it tends to show that, at the date of the report, the year 1763, the then Lord Chancellor was of opinion that "grandchildren" was a word of large extent and, in common parlance, took in everybody descended from the testator.

- The second decision dealing with the point is in *Earl of Orford v. Churchill* (2).
- H That was a case arising out of the construction of a will and a settlement, and it was unsuccessfully argued, *inter alia*, that the word "grandchildren" would comprehend great-grandchildren. In my opinion, however, the judgment is no authority for the view that, in a will, the word "grandchildren" with a suitable context may not properly be construed to include great-grandchildren and other descendants; and, although it is now well settled that, *primâ facie*, the word
- I "grandchildren" means descendants of the second degree, it is not impossible to find cases in which it is used in a wider sense. The derivation of the word, as I have pointed out, does not in any way indicate that it may not be so used.

In the present case, I have to give a meaning to the words "grandchildren of any degree." There is reason for using the word "degree" as indicating steps in a line of descent, and I am of opinion that the testator used the words "grandchildren of any degree" to indicate descendants of any degree—other than children—living at the date which he had mentioned. I think that some support for that construction is to be derived from the fact that he adds the words "and give to each one

a part, part and part alike," which tends to show that each one of those "grand-children of any degree" was to have a part. He did not add those words in his disposition of the one-fourth of the residuary trust fund "in trust as to the capital and income for all my grandchildren who may be living at the time in equal shares." In the case of a gift to grandchildren simpliciter there is no competition between parent and child. In the case of a gift to descendants, children may compete with parents, and it may very well be that the thought of the possibility of competition of that kind led to the testator's using the curious phrase "and give to each one a part, part and part alike."

I should add that there is evidence which is, in my opinion, admissible that the testator, before executing the second codicil containing the words in question, made the acquaintance of a great-grandchild—namely, Margaret Joyce Bromfield, the child of his granddaughter Margaret Eliza Bromfield. He had, in fact, at the date of the second codicil two great-grandchildren.

I shall declare that the words "grandchildren of any degree" in the testator's second codicil mean all his lawful descendants—other than children—of any degree, living at the date of the death of Ellen Hall, the wife of the testator's son John Hall.

Solicitors: *Field, Lindsay, & Davie*, Liverpool; *Weightman, Pedder & Co.*, Liverpool.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

ARNEIL AND ANOTHER v. PATERSON

[HOUSE OF LORDS (Lord Hailsham, Lord Dunedin, Lord Warrington, Lord Atkin and Lord Thankerton), May 14, 1931]

[Reported [1931] A.C. 560; 100 L.J.P.C. 161; 145 L.T. 393;
47 T.L.R. 441; 75 Sol. Jo. 424]

Animal—Dog—Worrying sheep—Two dogs acting together—Different owners—Several liability of owners—Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1).

Section 1 (1) of the Dogs Act, 1906, altered the common law rule on the question of liability, but, once liability is established the ordinary measure of damage must be applied.

The pursuers were the owners of certain sheep. The defender was the owner of a dog which, in company with another dog belonging to a defender who did not enter an appearance in the action, attacked the sheep and worried them, as the result of which ten died and seven others were injured. In the action, the pursuers claiming against both defenders damages for the loss of the sheep,

Held: there being an admission that the two dogs were acting together, in law each dog caused the whole of the injuries to the sheep and each of the two owners was responsible for the whole of the damage.

Notes. The Dogs Act, 1906, s. 1 (1), was amended by the Dogs (Amendment) Act, 1928, injury done to poultry being included in the section. By s. 7 of the Act of 1906 the expression "cattle" in s. 1 (1) includes sheep.

Referred to: *Bank View Mill, Ltd. v. Nelson Corpn. and Fryer & Co. (Nelson), Ltd.*, [1942] 2 All E.R. 477.

As to the law relating to dogs, see 1 HALSBURY'S LAWS (3rd Edn.) 688 et seq.; and for cases see 2 DIGEST 217-221, 223 et seq. For the Dogs Acts of 1906 and 1928, see 1 HALSBURY'S STATUTES (2nd Edn.) 870 and 874 respectively.

A Case referred to:

(1) *Piper v. Winniffrith and Leppard* (1917), 34 T.L.R. 108; 2 Digest (Repl.) 377, 536.

Appeal from an interlocutor of the First Division of the Court of Session.

B The appellants were farmers who owned a flock of black-faced ewes. The respondent William Paterson was the owner of a dog. The plaintiffs' claim was that on the morning of Jan. 21, 1930, two dogs, a cross-Airedale belonging to the respondent Paterson and a collie belonging to the second defender, trespassed on the appellants' farm where the ewes were grazing. The dogs, acting together, attacked the appellants' sheep, hunted and chased them, and severely bit, mauled, and worried seventeen of them. Six of the ewes were killed outright, four died afterwards from the injuries inflicted, and the other seven were severely injured. The appellants brought the present action in which they claimed from the respondent and the second defender damages in respect of the injuries to the sheep. The action was defended only by the respondent, Paterson, who admitted that his dog, with the second defender's dog, trespassed on the appellants' farm, that seventeen sheep were mauled and worried by the two dogs acting together, and that ten of the sheep had died.

D The question which arose at the trial was whether the defenders were jointly and severally liable for the damage, or whether the damage should be divided between them. The Sheriff-Substitute of Stirling, Dumbarton and Clackmannan granted decree against the defenders jointly and severally for £60, the agreed amount of the damages. The First Division (the Lord President, LORD BLACKBURN and LORD MORISON) recalled the decision of the Sheriff-Substitute, and held that the respondent Paterson was liable for one-half only of the damage on the ground that two dogs were jointly concerned in the damage, and that in the absence of evidence of what portion of the damage was caused by either dog the damage should be equally apportioned. The appellants appealed.

E *Condie Sandeman, K.C.*, and *James A. R. MacKinnon* (both of the Scottish Bar) for the appellants.

F *James Stevenson* (of the Scottish Bar) for the respondent.

LORD HAILSHAM.—This is an appeal from a decision of the Court of Session reversing the decision of the Sheriff-Substitute. The point at issue is a very short one, and the facts are not in dispute. It appears that the appellants are farmers who own a flock of black-faced sheep on a farm in Scotland. The respondent is the owner of a dog, and in the early morning of Jan. 21, 1930, the respondent's dog, in company with another dog belonging to the other defender, who has not entered any appearance, attacked the flock of sheep belonging to the appellants.

The statement in the condescendence is in these terms:

H "On the morning of Tuesday, Jan. 21, 1930, about six o'clock, two dogs, a cross-Airedale belonging to the first-named defender and a collie belonging to the second-named defender, trespassed on the pursuers' farm where the said ewes were grazing. The said dogs acting together attacked the pursuers' sheep, hunted and chased them, and severely bit, mauled, and worried seventeen of them."

To that condescendence the answer is made:

I "For the purpose of this action this defender [the respondent] admits that his dog, along with the other defender's dog, trespassed on the pursuers' farm, and that seventeen sheep were mauled and worried by the said two dogs acting together, and that ten of the sheep have died."

The damages for the total damage done to the sheep were agreed for the purposes of this action at a sum of £60, and at the hearing before the Sheriff-Substitute judgment was given against the present respondent for that amount. On appeal to the Court of Session, the Court of Session held that the respondent was liable only for half of the amount, on the ground that there were two dogs who were

jointly concerned in attacking and damaging the sheep, and that in the absence A
of any evidence as to how much of the damage was done by either of the dogs the
damage must be apportioned equally between the two defenders. It is from that
decision that this appeal is brought. It is admitted that there was nothing to show
that the respondent knew that his dog had any vicious propensities, and, therefore,
at common law he could not have been made liable. In the argument at the Bar B
the only ground of liability was rested upon the provision of the Dogs Act, 1906,
and that Act provides by s. 1 (1):

"The owner of a dog shall be liable in damages for injury done to any cattle by
that dog; and it shall not be necessary for the person seeking such damages to
show a previous mischievous propensity in the dog, or the owner's knowledge
of such previous propensity, or to show that the injury was attributable to C
neglect on the part of the owner."

The question, therefore, turns entirely upon the effect to be given to the provisions
of that subsection.

In this, as in any other case, there are two elements which have to be deter-
mined: First, the element of liability, and, secondly, when liability is established,
the element of damage. So far as liability is concerned, it is conceded that the D
section to which I have just drawn attention imposes on the respondent a liability
for the injury done to the sheep by his dog; but it is said that, since his dog was
concerned with another, in the absence of evidence as to how much injury each
dog actually did, each must be held responsible only for half the total damage. In
my view, that is a mistaken construction to be placed upon the statute. I think
the statute only alters the common law rule on the question of liability. Once E
liability is established, the ordinary measure of damage has to be applied. It has
to be ascertained how much injury "that dog" has done to the cattle—in this case
to the pursuers' sheep. I think that each of the dogs did in law occasion the
whole of the damage which was suffered by the sheep as the result of the action
of the two dogs acting together. If that be so, then each of the owners of the
two dogs is responsible for the whole of the damage which has been done, and F
judgment can be obtained against either of them.

Reference was made to *Piper v. Winnifrith and Leppard* (1), a decision of the
Divisional Court in England. The headnote in that case states that the mere fact
that two dogs acted together without any connected action by their owners did not
make their owners joint tortfeasors, and, therefore, the judge was entitled to divide
the damages as he had done, that is to say, half and half between the two owners. G
The case does not seem to be very clearly reported, but, so far as I understand the
facts, I do not think the headnote is justified by the facts as found, nor is it
justified by anything I find in the judgment. The case is one in which, apparently,
two dogs were owned by two different people living in the same house, and during
one night the two dogs did a certain amount of damage to the plaintiff's sheep. I
do not find any evidence or admission that the dogs were acting together; there H
may have been two separate incursions by the two dogs. I notice ATKIN, J., in
the concluding words of his judgment says:

"Each owner might be liable for the whole damage if it could be shown that
the dogs had so worked together that each had caused the whole of the damage;
but that was a question of fact, and there was no evidence of it." I

It seems to me that that sentence expressly saves the point which we have here
to determine. In this case we have an admission that the two dogs were acting
together, and, when that admission is made, then I think that in law each of the
two owners is responsible for the whole of the damage, because each dog did in
the eye of the law occasion the whole of the injury of which the pursuers complain.
It follows that, in my opinion, the decision of the court below was wrong and that
the judgment of the Sheriff-Substitute should be restored, and I move your Lord-
ships accordingly.

- A LORD DUNEDIN.**—I concur. From the very first moment in this case it seemed to me that the fallacy of the Court of Sessions' judgment was that they did not consider whether really each dog was, I will not say responsible, because that is an adjective which is more applicable to a human being than to a dog, but at least was the cause of what had happened. I think the fallacy of their view cannot be better exposed than by supposing only one sheep had been worried.
- B** Would we then have to hold that each dog had half-killed the sheep, and that, therefore, each owner should pay for half the value of the sheep?

LORD WARRINGTON.—I agree.

- LORD ATKIN.**—I am bound to say, with all respect to the opinions expressed in the court below, this seems to me to be a very clear case, for the reasons given
- C** by the noble viscount on the Woolsack and by the noble viscount who has just spoken. I find myself quite unable to add any further reasons to those that have been given, and I am glad to think that in this matter the law of Scotland and the law of England seem to be identical. I have not the least doubt that, according to the law of England, on the facts admitted in this case, the defender would be liable for the whole amount of the damages, and I respectfully concur in the
- D** criticism that has been made of the headnote in *Piper v. Winnifrith and Leppard* (1), as reported. It appears to me that the actual decision in that case was in no way inconsistent with the views that are held by the members of this House, with which I agree.

LORD THANKERTON.—I am clearly of the same opinion.

Appeal allowed.

- E** Solicitors: *Barlow, Lyde, & Gilbert*, for *Ketchen & Stevens*, W.S., Edinburgh; *Lee, Bolton, & Lee*, for *R. M. & W. M. Lennox*, Kilsyth; *Laing & Motherwell*, W.S., Edinburgh.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

F

G MILLER v. CANNON HILL ESTATES, LTD.

[KING'S BENCH DIVISION (Swift and Macnaghten, JJ.), January 19, 20, 1931]

[Reported [1931] 2 K.B. 113; 100 L.J.K.B. 740; 144 L.T. 567;
75 Sol. Jo. 155]

- H** *Sale of Land—Agreement to build or complete house—Implied warranty—Fitness for habitation.*

Where a builder contracts with a purchaser to build or complete a dwelling-house, apart from any express promise there is an implication of law, an implied warranty, that the house shall be reasonably fit for habitation. If, therefore, there is evidence on which a jury can find that such a dwelling-house is not fit for habitation owing to defective materials and workmanship, an

I action for damages for breach of contract is maintainable and the maxim *caveat emptor* does not apply.

Per SWIFT, J.: If one buys an unfurnished [completed] house, there is no implication of law and no implied contract, that the house is fit for human habitation.

Notes. Considered: *Hoskins v. Woodham*, [1938] 1 All E.R. 692; *Jennings v. Tavener*, [1955] 2 All E.R. 769. Referred to: *Perry v. Sharon*, [1937] 4 All E.R. 390.

As to the disclosure of material facts on the sale of land, see 29 HALSBURY'S A LAWS (2nd Edn.) 248 et seq., and for cases see 40 DIGEST 42 et seq.

Cases referred to:

- (1) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 49 W.R. 467; 17 T.L.R. 384, C.A.; 30 Digest (Repl.) 524, 1618.
- (2) *Best v. Edwards* (1895), 60 J.P. 9; 31 Digest (Repl.) 193, 3239.
- (3) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; B 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (4) *Lawrence v. Cassel*, [1930] 2 K.B. 83; 99 L.J.K.B. 525; 143 L.T. 291; 74 Sol. Jo. 421, C.A.; Digest Supp.

Appeal from the Mayor's and City of London Court.

The plaintiff was in need of a house for himself and his wife, and in January, 1928, he went to see a building site then being developed by the defendants at Cannon Hill, Raynes Park, Surrey. He saw the defendant's manager and secretary at Raynes Park, and inspected a show house on the estate. The plaintiff and his wife were given the assurance that the materials and workmanship used and employed in the construction of the houses were of the best. As a result, on Feb. 2, the plaintiff took an option to purchase a site known as Plot 8, Cannon Close. He paid a deposit on Feb. 14, and on March 6 entered into a formal contract for the purchase of the freehold site and a house thereon for £915. Building on the plot had commenced and a house was in course of construction. The agreement provided that the purchase was to be completed by June 29, 1928, and the property registered with an absolute title under the Land Registration Act, 1925. Clause 7 provided that

"the interior of the house shall be finished off similar to the show house, No. 66, Fairway, Raynes Park, and the company will finish and complete same to the purchaser's reasonable satisfaction,"

and cl. 9 provided:

"The company will obtain and hand over on completion the certificate of the local authority that the house is fit for habitation."

On May 8, 1928, the local surveyor certified the house as fit for habitation; the house was finished by the end of July; and the purchase was completed on Aug. 2. The plaintiff and his wife moved into the house in September, 1928, and lived there till February, 1930. The winter of 1929-30 was abnormally wet and serious damp penetrated the house. The plaintiff left the house on medical advice as being unfit for habitation, and in February, 1930, he was served with a notice by the sanitary inspector to abate the nuisance caused by the damp. On Jan. 14, 1930, the plaintiff brought the present action for damages for breach of contract, relying (a) on the representations made by the defendants' manager in January and February, 1928, and (b) on an implied warranty that the house was "fit for habitation." The defendants pleaded that the matter was concluded by the written contract of March 6, 1928, and the instrument of transfer; that the local surveyor had certified the premises as fit for habitation; that the defects (if any) were due to the abnormal wet weather; and that the doctrine caveat emptor applied.

The action was tried before His Honour JUDGE SHEWELL COOPER and a jury, who found that there was an oral agreement that the house should be built of proper materials and in a workmanlike manner. They found that the house was not fit for habitation on Aug. 2, 1928, or on Jan. 14, 1930, and that the defects were due to faulty construction aggravated by abnormal weather, and that, even apart from the weather, the house would not have been reasonably fit for habitation. They awarded the plaintiff £91 damages. On these findings the judge held that there was an express warranty by the defendants, and gave judgment for the plaintiff. The defendants appealed.

W. H. Moresby for the defendants.

Sir Thomas Hughes, K.C., and *Gilbert Paull* for the plaintiff.

A **SWIFT, J.**, stated the facts and continued: It is clear that the jury found that there was a warranty that the material and workmanship to be used and employed on the house should be of the best; they also found that the house was not reasonably fit for habitation; that it was not reasonably fit for habitation in normal weather, and that the plaintiff had sustained damages to the extent of £91 in consequence of that breach of warranty. No question arises on the jury's finding of fact that the house was not reasonably fit for habitation, or the damage which **B** the plaintiff had thereby sustained; but it is argued on behalf of the defendants, first, that there is no express warranty upon which damages could be awarded if the house was not fit for habitation, and that there is no implied warranty in the circumstances of this case that the house should be fit for habitation.

C With regard to the first of these points, counsel for the defendants contends that there was no warranty upon two grounds. He says, first, that the words which are alleged to amount to a warranty and which the jury have said amount to a warranty are incapable of being a warranty; and, secondly, that if they are incapable of being held to be a warranty, the jury ought not to have found that they were a warranty. He further said that even if they were capable in law of being a warranty, they did not, in fact, amount to a warranty. With regard to **D** the implied warranty he says that in the circumstances of this case there is no implied warranty, and, therefore, there being no express warranty and no implied warranty, even if this house were not fit for habitation as the jury has found, the plaintiff is not entitled to any damages. In considering those arguments we must ascertain what was the language which the jury found to have been used and to amount to a contract before we can determine whether in that language there could, as a **E** matter of law, be found material upon which the jury might say there was a contract; and, if there were material upon which a jury might say there was a contract, whether they ought to have done so. That is to say, it is necessary to decide not only whether there were words which were capable of forming a contract, but whether in fact they were intended by the parties to form a contract and did form a contract.

F First, is this promise that the house should be of the best material, given at an interview which had taken place some time before the final contract, capable of being held by a jury to amount to a contract? I cannot hesitate in thinking that it is. Whether it does in truth amount to a contract or not is a different matter, but that as a matter of law it is capable of forming the basis of a contract I can have no doubt. Here are two people bargaining with the representatives of the **G** defendants for the erection of a house; there are many qualities of material of which a house may be built; they do not know them all, but they know, at any rate, that there is good material and bad material. They asked as a preliminary to ordering the house and as the foundation for contracting that a house shall be built for them, that it should be built of good material, and they were assured most solemnly **H** that the house would be of good material. They were not only assured of it, but the assurance was fortified by a statement of the fact that the local surveyor supervised the work as it was being done and that it was impossible for him to be deceived about it. *De Lassalle v. Guildford* (1) is of full authority upon the question of warranty, although a particular passage as to the weight to be attached to certain evidence by a jury may have been inappropriately or too broadly **I** expressed. The Master of the Rolls there said in his judgment:

“Now in the present case, did the defendant assume to assert a fact, or merely to state an opinion or judgment upon a matter of which he had no special knowledge, and upon which the plaintiff's wife, on behalf of her husband, might be expected also to have an opinion? What is it the defendant asserts? I paraphrase the evidence. You need have no certificate of a sanitary inspector, it is quite unnecessary; the drains are in perfect condition. I give you my word upon the subject. Will that satisfy you? If so, hand me over the counterpart! What more deliberate and emphatic assertion of a fact could

well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? That the question asked and the answer given were seriously intended, to use the words of WILLS, J., in *Best v. Edwards* (2), to be the basis of the contractual relations between the parties I cannot doubt. It must be borne in mind that when he says, 'I cannot doubt that they were intended to amount to a contract,' he was in a position in which he had to deal with, and to find the answer to, the questions of fact as well as to lay down the law. He says here is the evidence that the plaintiff would not take the lease unless the drains were guaranteed, and surely the statements made by the defendant were not made on the assumption that they were then of no avail to the plaintiff except they were made fraudulently. In my judgment everything necessary to establish a warranty has in this case been proved."

I am far from saying that that language, in the words of the plaintiffs and his witnesses in this case, would necessarily satisfy me as a matter of fact that a warranty had been established. That, however, is not the point which this court has to consider, but rather whether that language could be held by twelve reasonable people to amount to a warranty. In my view, it clearly could be so held by the jury, having regard to all the circumstances—the position of the plaintiff and his wife and the defendants, the houses they had seen, the object of their visit. In my opinion, there was in truth a warranty given by the representatives of the defendants that the best material was used upon these premises and the best workmanship would be applied to them.

That disposes of the first point raised by counsel for the defendants, but it by no means disposes of the case. Indeed, it seems to me that it is a matter of very little moment in this case whether there was or whether there was not an express warranty regarding the condition of the material or the nature of the workmanship which should be used in this house, because I think it is plain from the whole of the facts that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in. I think it is quite clear law that if one buys an unfurnished house, there is no implication of law, and there is no implied contract, that the house is necessarily fit for human habitation. That must be good sense, because a man who buys an empty house may not necessarily need it as a dwelling-house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it. He may buy a house which wants a new roof put on, or which has other obvious defects of which he knows, and may have defects of which he does not know, and if he wants to buy a house which is fit for habitation, then he must expressly stipulate that the house shall be fit for habitation. He can always do that, he can always get an express warranty that an unfurnished house is fit for habitation—that is, if he is prepared to pay the price which attaches to an unfurnished house which has such a warranty rather than pay the price for an unfurnished house without such a warranty. The position is quite different when you contract with a builder, or with the owners of a building estate in course of development, that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up which is fit for him to come into as a dwelling-house. What is the position then as regards such people in accordance with the law? It is plain that when you get that state of facts there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is, for human dwelling. Our attention has been called to the well-known passage from the judgment of BOWEN, L.J., in *The Moorcock* (3). Can the parties here be thought, when the plaintiffs were bargaining for a dwelling-house

A which was to be erected in accordance with the character of the other dwelling-houses in the neighbourhood, to have been bargaining for something which was no protection in wet weather? The jury have found here that this house was in such a leaking or porous condition that it was quite unfit for human habitation. If the plaintiff has no implied warranty that it shall be fit for human habitation, then the consideration for which they bought this house wholly fails.

B The matter is not without recent and, I think, direct and binding, authority upon us in the Court of Appeal, in *Lawrence v. Cassel* (4). What was the agreement between the parties there? So far as it is material to this case it is to be found in cl. 4:

C "The vendor will complete the said dwelling-house in accordance with the plans of other 'B' type houses on the estate, and the house will contain sanitary fittings similar in all material particulars to the houses of this type already erected on the estate (as seen in Bentley Road)."

D There was nothing there about the defendant doing the work in a proper, efficient, and workmanlike manner, or that the materials used should be fit and proper for the purpose. That was implied. All that the written agreement specified was that the house should be built, and upon that the Court of Appeal held that it was rightly implied. Indeed, I do not think that it was ever disputed in the Court of Appeal that the very foundation of the action was that it was implied that the materials used should be suitable and fit and proper for the purpose, and that the work should be carried out in a proper, efficient, and workmanlike manner. In the present case the contract that the house shall be completed was not put into writing. The written agreement refers to a house erected, and there is no writing putting upon the defendants the obligation of completing the house unless it is E cl. 7 of the agreement. But it is admitted that the defendants were under a duty, and it must be an implied duty because such a duty is nowhere expressed, and therefore if they were under an implied duty to complete the house, they are under the same position as they would be under a written agreement to complete the F house. They are in the same position as the defendants were in *Lawrence v. Cassel* (4). Upon that agreement the law implies the further agreement that it shall be completed in an efficient and workmanlike manner and of proper materials. Here it is quite clear that there was, quite apart from the express agreement which the jury have found, and were entitled to find, an implied agreement that this house should be completed in an efficient and workmanlike manner and that proper G materials should be used, and the jury were entitled, and almost compelled, to find that both at the date of the conveyance and at the date when the plaintiff started his action, it was not built of good materials or in a workmanlike manner.

H In these circumstances I think that, if one looks merely at the question of the express contract, there was matter which it was proper to leave for the consideration of the jury, and on that matter the jury might come to the conclusion that there was an express contract. If, on the other hand, there was no matter which could properly be left to the jury, I think that on the undisputed facts as disclosed in this case there was an implied contract, that there was ample evidence of breach either of the oral or the implied contract, that the jury were justified in their conclusions, and that the learned judge acted rightly in entering judgment for the plaintiff and his judgment ought not to be disturbed.

I **MACNAGHTEN, J.**—It is not disputed that the intention of the parties was that the defendants should complete the house which was being erected or in the course of erection on March 6, 1928. It may be that the clause of the written agreement which provides that the interior of the house shall be finished off, ought on its true construction to be read as including also the exterior parts of the house which were still unfinished. If so, then the house was to be finished both externally and internally to the purchaser's reasonable satisfaction. It can hardly be suggested that the purchaser ought to be reasonably satisfied with a house which was throughout unfit for human habitation, but if it is held on the true construction of

the clause that it only applies to the interior of the house, then there is nothing A
in the written agreement expressing the admitted obligation of the defendants to
complete the roof and other external parts of the house. That being so, how
should this admitted obligation be expressed if it is to be reduced into words? It
can hardly be doubted that the obligation of the builder must have been an obliga-
tion to build properly, to build with proper materials and in a proper manner, and
to provide a house fit for the purpose for which the house was required, namely, B
for the habitation of the plaintiff and his wife. That is to say, it was an implied
term between the parties that the defendants should complete the house in a good
and workmanlike manner with materials of good quality and description, so as to
be fit for habitation. In that view of the matter, the question whether in fact
there was an oral collateral warranty that the house should be built of good material
and that it should be fit for habitation becomes, in my view, quite immaterial. C
The answer counsel for the defendants makes to this allegation of an implied agree-
ment is that in the contract the only obligation was to make a house in appearance
similar to the show house, and with a certificate by the district surveyor that it
was fit for habitation—not that it was in fact fit for habitation, but that the surveyor
certified that it was fit for habitation. First, it ought to be observed that no plea D
to that effect is set up in the defence. If that was the true obligation of the defen-
dants, and they were merely undertaking to get the certificate of the surveyor (a
Mr. G. Duram), the surveyor did in fact give a certificate, although from the form
of his certificate and the reference that he makes to bye-law 3 of the district
council's bye-laws, which deals primarily with the drains, it may well be that the
certificate is really only intended as a certificate that the house has been properly
connected with the public sewer. I think I am right in saying that the surveyor E
did not appear as a witness to support the certificate that he gave, and, therefore,
there was no opportunity for knowing whether he intended to say that this house,
which at the time of the trial had been condemned as unfit for occupation by some
other official of the district council, was, at the time he gave it, free from the
defects which it was established before the jury to have had throughout. In my
view, so soon as it is established that the house was not reasonably fit for human F
habitation at any time, and that this was due to the faulty construction of the
house by the defendants, the plaintiff is entitled to recover damages against the
defendants because they failed to carry out their obligation to complete the house
in a proper manner so that it might be fit for the purpose for which both parties
knew the house was required, namely, the habitation of the plaintiff and his wife.
I therefore think that judgment was rightly entered for the plaintiff with the G
amount of damages.

Appeal dismissed.

Solicitors: Upton, Britton, & Lamb; Sheffield, Powell, & Scott-Tucker.

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

A

BOTTOMLEY AND ANOTHER v. BANNISTER AND ANOTHER

[COURT OF APPEAL (Scrutton, Greer and Romer, L.J.J.), July 24, October 26, 1931]

[Reported [1932] 1 K.B. 458; 101 L.J.K.B. 46; 146 L.T. 68;

48 T.L.R. 39]

B

Landlord and Tenant—Liability of landlord—House unfit for occupation—Installation of gas boiler without flue.

The vendor or lessor of a house does not owe any duty, independently of contract, to the persons who come to live in the house either by purchase from him or as his tenants to exercise reasonable care to see that the house is fit for occupation.

C

B. and his wife were found dead from carbon monoxide poisoning in the bathroom of a dwelling-house of which B. was tenant-at-will from the defendants, pending the completion of the purchase of the house from them. Hot water for the bath was obtained from a boiler in the kitchen of the house, which was heated by a gas burner, for which there was no chimney flue. There was a linen chute from the kitchen to the bathroom by which gas could pass.

D

Held: (i) the boiler, burner, and chute were part of the realty, and so the cases as to the liability of those who supplied chattels dangerous in themselves to the person supplied or others had no bearing in this case;

(ii) the landlord of an unfurnished house was not liable to the tenant for defects in the house rendering it dangerous, even if he constructed the defects himself or was aware of their existence;

E

and, therefore, the defendants were entitled to judgment.

Per GREER, L.J.: No case has been cited in which a tenant or purchaser of a house has ever recovered against a lessor or vendor either by implied contract or in tort by establishing the liability of the vendor or landlord for injuries sustained through the house or its fixtures being unsafe at the date of the sale or lease.

F

Notes. With regard to the liability of a vendor on the sale of a house, see *Miller v. Cannon Hill Estates, Ltd.*, ante, p. 93.

Considered: *Donoghue v. Stevenson*, [1932] All E.R.Rep. 1; *Otto v. Bolton and Norris*, [1936] 1 All E.R. 960; *Perry v. Sharon Development Co.*, [1937] 4 All E.R. 390; *Davis v. Foots*, [1939] 4 All E.R. 4; *Travers v. Gloucester Corpn.*, [1946] 2 All E.R. 506. Referred to: *Ball v. L.C.C.*, [1949] 1 All E.R. 1056; *Edler v. Anerbach*, [1949] 2 All E.R. 692.

G

As to a landlord's liability for non-repair of the house, see 23 HALSBURY'S LAWS (3rd Edn.) 562 et seq., and for cases see 31 DIGEST (Repl.) 193 et seq.

Cases referred to:

H

(1) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, 10.

(2) *Sewell v. Angerstein* (1868), 18 L.T. 300, N.P.; 31 Digest (Repl.) 204, 3356.

(3) *Smith v. MacLure* (1884), 32 W.R. 459; 35 Digest 303, 525.

(4) *Hart v. Windsor* (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 8 Jur. 150; 152 E.R. 114; 31 Digest (Repl.) 133, 2716.

I

(5) *Robbins v. Jones* (1863), 15 C.B.N.S. 221; 3 New Rep. 85; 33 L.J.C.P. 1; 9 L.T. 523; 12 W.R. 248; 148 E.R. 768; sub nom. *Robins v. Jones*, 10 Jur.N.S. 239; 31 Digest (Repl.) 385, 5114.

(6) *Lane v. Cox*, [1897] 1 Q.B. 415; 66 L.J.Q.B. 193; 76 L.T. 135; 45 W.R. 261; 13 T.L.R. 142; 41 Sol. Jo. 142, C.A.; 31 Digest (Repl.) 195, 3261.

(7) *Sutton v. Temple* (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 31 Digest (Repl.) 194, 3252.

(8) *Lawrence v. Cassel*, [1930] 2 K.B. 83; 99 L.J.K.B. 525; 143 L.T. 291; 74 Sol. Jo. 421, C.A.; Digest Supp.

- (9) *Blacker v. Lake and Elliot, Ltd.* (1912), 106 L.T. 533, D.C.; 36 Digest **A**
(Repl.) 80, 428.
- (10) *Hodge & Sons v. Anglo-American Oil Co.* (1922), 12 Ll.L.Rep. 183; Digest
Supp.
- (11) *Earl v. Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R.
145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, 532.
- (12) *Parry v. Smith* (1879), 4 C.P.D. 325; 48 L.J.Q.B. 731; 41 L.T. 93; 43 J.P. **B**
801; 27 W.R. 801; 36 Digest (Repl.) 81, 433.
- (13) *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, [1909] A.C. 640;
79 L.J.P.C. 13; 101 L.T. 359; 25 T.L.R. 831, P.C.; 36 Digest (Repl.) 36,
176.
- (14) *Dixon v. Bell* (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest **C**
(Repl.) 80, 431.
- (15) *Scholfield v. Earl of Londesborough*, [1896] A.C. 514; 65 L.J.Q.B. 593; 75
L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700, H.L.; 26 Digest
219, 1741.
- (16) *Bank of Ireland v. Evans' Charities' Trustees* (1855), 5 H.L.Cas. 389; 25
L.T.O.S. 272; 3 W.R. 573; 3 C.L.R. 1066; 10 E.R. 950, H.L.; 13 Digest **D**
286, 179.
- (17) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R.
648; 50 Sol. Jo. 575, H.L.; 12 Digest (Repl.) 52, 283.

Appeal by the defendants from a judgment of HAWKE, J., entered, after a trial with a common jury, in favour of the plaintiffs for £1,700.

The action was brought under Lord Campbell's Act by the administrators of the estates of James and Enid Bottomley, deceased, for the benefit of their infant child, against the defendants, a firm of builders on a building estate. At the material time they had already built a number of houses, some of which were already occupied. On Sept. 27, 1929, they entered into an agreement for the sale of one of these houses, then practically completed, to one James Bottomley. Under that agreement completion was to take place on Oct. 28, but that was afterwards altered to Oct. 30. Under a clause in the agreement Bottomley was at liberty to take possession before completion as a tenant at will. This was not to prejudice the rights of either party under the agreement. Clause 9 of the agreement was as follows:

"The vendors will, prior to completion, complete and render fit for habitation to the reasonable satisfaction of the purchaser the said messuage or dwelling-house, the same to be similar in decoration and design to those already erected on the vendors' Denmark Road estate."

On Sept. 28, Bottomley, his wife and infant child went into possession. They appear to have had no servant. One of the features of the design of all the houses that the defendants were building was that hot water for the bath and sink was provided by a Halliday boiler heated by a Bunsen gas burner, with no flue to carry off waste products, if any, to the outer air. It was in evidence that some 15,000 of these boilers had been sold. It was also proved that the Aerated Bread Co. used over 500 of these boilers in the small kitchens of their various shops; that the Aerated Bread Co. selected them because they needed no flues, which it would often be expensive to construct in the company's shops; that no difficulty had occurred with them, though without flues; and that they were still being fixed at the time of the trial. The amount of gas used could be regulated by a needle, and the Halliday company advised that it should not exceed forty-five cubic feet an hour. The reason for no flue being fitted was the statements in the Halliday company's prospectus:

"As the special burner gives absolutely perfect combustion no noxious fumes are generated. . . . The special gas burner gives complete combustion."

A Besides this Halliday boiler fixed in the kitchen with no flue there was also a labour-saving device, namely, that a linen chute ran from the bathroom to the kitchen. It began in an enclosed wooden cupboard in the bathroom, was closed on that floor by a movable hatch, and finished in an enclosed wooden cupboard in the kitchen. The bathroom had a window with a fanlight over it. The kitchen had a door and a window-door into the open air. On Sept. 28 the Croydon Gas Co.'s inspector came to test the fitting before the company supplied gas to the occupier, Mr. Bottomley. He

"had to satisfy himself that the fittings were satisfactory and gas appliances set and working properly and burner rated as working at forty-five feet per hour."

C It was so rated at the gas company's standard pressure. On that day the Bottomleys went into possession, and the kitchen and, presumably, the Halliday boiler, must have been continuously used for the next four weeks. The Halliday boiler was being used in the other houses on the estate without any ill effects, but on the morning of Oct. 26 the husband and wife were found dead in the bathroom, undoubtedly killed by carbon monoxide gas which had come from the Bunsen burner of the Halliday boiler. Unfortunately, there was no precise evidence as to the adjustment of the needle of the burner at that time except that the gas manager, who apparently examined it three or four days afterwards, said that "it was passing far too much gas," but when scientifically tested in June, 1930, the house having been empty meanwhile, it was found to be set at seventy-five feet per hour, as against forty-five feet on Sept. 28, 1929.

E At the trial the following questions were left to the jury whose answers are appended: (Q.) Did the carbon monoxide which caused the deaths come from the apparatus in question? (A.) Yes. (Q.) Was the apparatus in question when used as installed by the defendants (a) without a flue, (b) in connection with the chute to the bathroom, dangerous for use? (A.) (a) Yes. (b) Yes. (Q.) Then, if yea, (a) did the defendants know, or (b) ought they to have known, that it was dangerous? (A.) (a) No. (b) Yes. Damages, £1,700. The defendants appealed.

F *Frank J. Powell* for the defendants.

Eastham, K.C., and *Cremlyn* for the plaintiffs.

Cur. adv. vult.

Oct. 26. The following judgments were read.

G **SCRUTTON, L.J.**, stated the facts and continued: **HAWKE, J.**, has held that the findings of the jury meant that there was a dangerous thing, and that the defendants were negligent in dealing with it, and with the adoption of devices for keeping the dangerous thing safe. It will be noticed that the "dangerous thing" was apparently "the apparatus when used with gas as installed," though the death was caused after the installed rate of flow of gas had apparently been altered. When H the apparatus was installed by the defendants the gas company had not regulated it. After the gas company, on behalf of the occupier, to whom they were going to supply gas, had set the regulator at forty-five feet an hour, there was no evidence that, so regulated, it was dangerous. There was no evidence that the defendants had anything to do with its regulation or alteration. The probability is almost overwhelming that the dead man or his wife altered the regulator to a dangerous I position after the gas inspector had regulated it safely. No question was asked whether the house was fit for habitation on Sept. 28, 1929. It was apparently admitted that the house was similar in design to the defendants' other houses in which no difficulty had occurred. No question was asked whether the defendants were guilty of negligence; nor except as above stated was there any direction as to the defendants' duty, of which negligence would be a breach. No question was asked about the alteration of the regulating needle, though it could hardly have been altered by anyone but the tenant or his wife. The judgment seems rather to have been put on tort, giving a cause of action to anyone who was injured by a

dangerous thing against the seller or the person responsible for the creation of a dangerous thing, than on contract. The wife had no contract, but must sue in tort; the husband could sue either in tort or contract; the child could not recover unless her father and/or her mother when alive and injured could have sued. A

I deal with the facts as being such as to conclusively establish (i) that the boiler, burner, and linen chute were parts of the realty; (ii) that, in view of the evidence from the Aerated Bread Co., such an installation properly regulated was not dangerous; (iii) that the defendants had nothing to do with the regulation of the gas, which, as regulated by the gas inspector for the occupier at forty-five feet, was perfectly safe; and (iv) that the alteration to seventy-five feet, which was dangerous, was the act of the occupier or his wife. The unfortunate form of the second question, asked of the jury: "Was the apparatus in question when used as installed by the defendants . . ." completely ignores facts (iii) and (iv). There was no evidence on which the jury could make findings inconsistent with the above four facts. B

At the time of the deaths Mr. Bottomley was a purchaser of real estate and a tenant at will of this house. The Halliday boiler connected with gas pipes was a part of the realty and of the house and could not be removed by the tenant: see *Sewell v. Angerstein* (2); *Smith v. MacLure* (3); FOA ON LANDLORD AND TENANT, 6th Edn. at pp. 768 and 780; and WOODFALL ON LANDLORD AND TENANT, 22nd Edn. at p. 796. It is well-established law that in the absence of express contract a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation even if he constructed the defects himself or is aware of their existence. Parliament has altered that general law by imposing by the Housing Act, 1925, an implied warranty of fitness in the case of small houses, the definition of which does not include the house in question in the present case. With regard to the general law, see per PARKE, B., in *Hart v. Windsor* (4), where he said (12 M. & W. at p. 87): C

"There is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position." D

EARLE, C.J., said in *Robbins v. Jones* (5) in a judgment delivered by WILLES, J. (15 C.B.N.S. at p. 240): "Fraud apart, there is no law against letting a tumbledown house." The headnote in the LAW REPORTS of *Lane v. Cox* (6), a decision of the Court of Appeal, is: E

"A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to the tenant, or to a person using the premises, for personal injuries happening during the term and due to the defective state of the house." F

In *Sutton v. Temple* (7) it was held that in a lease of land for grazing there was no implied contract that the land was fit for that purpose, it being in fact poisoned by heaps of refuse paint. Whether the law might be otherwise is a matter for consideration of Parliament: this court is bound by well-established law. But in this case there was a contract which, as *Lawrence v. Cassel* (8) shows, might add some obligation to the lease or conveyance. By that contract the defendants were, before completion (that is, before Oct. 28), (i) to complete the messuage so as to be similar in decoration and design to those already erected on the vendors' Denmark Road estate. I am of opinion that "design" covers the boiler without flue and in the same room with the linen chute, which is the design of the houses already erected; (ii) the house was to be "fit for habitation." No question on that was left to the jury, but in view of the evidence with regard to the other houses, the Aerated Bread Co.'s kitchens, and a month's residence in this house, I can see no evidence on which the jury could find that the house with the needle of the Halliday boiler properly regulated was not "fit for habitation." There was, therefore, in my opinion, no breach of contract. G

A There remains a claim in tort based on the cases where the circumstances in which a person in control of a dangerous thing is liable to persons with whom he has no contract have been considered. They have often been discussed. HAMILTON, J., dealt with them at length in *Blacker v. Lake and Elliot* (9), when he held that the question whether an article was dangerous per se was a question of law for the judge, not a question of fact for the jury. I had a similar question to consider in B *Hodge & Sons v. Anglo-American Oil Co.* (10), where I stated the law thus (12 Ll.L.Rep. at p. 188):

“The law, therefore, seems to be: (i) that if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons, with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care. (ii) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract: *Earl v. Lubbock* (11). (iii) In the case of a thing dangerous in itself, where either the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his own servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is *nova causa interveniens*.”

E *Earl v. Lubbock* (11), a decision of this court, is a very relevant case, but these are all cases relating to chattels and do not apply to real property or fixtures forming part of a house. The argument in the plaintiffs' case was rested on such decisions as that of *Parry v. Smith* (12), where a gas fitter left a leaky gas pipe on premises where he was altering the gas fittings and was held liable in tort to a servant of the occupier. It was not very clear in the present case whether the “dangerous thing per se” was said to be “gas” or as the judge put it in his question to the jury: “The apparatus in question when used as installed by the defendants without a flue” and with a linen chute. If “gas,” all gas is dangerous if the occupier leaves the tap on. If “gas as installed,” the installation as regulated was by the gas company, an independent contractor with the occupier and not with the vendors or landlords.

G There was no evidence on which the boiler “when used as installed by the defendants” could be said to be dangerous. Properly regulated at forty-five feet per hour there was no evidence of danger. It seems a great stretch of imagination to say that the 500 boilers of the Aerated Bread Co.'s kitchens, used without any bad results, are dangerous. They probably could be dangerous if not properly regulated. In this case the boiler was regulated by the gas inspector, for whom the defendants are not liable. It is suggested that the standard pressure at which he regulated might vary so as to alter the regulation. This was not critically examined, but I cannot believe that the standard pressure would vary so as to increase to one and two-thirds of the normal pressure, forty-five to seventy-five feet. Anyway, the defendants had nothing to do with the gas company's variation of its pressure. The company was supplying gas to the tenant as purchaser, not to the landlord. If the gas inspector regulated the gas wrongly, the defendants would not be liable. It is not suggested that the defendants altered, nor can one see any reason why they should alter, the regulator. In my opinion, it is obvious that the regulator was altered by the tenant or his wife, and for this the defendants could not be liable. The jury have found that the defendants did not know of the danger and I can see no evidence to justify their finding that the defendants ought to have known. The gas inspector after regulating it passed the appliance: ought he to have known it was dangerous as regulated? In my opinion, the appliance

properly regulated was not dangerous; its danger would come from improper regulation by the tenant or purchasers, and as the vendor-landlord did not know of the danger he could not warn. A

These observations are made on the assumption that the appliance is to be treated as a chattel, but as, in my opinion, it was part of the realty, and as it was not dangerous if properly regulated, and the vendor-landlord did not know of its danger if improperly regulated, he was under no liability to the purchaser-tenant. B
The plaintiffs relied strongly on the judgment of the Privy Council in *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (13). The facts in that case were that damage was caused by the ignition of natural gas in a very peculiar machine quite unlike that in the present case. The gas fitters were found by the jury to have been negligent in not having fitted a flue. In view of the evidence as to the A.B.C. kitchens the defendants, who did not know of any danger, could not, in my opinion, be found negligent in this case, and were not asked that question. C
The language of LORD DUNEDIN in that case has been criticised frequently: see *SALMOND ON TORTS*, 7th Edn. at p. 478, note (b); and also my judgment in *Hodge & Sons v. Anglo-American Oil Co.* (10). In that case I said (12 Ll.L.Rep. at p. 187):

"There remains the further question how far in the case of a thing dangerous in itself the fact that the damage was occasioned by the act of a third party in connection with the dangerous thing is a defence open to the original supplier. This appears to me to turn on the extent of the knowledge of, or warning given to, the third party. In *Dixon v. Bell* (14) a loaded gun with the priming removed was given to a mulatto girl of thirteen, who endeavoured to fire it off at a child. The supplier of the gun was held liable. But if the gun had been given with warning of its condition to a person of full age and intelligence I find it difficult to think that his act would not be a *nova causa interveniens*, so as to relieve the supplier. His duty is to give adequate warning of danger, as if he sells poison so labelled to an intelligent adult. I do not quite understand LORD DUNEDIN's remark in *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (13), where he says: D

'The duty being to take precaution, it is no excuse to say the accident would not have happened unless some other agency than that of the defendants had intermeddled with the matter. . . . On the other hand, if the proximate cause of the accident is not the negligence of the defendant but the conscious act of another volition, then he will not be liable.' . . . E F

It is not quite clear what is the distinction between the other agency which is no excuse and the conscious act of volition which is an excuse. Probably the owner fulfils his duty if he entrusts the dangerous thing to a competent person who knows or is warned of the danger. I think that if the danger is caused by (i) the negligence of the defendant in handing without warning a dangerous thing to a third party, and (ii) the act of that third party in dealing reasonably with the thing, in ignorance of its dangerous character, the defendant would not be excused. If, however, the defendant hands the dangerous thing with warning of its character on to a competent person who knows of its character, though neither the warning nor the knowledge is of the exact amount of the danger, I do not think the defendant is liable to third parties for the action of the receiver which is unreasonable in view of this knowledge or warning. His action is, I think, *nova causa interveniens*. For instance, if a chemist sells to a man of full age a substance labelled poison he cannot be liable to a third party for the action of that man in spreading it on bread and butter, whereby the third party is injured; or . . . if I give a gun to a gunsmith for extraction of a jammed cartridge telling him of the danger, I cannot be liable to a third party, say his workman, for damages caused by the gunsmith's negligent extraction of the cartridge." G H I

A In the present case, assuming the defendants have installed a chattel which, if used with gas, and if not properly regulated, will be dangerous, the defendants knew that before the gas company will supply gas they, being competent people, will test and regulate the chattel, so as to render it not dangerous. My view of the law is that the installation being part of the realty, the cases as to chattels do not apply, and that, if the installation is treated as a chattel, it is of a chattel
B handed to a competent person to regulate on behalf of the tenant occupier, and the vendor-landlord is not liable for what happens afterwards. In my opinion, the judgment appealed from should be set aside, and judgment entered for the defendants with costs here and below. If not, I should have thought that a new trial should have been ordered. I can understand that the jury sympathised with the
C little baby, but their sympathy must not be allowed to do an injustice to the defendants.

GREER, L.J.—The plaintiffs, on the trial before a judge and jury, obtained a verdict and judgment for £1,700 damages in a claim under the Fatal Accidents Act, 1846, formerly known as Lord Campbell's Act. The defendants, by their notice
D of appeal, asked this court to reverse the judgment and enter judgment for them on the ground that there was no evidence on which they could be held liable in law, and alternatively for a new trial on the ground of misdirection. In my opinion, this appeal ought to be allowed, and judgment entered for the defendants with costs here and below.

The action was brought by the administrators of the late Charles Henry
E Bottomley and of Enid Bottomley, his wife, to recover the pecuniary loss sustained by Mary Rennie Bottomley, the only child of the said C. H. Bottomley and Enid Bottomley, through the death of her parents, which the plaintiffs allege was caused by the negligence of the defendants. The facts of the case are peculiar, and if, as I think, the plaintiffs are in the present state of the law without remedy, the matter might well be worthy of consideration by the legislature. The defendants are
F building contractors who had acquired certain land in Carshalton, Surrey, and were in the course of developing it as a building estate. After they had built several houses on the land, they entered into a contract dated Sept. 27, 1929, to sell one of them, to be known as 35, Denmark Road, to Mr. Bottomley. The contract provided that the date of completion should be the 28th, afterwards altered to Oct. 30, 1929. By cl. 9 it was provided that the vendor would, prior to completion, complete and render fit for habitation to the reasonable satisfaction of the
G purchaser the said messuage or dwelling-house, the same to be similar in decoration and design to those already erected on the vendors' Denmark Road estate, and by cl. 10 that the purchaser should be at liberty at any time prior to the actual completion of the purchase to take possession of the premises thereby contracted to be sold, and if he did so he should hold the premises as tenant at will until the
H purchase was completed. The day after the agreement Mr. Bottomley entered into possession with his wife and daughter, and pending completion held the premises as a tenant at will. In all the houses then built on the said estate a fixture for heating the bath water, known as the Halliday boiler, had been fixed in the kitchens in a certain position immediately below the bathroom. One was so fixed in the house in question when the Bottomleys took possession. There was an
I enclosed cupboard in the kitchen which ascended to the bathroom floor, in a corner of which there was also an enclosed cupboard. The connection between the kitchen and the bathroom is not quite clear, but it is described in the evidence as a chute, and it was alleged that carbon monoxide escaped through this chute from the Halliday boiler and got into the bathroom. Attached to the boiler there was a needle which was intended to regulate the pressure of gas, and it was fixed so that the pressure ought not to have exceeded forty-five, but somehow or other, on Oct. 26, carbon monoxide seems to have been caused by excessive pressure and to have escaped through the chute into the bathroom when either Mr. or Mrs.

Bottomley were engaged in having a bath, and they were both found dead in the A
bathroom.

Certain questions were submitted to the jury at the trial, which they answered
as follows: (i) Did the carbon monoxide which caused the deaths come from the
apparatus in question? Yes. (ii) Was the apparatus in question when used as
installed by the defendants (a) without a flue, (b) in connection with the chute to
the bathroom, dangerous for use? (a) Yes. (b) Yes. (iii) If yea, (a) did the B
defendants know, or (b) ought they to have known, that it was dangerous? (a) No.
(b) Yes. Damages £1,700. No question was expressly asked of the jury whether
in installing the apparatus the defendants had been guilty of negligence, nor was
any question asked as to whether the deaths were the result of that negligence.
The absence of the question whether the deaths were the result of the negligence
is important because the defendants desired to have the jury's finding on the C
question whether the escape of the poisonous gas might not have been caused by
someone having tampered with the apparatus as originally fixed. Be this as it
may, the important question for determination is whether it was established that
there was any breach of duty by the defendants towards the plaintiffs.

Does the vendor or lessor of a house owe any duty, independently of contract,
to persons who may happen to come to live in the house either by purchase from D
him, or as his tenants, to exercise reasonable care to see that the house is fit for
occupation? It is a commonplace of the law of negligence that, before you can
establish liability for negligence, you must first show that the law recognises some
duty towards the person who puts forward the claim. The plaintiffs in this action
alleged that the defendants were guilty of a negligent breach of duty towards the
deceased in that they failed to attach to the Halliday boiler a flue to carry off the E
poisonous fumes through the wall into the open air. When the defendants installed
the boiler they had not then and might never have had any relations with the
deceased. English law does not recognise a duty in the air so to speak, that is,
a duty to undertake that no one should suffer from one's carelessness. The cus-
tomer owes a duty to his bank to draw his cheques carefully so that it would be
difficult for any holder fraudulently to alter them, but he owes no such duty to F
every person into whose hands the cheques may come: *Scholfield v. Earl of*
Londesborough (15). A corporation may owe a duty to itself and/or its share-
holders to take good care of its seal, but people who rely on its seal having been
carefully used do not obtain any rights thereby, however negligent the corporation
may have been with regard to its custody: *Bank of Ireland v. Evans Charities* (16).
It seems to me that this principle equally applies to the case of a builder or other G
owner of property, when the question is whether he owes any duty towards people
who may, with his consent, either as purchasers, tenants, or licensees of purchasers
or tenants, come on to his property and be damaged by its defective condition.
The law is stated by LORD ATKINSON in *Cavalier v. Pope* (17) ([1906] A.C. at
p. 432):

"It is well established that no duty is, at law, cast upon a landlord not to let H
a house in a dangerous or dilapidated condition, and further, that if he does let
it while in such a condition, he is not thereby rendered liable in damages for
injuries which may be sustained by the tenant, his (the tenant's) servants,
guests, customers, or others invited by him to enter the premises by reason of
this defective condition: *Robins v. Jones* (5) and *Lane v. Cox* (6)."

I
A purchaser of the freehold is, in my judgment, in no better position than a
tenant. No case was cited to us in which a tenant or purchaser has ever recovered
against a lessor or vendor either by implied contract or in tort by establishing the
liability of the vendor or landlord for injuries sustained through the house or its
fixtures being unsafe at the date of the sale or the lease. It was strenuously con-
tended by counsel for the plaintiffs that they were entitled to retain judgment by
reason of the principles involved in two classes of decisions. First, there were
those cases concerned with the liability of a contractor doing work negligently on

- A another person's premises to people with whom he had no contractual relations who were damaged by reason of his defective work. Such cases are *Parry v. Smith* (12), *Dominion Natural Gas Company, Ltd. v. Collins* (13), and *Heaven v. Pender* (1). The other cases are those which deal with the liability of a vendor of some chattel, which is dangerous in itself, who gives no warning to the purchaser which might be passed on to the user of the article. After the decisions in *Cavalier v. Pope* (17) and *Lane v. Cox* (6) I cannot hold that these decisions apply to cases between landlord and tenant or to cases between landlord and persons using the premises by licence of the tenant. The result is unsatisfactory, because in the present case, if the landlords, instead of doing the work themselves, before they sold the house, had done it afterwards as contractors to Mr. Bottomley, they would have been liable if there were sufficient evidence that it was negligence on their part to have installed the boiler without a flue. Even if the cases about contractors applied to the facts of the present case, I should have hesitated to hold on the facts proved at the trial that there was any evidence of want of reasonable care in installing the apparatus without a flue. Similar apparatus without a flue had been installed in 500 or 600 kitchens of the Aerated Bread Co. without having untoward results. Similar apparatus had been installed in the defendants' other houses on the land in question without any complaint having been received, or any damage having been incurred. The mere fact that the company's gas official thought that it was better to provide a flue would not, in my judgment, afford sufficient evidence to enable a jury to say that the defendants were negligent because they did not hold a similar view. Be that as it may, so far as Mr. Bottomley is concerned, we have to deal with the case of a man who had expressly agreed to purchase, and for the time being to become tenant of, a house similar in design to those already erected. He, therefore, took the risk of purchasing the premises in their actual condition.

With regard to the other class of case it is not easy to reconcile all the decisions on the subject. I agree with the view expressed by SCRUTTON, L.J., in *Hodge & Sons v. Anglo-American Oil Co.* (10) (12 Ll.L.Rep. at p. 186):

- F "If a person negligently puts in circulation a thing in fact dangerous, the state of the authorities in England is not very satisfactory as regards his liability towards a third person with whom he has no contract, but who is a member of a class who might reasonably be expected to use the dangerous thing."
- G It would serve no useful purpose to go through the various decisions in detail, but, in my judgment, it has not yet been decided by any authority binding on this court that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract, by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. As pointed out by LORD SUMNER in *Blacker v. Lake and Elliot, Ltd.* (9), the question whether an article belongs to a dangerous class is, where there is no dispute of fact as to the nature of the article, a question of law for the judge. In my judgment, the judge in the present case ought to have held that the Halliday boiler without a flue was not an article dangerous per se. It would admittedly have been quite safe if the needle had remained as fixed and there had been no exceptional pressure from the gas mains. If it be a defect in the Halliday boiler that it had no flue, that was a defect which was just as ascertainable by the deceased as by the defendants. For these reasons I think this appeal must be allowed.

As this action was based on tort, and not on a breach of contract, it is unnecessary to consider any claim for breach of cl. 9 of the contract. A breach of contract resulting in damage to the estate of the deceased gives a cause of action to the representatives independently of the Fatal Accidents Act, 1846. That Act applies only to create a cause of action which did not exist before the Act was passed. There was no evidence that Mr. Bottomley was reasonably or at all dissatisfied

with the condition of the premises. Further, inasmuch as the date of completion had not arrived when Mr. and Mrs. Bottomley met their death, it could not be said that the death was due to a breach of cl. 9 of the contract inasmuch as the defendants still had time to comply with that term of the contract. A

I wish to add that, assuming that there was evidence upon which any liability on the part of the defendants could have been established, I think there would have had to be a new trial, because the questions submitted to the jury were not of themselves sufficient to justify a verdict. I think the learned judge ought to have asked, first, whether the defendants were negligent in the circumstances, but, assuming that such a question is sufficiently put in the question whether they knew or ought to have known that the apparatus was dangerous, a further question ought to have been asked as to whether the death was due to that negligence or to the act of the deceased or the intervention of a third party who had manipulated the needle which operated to restrain the pressure of gas. He was asked to put a specific question as to this, but he did not do so. In my judgment, the appeal should be allowed, with costs, the judgment entered below should be set aside, and judgment entered for the defendants, with costs. B C

ROMER, L.J. (read by SCRUTTON, L.J.)—In this case the plaintiffs, the respondents in this court, sought at the trial to render the defendants liable in damages as being persons who had delivered to the late Mr. Bottomley a thing that was dangerous per se, when they knew or ought to have known of its dangerous character. Whether the dangerous thing was gas or the Halliday boiler, or gas and the boiler combined, was not made very clear in the argument. But seeing that the defendants did not supply any gas, and that without gas the boiler could not possibly be dangerous, it must be taken that the dangerous thing of which the plaintiffs complain was the boiler and gas combined. Treating the defendants as having supplied this dangerous thing to Mr. Bottomley, the plaintiffs then allege that it caused the presence of carbon monoxide gas in the bathroom of No. 25, Denmark Road, on Oct. 26, 1929, and so caused the deaths of Mr. Bottomley and of his wife. D E F

It seems obvious that, if the plaintiffs were to render the defendants liable for this catastrophe it was essential for them to prove (i) that the apparatus when used as installed by the defendants was dangerous in that it might cause carbon monoxide to penetrate into the bathroom, (ii) that by reason of its being so used carbon monoxide did in fact find its way into the bathroom, and (iii) that the gas caused the deaths of Mr. and Mrs. Bottomley. I need not pause to consider what the plaintiffs would have to prove in addition in respect to the knowledge or means of knowledge of the defendants. It is sufficient for the purpose to say that it was essential for the plaintiffs to prove the three facts already mentioned. At the trial the jury found that the apparatus when used as installed by the defendants was dangerous, and, it being admitted by the defendants that the deaths of Mr. and Mrs. Bottomley were caused by carbon monoxide, that this gas came from the apparatus in question. I do not pause to consider whether there was evidence before the jury which could justify the first of these findings. For the jury did not find, and, in spite of the protests of the learned counsel for the defendants, were not asked to find, whether the presence of the carbon monoxide in the bathroom was caused by the use of the apparatus as installed by the defendants. Evidence had been given which would have justified a finding that the presence of the carbon monoxide in the bathroom may have been due, not to the use of the apparatus as installed by the defendants, but to its use after the adjustment of the needle made by a representative of the gas company had been altered by Mr. and Mrs. Bottomley or some other person. Counsel for the plaintiffs objected to any specific question being left to the jury with regard to the effect of this evidence, on the ground that it sought to establish contributory negligence, and contributory negligence had not been pleaded. But the question to which the evidence was directed was not one of contributory negligence. It was the question whether G H I

A there was any connection at all between the deaths and the alleged negligence of the defendants, and this question should in some form or another have been left to the jury to decide. If, therefore, the case could properly be considered as falling within the class of case that governs the law with regard to the liability of the supplier of dangerous things, I should have been of opinion on this ground alone that a new trial should be ordered. But, in my judgment, the case falls within a different class altogether. Taking the facts as found by the jury with the admitted facts of the case, it seems to follow that the house No. 35, Denmark Road was, when Mr. and Mrs. Bottomley entered into possession of it, one that was, in the opinion of the jury, in a dangerous condition by reason of the fact that any carbon monoxide that might be generated by the use of the Halliday boiler as installed would, in consequence of the absence of a flue and the opening into the bathroom, find its way into that room and render its use dangerous.

C Even if this were so, the defendants cannot be liable for damage occasioned to the occupants of the house. It is true that by the agreement of Sept. 27, 1929, the defendants had entered into an obligation towards Mr. Bottomley to complete and render the house fit for habitation to his reasonable satisfaction before completion. But the time for completion had not arrived at the date of the accident, and the defendants had not, therefore, committed any breach of their contract at that time, even if a house erected, as this one was, precisely similar in decoration and design to those already erected on the defendants' estate could in any case have been considered to be a breach of the contract. Mr. Bottomley had taken possession of the premises before completion under the provisions of cl. 10 of the agreement. He did not thereby waive any rights that he had under the agreement, but by its express terms and pending completion he held the premises as tenant at will of the defendants.

F Assuming, therefore, that the findings of the jury are to be accepted, the case is one in which, by reason of the dangerous condition of premises that were let unfurnished, the tenant and his wife were fatally injured. It is, however, settled law that in such a case the landlord cannot be held liable in the absence of fraud on his part: see *Cavalier v. Pope* (17) and *Lane v. Cox* (6). There is not, of course, any suggestion of fraud on the part of the defendants in the present case, and I am unable for myself to see how, consistently with the rule enunciated in those and similar cases, the plaintiffs here are entitled to succeed. For these reasons, the appeal should, in my opinion, be allowed and the judgment set aside.

Appeal allowed.

G Solicitors: *J. Wilmer Hives; William C. Bonney.*

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

MARTIN *v.* PERRY AND DAW

[KING'S BENCH DIVISION (Charles, J.), March 25, 26, 1931]

[Reported [1931] 2 K.B. 310; 100 L.J.K.B. 582; 145 L.T. 455;
47 T.L.R. 377; 75 Sol. Jo. 259]

Estate Agent—Commission—Agreement to pay “on a sale being effected”—Commission payable on introduction of purchaser willing and able to complete—Burden of proof.

The plaintiff instructed the defendants, estate agents, to sell his business, the terms of the agency being embodied in a letter which stated that commission was payable “on a sale being effected.” The defendants introduced one R., who paid a deposit of £120 and entered into an agreement to purchase, but failed to complete. In an action by the plaintiff for the payment to him of the deposit held by the defendants, the defendants counter-claimed for commission.

Held: on the true construction of the letter commission became payable by the plaintiff to the defendants when the defendants had introduced a purchaser ready and willing to purchase and financially able to complete the purchase; the onus was on the defendants to prove that the person whom they introduced was of that character; they had failed to do so; and, therefore, their claim to commission must fail.

Notes. Referred to: *Ronald Bampton & Partners v. Gardner & Sons, Ltd.*, [1937] 3 All E.R. 438; *Poole v. Clarke & Co.*, [1945] 2 All E.R. 445; *Dennis Reed, Ltd. v. Goody*, [1950] 1 All E.R. 919; *Boots v. Christopher & Co.*, [1951] 2 All E.R. 1045.

As to an agent's remuneration, see 1 HALSBURY'S LAWS (3rd Edn.) 196 et seq., and for cases see 1 DIGEST 488 et seq.

Cases referred to:

- (1) *James v. Smith* (1921), [1931] 2 K.B. 317, n.; 100 L.J.K.B. 585, n.; 145 L.T. 457, n., C.A.; Digest Supp.
- (2) *Rose v. Perry and Daw* (1929), *Estates Gazette*, July 27, 1929.

Action tried by CHARLES, J., without a jury.

The facts are sufficiently apparent from the headnote and his Lordship's judgment.

J. D. Casswell for the plaintiff.

F. W. Beney for the defendants.

CHARLES, J.—The plaintiff, Arthur Martin, sues Messrs. E. W. Perry and Daw, who are estate agents, for the sum of £120, which was received by the defendants for the use of the plaintiff, it being the amount of a deposit paid to the defendants for and on behalf of the plaintiff, as his agents, by Mr. Henry Thomas Robinson on an intended sale of the plaintiff's business and goodwill of a tobacconist's business. There is no question at all between the parties that the plaintiff was entitled to that sum. The real matter for decision arises upon the defence and counter-claim. There is an allegation in para. 2 of the defence that on Nov. 14, 1927, the plaintiff verbally instructed and authorised the defendants, as agents upon his behalf, to find a purchaser of the said business, and on Feb. 18, 1929, he verbally undertook to remunerate the defendants for such services by paying them commission at the rate of 5 per cent. on the first £1,000 and 2½ per cent. on the balance of the total purchase price obtained. By his reply the plaintiff denies that the defendants were instructed to find a purchaser as therein alleged, and in para. 2 he says that it was a term of the agreement that the said commission should be payable to the defendants when they should have effected a sale of the said business and not otherwise, and that the said agreement was confirmed in writing by the defendants by a letter dated Feb. 18, 1929. So that, although by their pleadings the defendants have counter-claimed upon a verbal agreement and upon a verbal

A agreement alone, the plaintiff has indicated that what passed verbally was set down in this letter of Feb. 18, 1929, and they now rest themselves upon that letter. If it had not been for that I should have said that the defendants had entirely failed, because they had pleaded verbal agreements and given no evidence of any sort or description that there was any verbal agreement at any time; and it is only because it is introduced by the reply that I am enabled to look to the letter of Feb. 18.

B What does the letter say? It must be remembered that the plaintiff was desirous of selling his tobacconist's businesses at Norbury and West Norwood and Penge, and he got into touch with the defendants, and there is no evidence whatever as to what happened. Then upon Feb. 18, 1929, the defendants wrote the following letter to Mr. Martin:

C "Referring to our interview to-day we write to confirm that you are prepared to accept for the lease, goodwill, fixtures and fittings of these businesses . . . the sum of £2,400, and that on a sale being effected, you are prepared to allow us a commission of 5 per cent. on the first £1,000 and 2½ per cent. on the balance of the total purchase price, we to take stock on your behalf for a fee of 5 per cent. on the amount declared."

D That is the effective part of the letter. It is upon that letter that the dispute arises, and it does so upon these two sets of words: "on sale being effected" and "2½ per cent. on the balance of the total purchase price." Does "on a sale being effected" mean that the defendants have not only to introduce a purchaser, but that consequent upon that introduction there is to be an agreement, and consequent upon that agreement there is to be a completion, or does it mean that they earn their commission by the simple introduction of a purchaser who says he will purchase? It is pressed upon me by counsel for the defendants that it is sufficient that they should introduce a person willing to purchase; a person who enters into an agreement and no more; that there need be no completion; that the person introduced by the defendants may be a man of straw, a man who never could at any time be in a position to complete; and it is put on their behalf that in such a case that does not matter at all, and that they have done all that an estate agent can be called upon to do in introducing that person. It is pressed upon me by counsel for the plaintiff, particularly by reference to the unreported case of *James v. Smith* (1), that that is not enough; that one does not effect a sale unless (a) one introduces a purchaser who pursues the matter to completion, or (b) that one introduces a purchaser who at all times and at the proper time is ready, able and willing to execute the contract into which he enters.

G *James v. Smith* (1) is, I think, most unfortunately, not reported, for it has been cited in many cases subsequent to the date when it was decided by the Court of Appeal, and not for the first time I have to look at an unproved shorthand note of the case. It is one of the most comprehensive decisions in relation to the sale of premises by an estate agent and the terms upon which he can gain his commission therefrom, and I think it is a matter of real regret that it appears nowhere in any of the reports. In that case the words were a little different, but not very different. The question for decision there was what was meant by the words ". . . and to pay you a commission of £1,000 if the business is sold at this figure." In the present case the words are that the commission shall be paid "on a sale being effected." I cannot see that there is very much difference between the words in these two cases, although it is alleged that *Rose v. Perry and Daw* (2) is by its actual terms nearer and more akin to the case which I am considering. I am not prepared to say that that is so. I think that *James v. Smith* (1) is as nearly like this case as one can find. BANKES, L.J., puts the matter as follows in *James v. Smith* (1):

"Now, assume that the question for decision is: What is meant by the words 'and to pay you a commission of £1,000 if the business is sold at this figure?' As I understand the contention for the defendants, they put their argument in this twofold way. They say those words either mean, if the sale is completed

and the purchase money paid—that is what is meant by 'sold'—or they mean if the business is sold, meaning a contract of purchase is signed, but by a person able and willing to complete. They mean, and must mean, a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well; they do not mean and cannot mean a purchaser in the sense either of a man of straw or of a man without means."

Those observations in the judgment of BANKES, L.J., are confirmed and somewhat elaborated by SCRUTTON, L.J., and by ATKIN, L.J.

In the present case the defendants introduced a gentleman called Robinson. Was Mr. Robinson a person ready, willing and able to purchase and able to complete as well? It was said as clearly as anything can be said, in ATKIN, L.J.'s judgment in *James v. Smith* (1), that the onus is upon the estate agent to show that the person whom he introduces is a person of that character—a person able to purchase, a person able to complete as well. No evidence at all has been called before me, so that the defendants have not indicated to me in any way who Mr. Robinson is, or what he is; whether he is a moneyed man or whether he is a penniless man. I know nothing about him. All I know is that he is a person who appears upon the agreement which is entered into between himself and the plaintiff for the sale of these tobacconist's premises. I do not know who he is, and the defendants have not satisfied me that Mr. Robinson was a person able to purchase or able to complete, and it rested upon them to satisfy me that he was such a person. It is truly said that this agreement between the plaintiff and Mr. Robinson is a very odd one, because it has a curious clause, as follows:

"The purchaser is at liberty to assign this contract to a company and is then released from further liability under this contract."

Counsel contended that that wipes out the necessity of the defendants indicating to the court that the signatory to the contract, Mr. Robinson, was a man who was able to purchase and able to complete, because the plaintiff, in signing that contract, says in effect: "I do not care whether he is or whether he is not able to purchase or able to complete, because I give him the liberty at any moment of assigning this contract to a company, and he is then released from further liability under the contract." I cannot see that that contention is one which can be well sustained. It is only a liberty given to assign; the purchaser might never have assigned; and, as counsel frankly said, if he had not assigned (and in this case he did not assign), then the plaintiff must look to Mr. Robinson. Mr. Robinson did not complete; there has never been any completion; and I cannot see, in those circumstances, that the defendants have done that which it is necessary they should do before they can claim their commission. They have not satisfied me in this case that they have ever introduced a purchaser who, in the words of BANKES, L.J., was ready, willing and able to purchase and able to complete as well. The result is that there will be judgment for the plaintiff for £120, and judgment for the plaintiff on the counter-claim.

Judgment for plaintiff on claim and counter-claim.

Solicitors: *Burton & Son; Kenneth Brown, Baker, Baker.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

A

CANADIAN PACIFIC RAIL CO. v. R.

[PRIVY COUNCIL (Lord Dunedin, Lord Blanesburgh, Lord Atkin, Lord Thankerton and Lord Russell), December 4, 5, 8, 9, 11, 1930, February 19, 1931]

B

[Reported [1931] A.C. 414; 100 L.J.P.C. 129; 145 L.T. 129;

[1931] 1 W.W.R. 673; [1931] 2 D.L.R. 386]

Licence—Revocation—Notice—Duration—Sufficient to enable continuance of public service—Equitable estoppel to prevent revocation—No inducement by licensor to licensee to act to his prejudice—No mistaken belief by licensee as to parties' rights.

C

Trespass—Defence—Long occupation of land.

In an action by the Crown against the appellant company in which the Crown claimed possession of telegraph lines and poles which the appellants had placed on Crown land, with mesne profits and damages for trespass, the Judicial Committee found that before action brought the appellants were in occupation of the land in question by licence of the Crown.

D

Held: (i) there being no mistaken belief by the appellants as to the ownership of or the rights over the land, and so no such belief known to the Crown, and there being no inducement by the Crown to the appellants to build the telegraph lines and no belief by the appellants that they could acquire any rights in perpetuity over the land, there was nothing on which to ground an equitable estoppel which would prevent the licence being revocable;

E

(ii) the power of a licensor to determine a revocable licence depended on the circumstances of each case, but generally a licensee was entitled to a reasonable notice of revocation;

(iii) in the present case the bringing of the action by the Crown did not operate to terminate the licence; the telegraph line was part of a system in the existence and continuance of which the public had a considerable interest; and, therefore, the Crown must give the appellants such notice as was sufficient, not only to allow them to remove the poles and wires from the land, but also to enable them to make arrangements for the continued existence of the line by the erection of poles and wires elsewhere.

F

Evidence of long occupation of land held to negative an allegation that the occupier was a trespasser.

G

Notes. Considered: *Minister of Health v. Belotti*, [1944] 1 All E.R. 238. Explained and distinguished: *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, [1955] 2 All E.R. 657. Referred to: *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331.

As to defences to an action for trespass, see 32 HALSBURY'S LAWS (2nd Edn.) 18-22, and for cases see 43 DIGEST 409-411.

H

Cases referred to:

(1) *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699; 53 L.J.P.C. 105; 51 L.T. 475; 11 Digest (Repl.) 126, *72.

(2) *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129; 12 Jur.N.S. 506; 14 W.R. 926, H.L.; 30 Digest (Repl.) 406, 502.

I

(3) *Lala Beni Ram v. Kundan Lall* (1899), 15 T.L.R. 258, P.C.; L.R. 26 I.A. 58; 30 Digest (Repl.) 383, 268.

(4) *Cornish v. Stubbs* (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 18 W.R. 547; 30 Digest (Repl.) 540, 1745.

(5) *Mellor v. Watkins* (1874), L.R. 9 Q.B. 400; 23 W.R. 55; 30 Digest (Repl.) 540, 1746.

Appeal by special leave from a judgment of the Supreme Court of Canada, in part dismissing the appellant's appeal, and in part allowing the respondent's cross-appeal, from a judgment of the Exchequer Court of Canada.

The action was commenced by the Crown on the information of the Attorney-General of Canada by information of intrusion filed in the Exchequer Court of Canada on Sept. 15, 1926. In the information it was alleged that on or before or since Jan. 1, 1890, the appellant had wrongfully and in violation of the respondent's rights entered and intruded upon certain lands comprising the right-of-way, yards and station grounds of that part of the Canadian Government Railways known as the Intercolonial Railway, and constructed thereon a telegraph line about 500 miles in length, which had since been operated as such. The Attorney-General claimed possession and \$713,408 for the issues and profits from Jan. 1, 1890, or, in the alternative, damages in the sum of \$100,000 for trespass. Alternatively, the Attorney-General sought a declaration as to the rights, if any, of the appellant in the said lands in respect of the said line of poles and wires. The appellant pleaded a general denial, leave and licence, a lost grant or grants, the Statute of Limitations and estoppel by conduct, laches and acquiescence. There was no dispute as to the Crown's title to the lands claimed, nor as to the appellant's occupation of these lands for the purposes of its telegraph lines.

In the Exchequer Court, AUDETTE, J., dealt only with the question of law, leaving the question of damages to be determined. He held that the appellant's telegraph lines were and had been from the beginning on the respondent's right of way by the respondent's licence and with full knowledge of the Canadian government railway officials, but that such licence was revocable. The appellant appealed to the Supreme Court of Canada, contending that the licence was irrevocable and that the action ought to have been dismissed. The respondent cross-appealed contending that the appellant's telegraph lines had been placed on the right-of-way without leave or licence, and that the appellant was a trespasser, or, in the alternative, that the licence, if any, had been revoked. By the judgment of the Supreme Court delivered by NEWCOMBE, J., and concurred in by ANGLIN, C.J., DUFF, RINFRET and LAMONT, JJ., it was held that the conduct of the respondent's officials did not bind the Crown, and that, except in regard to the Pictou branch, the appellant was bound to remove its line and to make payment for past occupation or pay damages. The railway company appealed.

W. N. Tilley, K.C. (of the Canadian Bar), *Geoffrey Lawrence, K.C.*, and *C. F. H. Carson* (of the Canadian Bar) for the appellant.

N. W. Rowell, K.C., and *I. C. Rand, K.C.* (both of the Canadian Bar), for the respondent.

Cur. adv. vult.

Feb. 19. **LORD RUSSELL.**—This appeal was brought against a judgment of the Supreme Court of Canada which in part dismissed the appellant's appeal, and in part allowed the respondent's cross-appeal, from a judgment of the Exchequer Court of Canada in proceedings, in which the Crown, on the information of the Attorney-General of Canada, was plaintiff, and the Canadian Pacific Rail. Co. (the appellant here) was defendant. The object of the proceedings was to obtain the removal from the roadway and lands of the Intercolonial Railway of the appellant's line of telegraph poles and wires. The Intercolonial Railway forms part of the Canadian Government Railways system, and its roadway lies in the provinces of New Brunswick and Nova Scotia. The appellant's telegraph line was, at the date of the filing of the information (Sept. 15, 1926), substantially all erected upon and carried along the Intercolonial Railway's roadway. The telegraph line forms part of a telegraph system worked by the appellant, and is of undoubted importance both to itself and to the public, inasmuch as it connects with the cable station at Canso as well as with Halifax and other important points in the Maritime provinces.

For the purpose of determining the rights of the parties the Supreme Court, in considering the case, divided the appellant's telegraph line into three sections. This appears to their Lordships to be a convenient course, and they propose to adopt it in this judgment. The three sections are as follows: (a) The "Main Telegraph Line," namely, from Coldbrook near St. John through Moncton and

A Truro to Fairview Junction near Halifax, and from Truro to New Glasgow. This was constructed in the years 1888, 1889 and 1890. (b) The "Branch Telegraph Line," namely, from New Glasgow to Sydney. This was constructed in 1893; and (c) The "Westville Telegraph Line," namely, from Westville to Pictou. This was constructed in 1911. It will be necessary to consider the circumstances in which each of these sections was constructed, where the poles were placed, and how it came about that eventually substantially the whole system came to be situated on the lands of the Intercolonial Railway. But before doing so it will be advisable to state exactly what were the claims which were put forward by the Crown, and how each court has dealt with those claims.

B According to the information as it was filed and as it stood at the opening of the trial, the Crown's case was that the appellant was from the very start a trespasser in respect of its entire line. No other case was suggested. The allegation ran thus:

C "(ii) On or before or since Jan. 1, 1890, the defendant in or upon the possession of the plaintiff of and in the premises, wrongfully and in violation of the plaintiff's rights, entered and intruded and constructed thereon, a line of poles and wires which the said defendant has ever since operated as part of a telegraph system."

D The relief claimed was possession and mesne profits. At the trial leave to amend was asked for and granted, with the result that damages for trespass were claimed as an alternative to the claim for mesne profits, and, as alternative relief, a declaration was sought in the following terms:

E "(b)—(i) In the alternative a declaration as to the rights, if any, of the defendant in said lands in respect of the said line of poles and wires."

The appellant had pleaded licence, either irrevocable or, if revocable, unrevoked, and this, no doubt, was the reason why it was thought prudent by the Crown's advisers to include a claim for a declaration as to the defendant's rights in the Crown lands, notwithstanding that such a claim would appear to be inconsistent with any claims founded upon trespass. It is, however, true to say that the Crown's primary contention throughout has been, that the appellant was and is a trespasser, and nothing else.

F The action was tried by AUDETTE, J., and after a hearing which lasted for nine days, the learned judge delivered his judgment on March 21, 1929. By his formal judgment, after making a declaration to the effect that the roadway in question of the Intercolonial Railway was owned by and in the possession of the Crown, he made an order in the following terms:

G "And this court doth further order, adjudge and declare that the property of the defendant now on the said lands and premises consisting of a line of telegraph poles erected thereon and carrying wires for telegraph purposes is and has, from the respective dates when the several portions thereof were originally placed thereon, been on the said lands and premises with the leave and licence of the plaintiff, but not an irrevocable licence. And this court doth further order that either party to this action have leave to apply, upon notice, for further directions. And this court doth further order and adjudge that the question of costs between the parties be reserved."

H The learned judge, it will be observed, drew no distinction in regard to the rights relating to any particular section of the telegraph line. His view of the result of the evidence was, that as regards the whole, the appellant had placed its poles and wires upon the Intercolonial roadway under licence from the Crown, and that such licence remained unrevoked at the date of the judgment. If this correctly represents, as their Lordships think it does, the judgment of the trial judge, the action was at an end, and nothing remained for decision or discussion except the question of costs.

I Both sides appealed to the Supreme Court. The appellant appealed from the judgment, except in so far as it declared that the line of telegraph poles was and

had been on the lands with the leave and licence of the Crown, upon the grounds : A
 (i) That the trial judge was in error in holding that the licence was not irrevocable, and (ii) that on the facts found by him the action should have been dismissed with costs. The Crown, by way of cross-appeal, asked that instead of the declaration hereinbefore set out, it should be declared that the appellant was throughout a trespasser, or, in the alternative, that, if the appellant had any leave or licence, the same had been revoked before the commencement of the action. On June 11, B
 1930, the Supreme Court made an order disposing of both appeals in the following terms :

"This court did order and adjudge that as to (i) the line from St. John to Moncton, from Moncton to Halifax via Truro, and from Truro to New Glasgow and as to (ii) the line from New Glasgow to Sydney the said appeal should be and the same was dismissed, and the said cross-appeal should be and the same was allowed. And this court did further order and adjudge that as to the line from Westville to Pictou the said appeal should be and the same was allowed, and the said cross-appeal should be and the same was dismissed." C

After making certain provisions as to costs the court further ordered that the case be remitted to the trial judge in order that he might proceed with the trial thereof. D

Inasmuch as the Supreme Court allowed the cross-appeal as regards the Main Telegraph Line and the Branch Telegraph Line, the trial of the action would have to proceed in relation to the claims for damages; but it must be pointed out that the order does not indicate upon which footing the cross-appeal succeeded, whether upon the footing that the appellant was a trespasser throughout, or upon the footing that the appellant was a licensee whose licence had been revoked before action. This was obviously a question of the first importance in considering the quantum of damages, and one, the answer to which, should have been made plain upon the face of the order. Without it the order is incomplete. Their Lordships, however, gather from a perusal of the language used by the learned judges in the Supreme Court that the view which there prevailed was that, as regards the Main Telegraph Line, the appellant was a trespasser throughout, but that as regards the Branch Telegraph Line, the appellant "was at the beginning of this action in no better position than that of a licensee whose leave was terminated or exhausted." E
 In relation to these two sections of the telegraph line the five judges were unanimous. So far as concerns the Westville Telegraph Line, there was also unanimity in the view that the appellant was not a trespasser throughout, but had originally placed the telegraph line on the roadway under licence from the Crown. The Chief Justice of Canada, however, was of opinion that the bringing of the action of itself determined the licence. The other members of the court (DUFF, NEWCOMBE, RINFRET and LAMONT, JJ.) considered that the licence had not been revoked. F
 Their Lordships now proceed to consider the facts disclosed by the evidence in relation to each of the three sections of the appellant's telegraph line. G

(a) THE MAIN TELEGRAPH LINE H

This section of the appellant's telegraph line was constructed in the years 1888-90. On May 15, 1888, the appellant applied by letter, addressed to the Department of Railways and Canals, for permission "to construct an extension of its telegraph line along the Intercolonial Railway from St. John to Halifax via Moncton." This covers the whole of this section, except the portion from Truro to New Glasgow. Views were apparently entertained in the department that antecedent agreements with other telegraph companies made it doubtful whether the permission asked for could or should be granted. However that may be, renewed applications by letters dated Aug. 30, 1888, were made to the department and to the Minister of Railways and Canals by the appellant's solicitor, Mr. George M. Clark. The applications were refused and the appellant was so informed by a letter dated Sept. 4, 1888. This document is not forthcoming, but from a reference to it in a departmental letter of Nov. 15, 1889, it would appear that the reason given for the refusal was the existence of the said antecedent agreements. I

A The construction of the first section proceeded accordingly upon the footing that the telegraph line would be constructed off the Intercolonial roadway. This is apparent from a letter of June 21, 1889, in which Mr. Schreiber (the general manager of Government Railways) agreed with Mr. Hosmer (the manager of the appellant's telegraph system) to grant railway facilities in relation to

B "the construction of your line of telegraph between St. John and Halifax and Truro and New Glasgow outside and near to the I.C.R. fence."

This, be it noted, covers the whole of the first section. In the course of the construction, however, poles were at some points erected on the Intercolonial roadway, and by a letter from the department to the appellant's secretary (dated Jan. 7, 1890) the request was made that the poles be at once removed. Beyond an answer

C to the effect that the letter would be submitted to the board of directors, no reply was made by the appellant. On Sept. 10, 1890, an information was filed by the Crown against the appellant, claiming an order compelling the appellant to remove the offending poles. In the meantime Mr. Hosmer had got into communication with a Mr. Dwight by letter, in which he stated that "the few poles we have on the railroad cannot possibly be of any damage to your company or the Western Union." Mr. Dwight represented the interests of those whose agreements had been supposed to debar the Crown from assenting to the placing of the appellant's poles on the Intercolonial roadway. Mr. Dwight wrote on Sept. 16, 1890, to Mr. Hosmer to the effect that they made no complaint as to the location of the poles.

D "You may consider yourself welcome, so far as we are concerned, to any such accommodation of the kind as you may need anywhere along the route." Armed with this correspondence the appellant, through Mr. Van Horne, approached Sir E John Macdonald, then Prime Minister and Acting Minister of Railways, who, on Oct. 9, 1890, wrote to Mr. Van Horne a letter in the following terms :

E "I have yours of the 22nd ult. and return you the papers therein enclosed, as you desire. The government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the line of the I.C.R. The trouble is that long ago, by an absurd agreement, the Montreal Telegraph Co. was given the exclusive right to plant poles and wires along the line of the I.C.R. Such being the case, the government officials gave notice to your people not to plant poles, but the warning was utterly disregarded. The proceedings were taken lest the government might be held responsible by the Montreal Telegraph Co. for breach of agreement and consequent damage. F Dwight's letter to Hosmer is satisfactory enough, but it is not, I take it, binding on the company, especially if under the control of Wiman. However, G if the C.P.R. will stand between the government and all harm in the event of proceedings being taken, we will not interfere with your telegraph poles."

H The legal proceedings by the Crown were not further prosecuted. In July, 1891, request was made, on behalf of the appellant, for leave to straighten the telegraph line by planting a few poles on the Intercolonial property; but the request was refused. A similar request in regard to about a mile of poles was made and refused in July and August, 1892. Notwithstanding these refusals the appellant's men seem to have placed poles to some extent upon the Intercolonial roadway. The policy or procedure adopted may be indicated by reference to a memorandum from I the appellant's telegraph department at St. John, dated Sept. 22, 1892, in which the writer states :

"I hear the G.N.W. recently sent a man over the I.C.R. to make particular note of the number of poles we have on railway property with a view of bringing the matter up again to make us remove them. Have you heard anything about it? They are evidently getting ready for another kick. We have moved about 200 poles this summer in different places to straighten out line and I have ordered the men to keep on with the work unless they are stopped. If they leave us alone long enough we will have a moderately good line east soon."

Proceedings were threatened by the Crown; but the idea seems to have been A dropped upon representations that the matter was covered by Mr. Dwight's letter. Further, the evidence shows that in 1904 a Mr. Pottinger (then general manager of the Intercolonial Railway) gave verbal permission for some five to ten miles of poles being placed on the roadway between St. John and Moncton.

This statement covers the relevant facts relating to the original construction of the "Main Telegraph Line," and its maintenance down to the year 1905, when its B re-building began. They may fairly be summed up by saying that, while leave to erect the line on Crown property had been refused, the appellant had succeeded in placing a relatively small number of poles on Crown property, some with leave and some without.

In 1905 the re-building began, the first portion to be re-built being the section between Truro and Fairview Junction. Other sections were re-built from time to C time, with the result that the whole of the "Main Telegraph Line" was reconstructed with all its poles, or substantially all its poles, set upon the Intercolonial roadway and property. With the exception of the section between Sussex and Moncton, this had been accomplished by 1914. It was argued before their Lordships that in so acting the appellant had the consent of the Crown by virtue of Sir D John Macdonald's letter of Oct. 9, 1890. Their Lordships are unable to accept this contention; neither it, nor the Dwight correspondence, can properly be stretched to cover more than what was actually being discussed and dealt with at the time, namely, the question whether the "few poles" which had then been erected on the Intercolonial roadway should or should not be permitted to remain. The evidence and documents in relation to the "Main Telegraph Line" appear to E their Lordships to show that (with certain exceptions as to small portions thereof) it was, as it now stands, established on Intercolonial property, without any leave or licence from the Crown, and that the appellant was at the time of such establishment a trespasser in respect thereof.

There remains, however, the question whether at the date of suit the appellant was a trespasser. The suit was not instituted until 1926. In the meanwhile discussion had arisen and correspondence was exchanged between the appellant's F manager, Mr. McMillan, and Mr. Gutelius, the general manager of Government Railways, in regard to a proposed agreement as to the terms of payment for transport along the railway of material and men for repairing the appellant's telegraph line. In the course of this correspondence, Mr. Gutelius wrote on Oct. 31, 1916, to Mr. McMillan a letter in which occurs the following passage:

"I find upon investigation that the Canadian Pacific Railway Telegraphs are G trespassers with their poles on the right-of-way of the Canadian Government Railways to the extent of 452 miles. We feel, therefore, that effective at once you should pay a reasonable rental for this pole privilege by the execution of an agreement which, among other things, should cover the transportation of your linemen and workmen, the movement of construction trains and the joint use H of such stations at St. John."

Mr. McMillan denied the suggestion of trespass, alleging permission from the Minister of Railways. In June, 1917, Mr. Gutelius resigned, and Mr. Hayes was appointed general manager of the Canadian Government Railways, east of the River St. Lawrence. In July, 1917, the matter was taken up between Mr. I McMillan and Mr. Hayes. On Aug. 3, 1917, Mr. Hayes wrote to Mr. McMillan stating the effect of a discussion which he had had with Mr. Pottinger, and adding:

"The foregoing may take your company out of the class of trespassers on the railway property, but I cannot see it at all relieves you of paying reasonable compensation for the privilege you enjoy. As the draft agreement that has been prepared does not seem to provide for these railways a sufficient consideration for the privileges you enjoy we shall be obliged to review and submit a revised proposition for your consideration."

A A revised draft agreement was submitted and discussed for some months, but no agreement was ever completed. Accounts were sent to the appellant from time to time claiming pole rent, but these were never paid. The matter seems to have rested for six or seven years, until March 20, 1924, when Mr. Edwards (representing the Department of Justice of Canada) wrote to Mr. Beatty, the appellant's president, the following letter:

B "I have been instructed by the Department of Railways and Canals to take up with you the question of certain lines of telegraph wires and poles belonging to you which are situate on the lands of the Canadian Government Railway, and which lines extend from the city of St. John to the city of Halifax; from Truro to Sydney, and from Painsie Junction to Point du Chene. I am instructed to inform you that all offers of settlement or otherwise, heretofore made to the Canadian Pacific Rail. Co. or to the Canadian Pacific Telegraph Co. by the government, or anyone on its behalf, are withdrawn and to say that the wire and poles must be removed from off the Government Railways' lands, and that otherwise the said poles and wires will be removed. No time has been fixed within which you must effect this removal, but unless you agree to act at once in the matter, a date will be fixed by the Department of Railways and Canals."

D Some further negotiations took place, but without result, and on Jan. 29, 1926, Mr. Edwards wrote to appellant's solicitor the following letter:

E "Referring to previous correspondence with regard to the demand of the Department of Railways and Canals that the lines of telegraph wires and poles operated by your company on the lands of the Canadian Government Railways be removed therefrom, or satisfactory arrangements made with the department for the rental thereof, I understand that certain negotiations have taken place between officials of your company and of the government, but that it has not been found possible to reach an agreement, and I am instructed, therefore, to inform you that it is the intention of the department to at once proceed with the action outlined in my letter to Mr. Beatty of March 20, 1924."

F On Sept. 15, 1926, the present proceedings were instituted.

G From a consideration of the foregoing facts their Lordships draw the following conclusions as regards the section under consideration: (i) That, although the placing of the poles upon the Intercolonial roadway was originally a trespass by the appellant, the poles have remained upon the roadway for long periods of years; (ii) that the fact that substantially all the appellant's poles were on Intercolonial property must have been known to those who represented the Intercolonial Railway and whose duty it was to report the fact to their principals; (iii) that for many years before action was brought the appellant's telegraph poles must be treated as being on the Intercolonial roadway with the leave and licence of the Crown; and (iv) that consequently (subject to the question of revocation) the appellant was not at the date of suit a trespasser. While their Lordships are in agreement with the view entertained by the Supreme Court that the re-building of the telegraph line upon the Intercolonial roadway was a trespass by the appellant, they feel unable to accept the view that the appellant was a trespasser at the date of suit. The length of time during which the occupation by the appellant was known to and acquiesced in by the Crown, and in respect of which it was claiming to be paid rent, is ignored in the judgment of the Supreme Court. In their Lordships' view, the Crown's knowledge, acquiescence and claim indicated above are destructive of the view that the appellant was a trespasser at the date of suit. Their Lordships are of opinion in regard to the "Main Telegraphic Line," that before the institution of the suit the appellant's telegraph poles and wires were on the property of the Intercolonial Railway with the leave and licence of the Crown. For the moment is reserved the consideration of the questions: (i) Whether such licence was revocable or not; (ii) whether, if revocable, it had been revoked before action or by the institution of the proceedings; and (iii) if revocable but unrevoked, how and in

what circumstances the licence is revocable. These questions can most conveniently be considered in relation to the whole telegraph line, after the special facts regarding the other two sections have been dealt with. This their Lordships now proceed to do.

(b) THE BRANCH TELEGRAPH LINE

This section was constructed in 1893. There had been in 1887 and 1888 some correspondence with the Government Railways when the railway between the Straits of Canse and Sydney was being built, and in March, 1893, the appellant, through Mr. Hosmer, returned to the charge, and applied to the Department of Railways and Canals for permission to build the contemplated telegraph line along the Intercolonial roadway between New Glasgow and Sydney. Mr. Schreiber replied on March 10, 1893:

"There will be no difficulty about this, but it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Co."

Mr. Hosmer, in answer, thanked him for his letter, and asked that the necessary contract be prepared. A contract was prepared and agreed between the parties. It was executed by the appellant, as appears by a letter from the appellant's secretary to the Secretary of the Department of Railways and Canals, dated July 25, 1893, which runs thus:

"I beg to enclose agreement in duplicate, executed by this company providing for the construction of a telegraph line on the Intercolonial Railway between New Glasgow and Sydney. Will you please return one copy to me when executed by the Minister of Railways."

There is no proof that the agreement was ever executed so as to bind the Crown. However that may be, this section of the appellant's telegraph line was constructed along the Intercolonial roadway. Further, we are left in the dark as to the terms of the document which had been executed by the appellant, for it seems to have disappeared with other documents in a fire, and no copy or draft is forthcoming. The agreement with the Western Union Telegraph Co. is in evidence. It is dated Oct. 16, 1889. Its duration was for a term of twenty years from July 1, 1889, and thereafter until the expiration of one year after written notice should have been given, after the close of the said term, by either party to the other of an intention to terminate the same. It contained a clause (cl. 25) which ran thus:

"When this agreement expires, either by lapse of time or pursuant to notice terminating this contract as in the preceding clause stated, the company shall not be required to remove its poles and wires erected under this agreement from the railway property, but all other rights herein granted shall thereupon cease and determine."

It was contended by the appellant that in some way the rights of the parties as to this section were to be determined upon the footing that the provisions of the Western Union agreement applied *mutatis mutandis*, and that, by virtue of cl. 25, the appellant was secured in the permanent enjoyment of the poles and wires upon the railway property as part of an operative telegraph system. Their Lordships are unable to accept this view. The stipulation for "a written agreement similar to the Western Union Telegraph Co." means no more than that the parties were to negotiate on the lines of that document. Even if the stipulation meant that a clause identical with cl. 25 was to apply, their Lordships would feel unable to extract from it the permanent rights which the appellant claims. The true position in regard to this section of the appellant's telegraph line would appear to be this. The appellant had, in strictness, no right to place the telegraph line upon any part of the Intercolonial roadway, before the stipulated agreement had been agreed upon, and executed by the parties. Nevertheless, the appellant did enter upon and occupy the roadway by means of the telegraph line. This action must, their Lordships think, be treated as having taken place with the leave and licence of the Crown, upon the footing that an agreement would be executed by the parties and

A in anticipation thereof. It being impossible to establish either that an agreement binding the Crown was executed, or (if any was executed) what were its terms, the appellant's occupation must, their Lordships think, be treated as continuing to be only that of a licensee.

(c) THE WESTVILLE TELEGRAPH LINE

B This section, which is only some ten miles in length, was built in 1911. On March 20, 1911, Mr. McNicoll, the appellant's general manager, wrote to Mr. Pottinger, then assistant chairman of the Intercolonial Railway, the following letter:

C "I understand that Mr. E. M. Macdonald, M.P., has been in communication with you with regard to giving us right of way for building telegraph line from Truro to Pictou Junction, and that you have decided to grant us this permit on an agreement to be executed by us."

To this Mr. Pottinger replied on April 7, 1911:

D "I duly received your letter dated March 20, with reference to building a telegraph line from Truro to Pictou Junction. What was asked by your telegraph officials was for right-of-way to build a line from Westville Station to Pictou, a distance of 10.59 miles. As I told you verbally when in Montreal, it will be all right for you to go on and build this line, and we will arrange about the agreement at a later period. Instructions have been given to our Track Department to permit the building of the line. There is a long trestle bridge over a portion of Pictou Harbour, and there the wires will have to be attached to the bridge. The position of the poles of the telegraph line on the land and the position of the wires on the bridge can be arranged between the telegraph officials and our roadmaster. There is a telegraph line of the Western Union Telegraph Company along that part of the railway, and your line of course will be placed so as not to interfere with the Western Union line."

E No agreement was ever negotiated, but the appellant proceeded with the construction of the telegraph line and erected it upon the Intercolonial roadway.

F As regards this section it appears to their Lordships that the appellant was allowed to enter and construct the telegraph line upon Crown property pending negotiations which would result in an agreement defining the rights and liabilities of the parties. In these circumstances it is impossible to treat the appellant as having entered as a trespasser. The appellant entered and continued to be there by leave and licence of the Crown. Their Lordships are, accordingly, of opinion G that the correct view to be taken, as a result of the evidence, is that as regards all three sections of the telegraph line the appellant was, before action brought, in occupation by leave and licence of the Crown.

There remain for consideration the three further questions hereinbefore set forth, and with these their Lordships will now proceed to deal.

H (i) Was the licence, under which the appellant was in occupation of Crown land, revocable? Various arguments in favour of irrevocability were presented to the board. One, having special reference to the Branch Telegraph Line, and the effect of cl. 25 of the Western Union Agreement, has already been dealt with. Others were of general application to all three sections of the telegraph line.

I It was said that the Crown encouraged the appellant to build the telegraph line upon Crown property, and that thereby the appellant acquired the right to keep the telegraph line there and use it in perpetuity. In support of this proposition reliance was placed on *Plimmer v. Wellington Corpn.* (1). As their Lordships understand that decision, it was based on contract inferred to have been made between Plimmer and the government. As pointed out in the judgment, Plimmer in erecting his original works on government land with government permission, became an occupant of the land under a revocable licence. Later, by virtue of transactions for the mutual benefit of both sides, from which the board drew the inference of a contract, Plimmer's right to occupy ceased to be revocable and became a perpetual right to occupy and use the land in question for the purposes

of a jetty. In the present case the facts appear to be very different. As regards the Main Telegraph Line there was no encouragement and no mutual arrangement of any kind. There was nothing but original trespass, which, by dint of toleration over a period of time, became an occupation by leave and licence. As regards the other two sections of the telegraph line, the original occupation was permitted by the Crown, but only upon the footing that the rights of the parties would be defined by agreement thereafter to be negotiated. Unless and until such agreements had been negotiated and had become binding, the occupation continued by leave and licence only, and the appellant must be taken to have erected the telegraph line subject to the risk of the permission being withdrawn if no agreement was effected. In their Lordships' view *Plimmer's Case* (1) is far removed in its facts from the present case, and is of no assistance to the appellant.

It was further contended that the Crown was precluded from revoking the licence by reason of some equitable doctrine, which it was alleged was applicable to the case. The doctrine was not very clearly defined, but reference was made to *Ramsden v. Dyson* (2). In the course of the judgments in that case instances are given in which equity will intervene in favour of a litigant as against the legal owner of land. One such: see per LORD CRANWORTH at pp. 140-141; is the case where A builds on land which he thinks is his, but is really B's, and B knowing of A's mistake, encourages A to build either directly or by abstaining from asserting his legal right. In such a case equity will intervene for the protection of A. This, their Lordships understand to have been the equitable doctrine which was invoked by the appellant. It is a doctrine which is sometimes alluded to under the name of "equitable estoppel." Whether there can be any estoppel which is equitable as distinct from legal and whether "equitable estoppel" is an accurate phrase, their Lordships did not pause to inquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying. Thus, in the case put, B's conduct is such that from it may be inferred a contract by B not to disturb A in the possession of the land, or it may amount to a statement by B that the land is A's upon the faith of which A has acted and built.

Reference may properly be made to a case before this board (*Lala Beni Ram v. Kundan Lall* (3)), in which the necessity for contract as a basis for this intervention of equity is made clear. In that case tenants of land had successfully resisted ejectment after the determination of their lease, upon the ground that the land-owners, by standing by and allowing buildings to be erected on the land by the tenants, were estopped from ejecting the tenants. On appeal from the High Court of Allahabad this board was of opinion that the judgments appealed from should be reversed and ejectment decreed. In the view of the board, in order to raise the estoppel which the courts below had enforced against the owner of the land,

"It was incumbent upon the respondents to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation."

Upon the facts of the present case their Lordships can find no foundation for the application of any equitable doctrine in favour of the appellant. There was no mistaken belief by the appellant as to the ownership of or the rights over the Intercolonial property, still less was there any such mistaken belief, which was known to the Crown. There was no conduct on the part of the Crown which induced the appellant to build in the belief that rights in perpetuity would be acquired. There was nothing upon which to ground any estoppel. The facts are all the other way. As already stated, the Main Telegraph Line came on the roadway by way of trespass, the other two sections came there upon the footing that the rights would be subject to and would be defined by written agreements to be

A negotiated between the parties. Their Lordships are of opinion that the appellant's claim that the licence is irrevocable fails, and that the Crown was at liberty to revoke the licence, and so to put an end to the continued existence of the appellant's telegraph line upon the Crown property.

(ii) Was the licence revoked before action or by the institution of proceedings? So far as concerns the alleged revocation before action, this depends upon the construction to be placed upon two documents, namely, the two letters from Mr. Edwards, which are dated March 20, 1924, and Jan. 29, 1926, and which have already been quoted in full. The first-mentioned letter (which does not in terms cover the Westville Telegraph Line) does not, in their Lordships' view, purport to determine the licence. At most it amounts to an intimation that a date will in the future be fixed for the removal of the telegraph line, i.e., it is an intimation that the licence will be put an end to at some future time. The second letter appears to carry the matter no further, as a determination of the licence. The alternative which is mentioned in the opening sentence confirms the view that the first letter was not intended to be a notice determining the licence. All that the second letter does is to state the intention of the department at once to proceed with the action outlined in the first letter, namely, fix a date. No date was ever fixed. In these circumstances their Lordships are of opinion that the licence had not been determined before action brought.

The question next arises whether the institution of the proceedings ipso facto determined the licence. The majority of the Supreme Court apparently thought not, because as regards the Westville Telegraph Line (which is included in the information) their decision was based upon the view that the Crown had no cause of action when the information was filed. The Chief Justice of Canada thought otherwise. The point does not appear to have been taken before the trial judge; at all events it is not referred to in his judgment. Neither is the point taken in the respondent's factum before the Supreme Court. The determination of this point involves the consideration of the third question, namely:

(iii) If the licence is revocable but unrevoked, how and in what circumstances the licence is revocable? Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation. For this proposition reference may be made to *Cornish v. Stubbs* (4) and *Mellor v. Watkins* (5), in the latter of which cases BLACKBURN, J., states that a person giving a revocable licence "is bound to give the licensee reasonable notice." When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence *brevis manu* at the will of the licensor. But the exercise of the rights may have involved the licensee in obligations in other directions, which the determination of the licence would disable him from fulfilling, unless the licence were determined after a notice sufficient, in point of time, for the making of substituted arrangements. In such circumstances the licensee would, their Lordships conceive, be entitled to breathing space sufficient for this purpose. The case before the Board would appear to be peculiarly a case in which grave injustice might ensue if the Crown were at liberty by the mere initiation of legal proceedings to determine summarily the rights of the appellant, and turn the appellant's occupancy into trespass. For the appellant is not the only one concerned; the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest. It appears to their Lordships that this is a case in which the licence can only be effectively ended, after notice has been served upon the appellant determining the licence on such a specified date in the future, as will give the appellant an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and

wires elsewhere than on Crown property. Their Lordships are, accordingly, of opinion that the appellant's licence was not determined by the institution of the proceedings. A

In the result, therefore, the position is that the appellant is in occupation as a licensee whose licence is renewable, but unrevoked. Inasmuch as the Crown, by amendment, asked for a declaration of the appellant's rights, a proper declaration of those rights should be made; but in all other respects the action fails and is at an end. There is nothing left to try. Their Lordships feel little doubt that as between the Canadian Pacific Rail. Co. and the Crown, suitable contractual arrangements will be made which will obviate further litigation. If, however, this anticipation proves to be ill-founded, it will be for the Crown to determine the licence by service of a notice the sufficiency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice. Inasmuch as their Lordships are of opinion that no irrevocable licence exists, and that no permanent interest was vested in the appellant, other points raised on behalf of the Crown do not appear to call for comment or decision. B C

The result of the appeal may now be stated. It succeeds in part and fails in part. It succeeds in so far as it has established that the appellant is not at the present time a trespasser in respect of any section of the telegraph line; but it fails in so far as it sought to establish that as regards the whole telegraph line the licence was irrevocable. Neither the order of the Supreme Court nor the order of the trial judge can stand. The order of the Supreme Court should be discharged and the order made by the trial judge should be varied as hereafter indicated. As regards costs, their Lordships feel that although the action has been fruitful to the extent of a declaration defining the appellant's rights, yet the main costs of the trial were incurred in relation to the Crown's principal contention, namely, that the appellant was, and always had been, a trespasser. Upon that issue the Crown has failed. Their Lordships think that justice will be done by ordering the Crown to pay four-fifths of the appellant's costs of the action. As regards the costs of the appeal to the Supreme Court and before the Board, their Lordships are impressed by the fact that the appellant's primary claim, which necessarily occupied much of the argument, was for a right in perpetuity, and that this claim has failed. They are of opinion that there should be no costs of the appeals to the Supreme Court or of the appeal here. For the reasons above appearing their Lordships are of opinion that the order of the Supreme Court should be discharged, and the order of the trial judge varied in manner following: (i) By omitting from the second declaration the words "and has from the respective dates when the several portions thereof were originally placed thereon been"; (ii) by omitting the last two paragraphs thereof; and (iii) by ordering that the plaintiff do pay to the defendant four-fifths of the defendant's costs of action to be taxed. There will be no costs of the appeals to the Supreme Court or of the appeal before this Board. Their Lordships will humbly advise His Majesty accordingly. D E F G H

Order discharged.

Solicitors: *Blake & Redden; Charles Russell & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re KATHERINE ET CIE, LTD.

[CHANCERY DIVISION (Maugham, J.), July 29, 30, 1931]

[Reported [1932] 1 Ch. 70; 101 L.J.Ch. 91; 146 L.T. 226;

[1931] B. & C.R. 121]

Company—Winding-up—Disclaimer of onerous property—Objection by lessors—Discretion of court—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 267, s. 296.

By s. 267 (1) of the Companies Act, 1929, where any part of the property of a company which is being wound-up "consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company . . . may, with the leave of the court . . . disclaim the property." By sub-s. (4) "the liquidator shall not be entitled to disclaim any property under the section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the court, given notice to the applicant that he intends to apply to the court for leave to disclaim . . ." By s. 296 of the Act of 1929, when a company is dissolved, all property and rights vested in the company are deemed to be bona vacantia. The liquidator of a company which was being voluntarily wound-up and which held a lease of certain property applied for an order that he be at liberty to disclaim the lease. The lessors, who were relying on guarantors for the payment of rent and performance of the covenants, opposed the application.

Held: the court, in the exercise of its discretion under s. 267 of the Act of 1929, might properly balance the advantages and disadvantages of a disclaimer to be gained by the liquidator in the liquidation of the assets and by persons affected by the disclaimer, and the fact that the property in question was now deemed to be bona vacantia did not affect the conclusion that the court's refusal to allow the disclaimer would not prejudice the liquidator in the winding-up; the lessors would be seriously injured if the disclaimer was allowed; and, therefore, the court, in the exercise of its discretion, would refuse to allow it.

Re Clarke (1) (1881), 17 Ch.D. 759, distinguished.

Re Müller (2) (1880), 15 Ch.D. 289, considered.

Notes. Section 267 and s. 296 of the Companies Act, 1929, have been replaced by s. 323 and s. 354 respectively of the Companies Act, 1948, for which, see **H 3 HALSBURY'S STATUTES** (2nd Edn.) 705, 728.

As to disclaimer of onerous property, in the winding-up of a company, see **6 HALSBURY'S LAWS** (3rd Edn.) 686-689, paras. 1365-1371; and for cases on the subject, see **10 DIGEST (Repl.)** 917-919, 6264-6277.

Cases referred to:

- (1) *Re Clarke, Ex parte East and West India Dock Co.* (1881), 17 Ch.D. 759; 50 L.J.Ch. 789; 45 L.T. 6; 30 W.R. 22, C.A.; 4 Digest 528, 4834.
- (2) *Re Müller, Ex parte Buxton* (1880), 15 Ch.D. 289; 43 L.T. 183; 29 W.R. 28, C.A.; 4 Digest 230, 2158.
- (3) *Stacey v. Hill*, [1901] 1 K.B. 660; 70 L.J.K.B. 435; 84 L.T. 410; 49 W.R. 390; 17 T.L.R. 311; 45 Sol. Jo. 325; 8 Mans. 169, C.A.; 5 Digest 951, 7793.
- (4) *Re Panther Lead Co.*, [1896] 1 Ch. 978; 65 L.J.Ch. 499; 44 W.R. 573; 12 T.L.R. 327; 40 Sol. Jo. 437; 3 Mans. 165; 31 Digest (Repl.) 570, 6910.

- (5) *Hastings Corpn. v. Letton*, [1908] 1 K.B. 378; 77 L.J.K.B. 149; 97 L.T. 582; 23 T.L.R. 456; 15 Mans. 58; 10 Digest (Repl.) 1104, 7627. A

Motion.

By a lease dated June 1, 1928, made between Charles Frederick Coni and Alfred Newell Golding Coni, as lessors, and Katherine et Cie, Ltd. (hereinafter referred to as "the company") as lessees, and Katherine Helen Adamson and Helen Myrtle Dorothy Kellett, as guarantors, the lessors demised certain premises to the company for the term of eight and a quarter years from March 25, 1928. The guarantors, in consideration of the acceptance by the lessors at their request of the company as tenant of the premises, jointly and severally guaranteed the punctual and faithful observance and performance by the company of the covenants and conditions in the lease and due payments of the rent. Also the guarantors jointly and severally undertook to be responsible to the lessors as sureties for the company for the payment by the company of all the sums of money, costs, damages and expenses that might become due to the lessors from the company by reason of the tenancy. A resolution was passed on Jan. 9, 1931, by the company for voluntary winding-up and also for the appointment, as liquidator, of Edgar Joseph Grande. On June 23, 1931, an originating summons was issued, and the liquidator applied for an order that he be at liberty to disclaim the lease. The lessors, who were relying on the guarantors for the payment of the rent and performance of the covenants, opposed the application, and the registrar made no order, except that the liquidator should pay to the lessors and to Helen Myrtle Dorothy Kellett their respective costs of the application. The liquidator appealed against the registrar's decision, and on July 29, 1931, a motion came before the court. B C D

C. N. Tindale Davis for the liquidator. E

McCrinkle for the respondents, the lessors.

MAUGHAM, J., stated the facts and continued: The company is insolvent, and the lessors, who have the benefit of a substantial guarantee so long as the lease is subsisting, object to leave being granted to the liquidator to disclaim the lease. If leave be granted, the lease will be at an end, and in *Stacey v. Hill* (3) it has been held that, where the trustee in bankruptcy of a lessee disclaims the lease, the term is determined as between the lessor and the lessee, and, therefore, since no rent can subsequently accrue due under the lease from the lessee, the guarantors of the rent are freed from liability. The lessors say that the result of the disclaimer, if allowed, would be a loss of some thousands of pounds. If the lease is not disclaimed, the lessors can prove for rent and can enter and claim for future rent and breaches of covenant: *Re Panther Lead Co.* (4). If disclaimer takes place, they may prove in the liquidation as a debt to the amount of the injury sustained. The anticipated dividend is of small amount. F G

The disclaimer section of the Companies Act, 1929, is s. 267 (4). It is new, and reproduces with modifications s. 54 of the Bankruptcy Act, 1914. Before the coming into force of the Companies Act, 1929, there was no right of disclaiming property, however onerous, in the winding-up of a company. There are, however, differences between the sections applicable in the case of the liquidation of a company and in the case of a bankruptcy. The former case differs from that of a bankruptcy, especially in this respect, that the winding-up of a company does not effect a *cessio bonorum*, and that the property of the company remains vested in the company as before; whilst in a bankruptcy the property of the bankrupt vests in the trustee. It follows that a trustee in bankruptcy, if he does not disclaim the property, is, or may be, personally liable, whereas in the liquidation of a company property not disclaimed by the liquidator remains vested in the company and the liquidator does not incur the smallest liability. It should be observed that s. 267 of the Companies Act, 1929, requires the leave of the court, and that it is a new provision. Companies have been wound-up ever since 1862 without such a section, and without any very serious difficulty. It is, I think, clear that the leave of the court may be refused, and that the matter is really one for the discretion of the H I

A court to be exercised on legal grounds. Counsel for the liquidator, in his admirable argument, has frankly faced the point, and has contended that the reason why, in the present case, the court cannot properly refuse to consent to a disclaimer is because the interests of the liquidation are paramount, and, accordingly, the court has no right to consider whether the operation of a disclaimer will affect the interest of third parties. He bases his contention on *Re Clarke, Ex parte East and West India Dock Co.* (1), but it is to be remembered that, at the time of that decision, the Bankruptcy Act, 1869, was in force, and that it differs widely from the more modern Bankruptcy Acts. Also, in that case, the objection to disclaimer was made by persons who had no rights as such in the administration, and who were persons only indirectly interested in it. It appears from the facts that the disclaimer in that case was opposed by certain mortgagees who, it was suggested, would not be affected by the bankruptcy, and by original landlords who had no claim against the bankrupt's estate, inasmuch as the original lease had been assigned to the bankrupt. LORD SELBORNE, L.C., observed (17 Ch.D. at p. 764):

"On the face of the section [that is, s. 23 of the Bankruptcy Act, 1869] it appears to us that the power given by it is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, looking at that object alone, the disclaimer ought to be allowed, the court would be introducing considerations foreign to the purpose of the legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it. . . ."

That dictum, however, does not apply to the objections of landlords with a right of proof. I must further bear in mind that the Court of Appeal, still dealing with the Bankruptcy Act, 1869, had only a few months before, in *Re Müller, Ex parte Buxton* (2), taken a view which is not easily reconcilable with that of LORD SELBORNE. There a lease had been granted to one Müller who, on his bankruptcy, had deposited it with one S. C. Buxton as security for the repayment of moneys which Buxton had lent to him. There was, apparently, only a deposit of the lease, and the mortgage was, therefore, an equitable mortgage. The trustee in the bankruptcy of Müller desired to disclaim the lease, and the effect of the disclaimer would have been to destroy Buxton's security. Buxton opposed the disclaimer, and ultimately the question for decision was whether he should enter into a covenant of indemnity as an assignee. He insisted that he was not bound to indemnify the trustee in bankruptcy. By his notice of appeal, the appellant asked that the trustee might be authorised and directed to assign all the interest acquired by him as trustee in the property comprised in the lease to Buxton. JAMES, L.J., said (15 Ch.D. at p. 291):

"If the equitable mortgagee intercepts the trustee's right to disclaim, a right which is given to him by statute subject to the equitable rights of other persons, he must, like any other person who claims the property, take it on the usual terms, i.e., he must covenant to indemnify the trustee against liability under the lease. The trustee will not get the benefit of a disclaimer; he will assign as a continuing lessee up to the time of the assignment, and as he will thus retain a liability which he would otherwise have got rid of, the assignee must indemnify the trustee against the consequences of his retaining the lease up to the date of the assignment."

I am not sure that those two statements of the law are reconcilable. WILLIAMS ON BANKRUPTCY, 13th Edn. at p. 343, says, in reference to those two cases:

"It was held, under the Act of 1869, that in determining whether leave should be given to a trustee to disclaim the court ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of the bankrupt's estate, and ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties (*Ex parte East and West India Dock Co.* (1)). This

case seems inconsistent with the earlier case of *Ex parte Buxton* (2), where the court seems to have thought that leave to disclaim ought not to be given to the prejudice of an equitable mortgagee if he was willing to take an assignment of the legal estate in the lease, and to give the trustee a proper and sufficient indemnity." A

However that may be, it seems to me that the case of a disclaimer in a liquidation is very different from that of a disclaimer in a bankruptcy, and, whatever may be the overriding considerations which, in *Re Clarke, Ex parte East and West India Dock Co.* (1), caused LORD SELBORNE to take the view that the injury of persons not directly interested ought not to be borne in mind, I see no reason why, exercising my discretion under s. 267 of the Companies Act, 1929, I ought not to consider matters of that kind. I would add that sub-s. (2) of s. 267 tends to show that disclaimer is not intended to affect the rights and liabilities of third persons. B
C
In my opinion, the court may properly balance the advantages and disadvantages of a disclaimer to be gained by the liquidator in the liquidation of the assets and by persons affected by the disclaimer.

It is true that the consequences of a dissolution have been changed since the year 1928, that is, since s. 296 of the Companies Act, 1929, came into force. That section provides : D

"Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections of the Act, be deemed to be bona vacantia and shall accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, and shall vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall." E

Before that section came into force it had been held that, on a dissolution, a lease vested in the company came to an end, and that the property reverted to the lessor : *Hastings Corpn. v. Letton* (5). The fact that the property in the present case is now deemed to be bona vacantia does not affect the conclusion that the refusal of the court to allow the disclaimer will not prejudice the liquidator in winding-up the affairs of the company and concluding the liquidation in due course. F

On the whole, having regard to the fact that the lessors—who are persons entitled to appear—will be very seriously injured, I exercise my discretion by refusing to allow this disclaimer and, consequently, I dismiss the appeal. I may add that it was a very proper matter to bring before the court. G

Appeal dismissed.

Solicitors : *Wingfields, Halse, & Trustram; Anstey & Co.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*] H

Re HOOPER. PARKER v. WARD

[CHANCERY DIVISION (Maugham, J.), February 27, March 4, 1931]

[Reported [1932] 1 Ch. 38; 101 L.J.Ch. 61; 146 L.T. 208]

Charity—Graves, vault, monuments, tablet and window—Bequest to maintain “so far as they legally can do so.”

By his will in 1927 the testator bequeathed to his trustees out of pure personalty £1,000, from the income of which to provide “so far as they legally can do so and in any manner that they may in their discretion arrange for so long as may be practicable” for the care and upkeep of certain graves and monuments, a vault, a tablet and a window. The testator died in 1929. On a summons to determine whether the bequest was valid in whole or in part,

Held: the phrase “so far as they legally can do so” being indistinguishable from the phrase “so long as the law for the time being permits,” the trust for the upkeep of the graves, the vault and the monuments was valid for a period of twenty-one years, and, the trust for the upkeep of the tablet and the window being a good charitable gift, the rule against perpetuities did not apply to it.

Pirbright v. Salwey (1), [1896] W.N. 86, followed.

Notes. Distinguished: *Re Compton, Powell v. Compton*, [1946] 1 All E.R. 117. Referred to: *Re Astor's Settlement Trusts, Astor v. Scholfield*, [1952] 1 All E.R. 1067.

As to gifts for monuments and tombs, see 4 HALSBURY'S LAWS (3rd Edn.) 234–236, para. 516; and for cases on the subject see 8 DIGEST (Repl.) 353–354, 313–341.

Case referred to:

(1) *Pirbright v. Salwey*, [1896] W.N. 86; 8 Digest (Repl.) 353, 327.

Adjourned Summons.

By cl. 8 of his will, dated Dec. 8, 1927, H. D. Hooper provided as follows:

“I give and bequeath unto my trustees out of pure personalty the sum of one thousand pounds upon trust that they will invest the same and to the intent that so far as they legally can do so and in any manner that they may in their discretion arrange they will out of the annual income thereof provide for so long as may be practicable for the care and upkeep of the grave and monument in the Torquay cemetery of my dear father and mother and of the vault and monument there in which lie the remains of my said dear wife and two daughters, also the grave and monument in Shotley churchyard near Ipswich where my gallant and only son lies buried and of the tablet in Saint Matthias' Church at Ilsham aforesaid to the memories of my said wife and children and the window in the same church to the memory of my late father. Provided always and I hereby expressly authorise and empower my said trustees that if at any time by capital payments out of such sum of one thousand pounds or investments representing the same they can secure all or any of the objects aforesaid they shall be at liberty to do so. And in that event or events as to the surplus—if any—of such sum and any accumulations of income I give and bequeath the same to the Vicar and Churchwardens of Saint Matthias' Church Ilsham aforesaid for such purposes and for such objects as they in their uncontrolled discretion may determine.”

The testator died on Oct. 16, 1929. This summons was issued by the executors and trustees asking (inter alia) whether the bequest to provide for the care and upkeep of the grave and monument and the vault and monument in the Torquay cemetery, the grave and monument in Shotley churchyard, and the tablet and window in St. Matthias' Church at Ilsham was valid in whole or in part.

Norwood for the summons.

Cleveland-Stevens, K.C., and *C. R. R. Romer* for the vicar and churchwardens of St. Matthias' Church and for the Charity Organisation Society (Torquay).

Wilfrid Hunt for a residuary legatee.

Daynes, K.C., Vaisey, K.C., and G. H. Allen for next-of-kin.

Stafford Crossman for the Attorney-General.

MAUGHAM, J.—This point is one to my mind of considerable doubt, and I should have felt some difficulty in deciding it if it were not for *Pirbright v. Salwey* (1), which, as far as I know, unfortunately, is reported only in the WEEKLY NOTES as follows:

"A testator, after expressing his wish to be buried in the enclosure in which his child lay in the churchyard of E., bequeathed to the rector and churchwardens for the time being of the parish church £800 Consols, to be invested in their joint names, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the enclosure and decorating the same with flowers: Held, that the gift was valid for at least a period of twenty-one years from the testator's death, and semble, that it was not charitable."

That was a decision arrived at by STIRLING, J., after argument by very eminent counsel. The case does not appear to have attracted much attention of the textbook writers, but, so far as I can see, it does not appear to have been commented on adversely, and I shall follow it.

The trustees here have the sum of £1,000 which they have to hold on trust to "invest the same and to the intent that so far as they legally can do so and in any manner that they may in their discretion arrange they will out of the annual income thereof"

do substantially four things: first, provide for the care and upkeep of the grave and monument in the Torquay cemetery; secondly, for the care and upkeep of a vault and monument there in which lie the remains of the testator's wife and daughters; thirdly, for the care and upkeep of a grave and monument in Shotley churchyard, near Ipswich, where the testator's son lies buried; and, fourthly, for the care and upkeep of the tablet in St. Matthias' Church at Ilsham to the memories of the testator's wife and children, and the window in the same church to the memory of his late father. All those four things have to be done expressly according to an arrangement made in the discretion of the trustees, and so far as they legally can do so. I do not think that is distinguishable from the phrase "so long as the law for the time being permits."

Accordingly, following the decision in *Pirbright v. Salwey* (1), I have come to the conclusion that this trust is valid for a period of twenty-one years from the testator's death so far as regards the three matters which involve the upkeep of graves or vault or monuments in the churchyard or in the cemetery. As regards the tablet in St. Matthias' Church and the window in the same church, there is no question but that that is a good charitable gift, and, therefore, the rule against perpetuities does not apply. With regard to apportionment, there is no room for a legal apportionment, because it is left to the discretion of the trustees to arrange how much they will out of this income apply during the twenty-one years to the four objects in question. At the end of the twenty-one years any part which is not applied for the upkeep of the tablet and the window in St. Matthias' Church will, of course, be undisposed of, and will fall, unless some other event happens, into the residue.

Solicitors: *Woodcock, Ryland, & Parker; Cunliffe, Blake, & Mossman; Clayton, Sons, & Fergus; Field, Roscoe & Co.; Treasury Solicitor.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

TOLLEY v. J. S. FRY & SONS, LTD.

[HOUSE OF LORDS (Lord Hailsham, Lord Dunedin, Lord Buckmaster, Lord Blanesburgh and Lord Tomlin), October 30, 31, 1930, March 23, 1931]

[Reported [1931] A.C. 333; 100 L.J.K.B. 328; 145 L.T. 1; 47 T.L.R. 351; 75 Sol. Jo. 220]

Libel—Defamatory meaning—Matter primâ facie innocent—Defamatory by reason of circumstances surrounding publication.

The plaintiff was a champion amateur golfer. In June, 1928, the defendants caused to appear in certain newspapers an advertisement of their chocolate. In the middle of statements about kinds and prices of the chocolate, there appeared a caricature of the plaintiff playing a stroke at golf, with a carton of the defendants' chocolate protruding from his pocket, in the company of a caddie who was holding up packets of the defendants' chocolate. Below this picture there appeared the following verse:

"The caddie to Tolley said: 'Oh, Sir!
Good shot, Sir! That ball, see it go, Sir.
My word, how it flies,
Like a Cartet of Fry's.
They're handy, they're good, and priced low, Sir.' "

The plaintiff brought an action for libel, and alleged as an innuendo that the defendants meant and were understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate, that he did so for gain and reward, that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by those means, and that he had been guilty of conduct unworthy of his status as an amateur golfer. Evidence was given that a golfer who so acted would not be regarded as maintaining his amateur status as a golfer and would be called on to resign from the membership of any reputable golf club.

Held: that which was primâ facie innocent might become capable of a defamatory meaning by reason of the circumstances surrounding its publication; in the present case (LORD BLANESBURGH dissenting) the matter complained of, regarded in vacuo, was innocent, but, by reason of the circumstances in which it was published, it was capable of a defamatory meaning; and there was evidence on which the jury could find that it was defamatory of the plaintiff, who, therefore, was entitled to succeed.

Notes. Referred to: *Byrne v. Deane*, [1937] 2 All E.R. 204; *English and Scottish Co-operative Properties Mortgage and Investment Society, Ltd. v. Odhams Press, Ltd.*, [1940] 1 All E.R. 1; *Hough v. London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31; *Knuppfer v. London Express Newspaper, Ltd.*, [1942] 2 All E.R. 555; *McCulloch v. Lewis A. May (Produce Distributors), Ltd.*, [1947] 2 All E.R. 845.

As to what statements are defamatory, see 20 HALSBURY'S LAWS (2nd Edn.) 395 et seq., and for cases see 32 DIGEST 17 et seq.

Cases referred to:

- (1) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- (2) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 36 Digest (Repl.) 166, 890.

Appeal from an order of the Court of Appeal (GREER and SLESSER, L.JJ.; SCRUTTON, L.J., dissenting), reported, [1930] 1 K.B. 467.

The appellant, the plaintiff in the action, Cyril Tolley, an amateur golf champion, claimed damages from the respondents, J. S. Fry & Sons, Ltd., chocolate manufacturers, in respect of an alleged libel published by the respondents in the "Daily Sketch" of June 20, 1928, and the "Daily Mail" of June 22, 1928. The matter complained of consisted of a caricature of the appellant playing a stroke at golf while a caddie looked on, and below the picture the following limerick:

"The caddie to Tolley said: 'Oh, Sir!

Good shot, Sir! That ball, see it go, Sir.

My word, how it flies,

Like a Cartet of Fry's.

They're handy, they're good, and priced low, Sir.' "

The appellant complained that that advertisement meant that he had agreed or permitted his portrait to be exhibited for the purpose of advertising the defendants' chocolate; that he had done so for gain and reward, and had prostituted his reputation as an amateur golfer for advertising purposes; that he was seeking notoriety and gain by that means; and that he had been guilty of conduct unworthy of his status as an amateur golfer. The respondents admitted publication. They denied the innuendo and said that the words were incapable of constituting a libel. The jury returned a verdict for the appellant assessing the damages at £1,000 and judgment was entered accordingly.

In the Court of Appeal it was held by GREER and SLESSER, L.JJ. (SCRUTTON, L.J., dissenting), that the publication was not libellous, that there was no evidence in support of the innuendo which would entitle the jury to find for the appellant, and that the learned trial judge was wrong in refusing to enter judgment for the respondents. It was held, further, by all the members of the court, that the damages were excessive and that there ought to be a new trial. The appellant appealed.

Rayner Goddard, K.C., H. M. Givven and Lawson Campbell for the appellant.

Norman Birkett, K.C., and Walter Monckton, K.C., for the respondents.

The House took time for consideration.

March 23. **LORD HAILSHAM.**—The plaintiff in this case is a well-known amateur golfer. The defendants are manufacturers of chocolate in various forms. In June, 1928, the defendants published in the "Daily Sketch" and "Daily Mail," newspapers enjoying a large circulation in London and the provinces, a caricature of the plaintiff which represented him in golfing costume having just completed a drive, with a packet of the defendants' chocolate protruding from his pocket, in the company of a caddie who is holding up packets of the defendants' chocolate, and below the caricature was a limerick in the following terms:

"The caddie to Tolley said: 'Oh, Sir!

Good shot, Sir! That ball, see it go, Sir.

My word, how it flies,

Like a Cartet of Fry's.

They're handy, they're good, and priced low, Sir.' "

The caricature and the limerick were surrounded with descriptions of the merits of the defendants' chocolates, and the whole was plainly an advertisement of the defendants' goods.

The plaintiff thereupon brought this action for damages for libel. He did not complain of the caricature or the words as being defamatory in themselves; but the innuendo alleged that the

"defendants meant and were understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate, that he had done so for gain and reward, that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by the means aforesaid, and that he had been guilty of conduct unworthy of his status as an amateur golfer."

A At the conclusion of the plaintiff's case, the defendants submitted that there was no case to go to the jury; the judge overruled this contention and the jury found a verdict for the plaintiff for £1,000 damages. From this decision the defendants appealed, asking for a new trial on the ground that the damages were excessive, and further asking for judgment on the ground that the judge ought to have ruled that there was no case to go to the jury. The Court of Appeal came to the conclusion that the damages were excessive, and that there ought in any event to be a new trial on that ground; but the majority of the court further held that there was no case to leave to the jury and, accordingly, directed that judgment should be entered for the defendants. From this latter decision the present appeal is brought to your Lordships' House. From the foregoing narrative it is plain that in order to succeed, the plaintiff must satisfy the jury that the publication complained of was capable of some, at least, of the meanings attributed to it in the innuendo, and that those meanings were defamatory.

The oral evidence adduced by the plaintiff, apart from his own testimony, was that of a Mr. Storey, an eminent amateur golfer, and Mr. Hobson, a secretary of two well-known golf clubs. Mr. Storey said: "If an amateur golfer lent himself to a scheme for advertising, a great many people would think he was not maintaining his amateur status. It would damage his reputation as an amateur golfer." Mr. Hobson said: "If an amateur lent himself, as a golfer, to the advertisement of people's goods, I think he would be called on to resign the membership of any reputable club." No evidence was called to contradict this testimony; and it seems to me that, if the jury accepted that evidence, they were bound to reach the conclusion that, if the publication conveyed the meaning that the plaintiff had lent himself to the defendants' advertising scheme, it was defamatory. There remains, however, the question whether the publication was capable of bearing that meaning. If it was capable of such a meaning, then it seems to me that the judge was bound to leave the case to the jury. The case is unusual in that the defamatory innuendo does not depend upon the words used of the plaintiff, but solely upon the circumstances in which the publication takes place. The argument for the defendants was that there was no evidence called to prove that well-known persons were in the habit of allowing their names to be used for advertising purposes, and that in the absence of such evidence a jury could not be allowed to reach the conclusion that the publication impliedly represented that the plaintiff had given such permission. I gravely doubt whether any such evidence was necessary. The question here does not depend upon a state of facts known only to some special class of the community, but to the inference which would be drawn by the ordinary man or woman from the facts of the publication. It is always difficult to determine with precision the amount of judicial knowledge which is permissible to a judge or jury; but I am not satisfied that it would not be open to a jury acting on their own knowledge as ordinary citizens to assume that no reputable firm would have the effrontery and bad taste to take the name and reputation of a well-known man for an advertisement commending their goods without first obtaining his consent. But if evidence was necessary, I think it is to be found in the correspondence between the defendants and their advertising agency, which was put in at the trial. No objection was taken either in the courts below or at the Bar of your Lordships' House, to the admissibility of this correspondence as a correct statement of the opinions of the writers. From this correspondence it appears that about six months before the date of the publication complained of, the defendants had been considering the possibility of using the names of a number of well-known men and women in various walks of life, to commend their goods and advertise their merits. Apparently, they had been conscious from a very early date that some of the persons with whom they were proposing to take this liberty would be likely to object; and counsel's opinion was taken as to whether each individual caricature could be regarded as libellous. The defendants expressed themselves as unwilling to allow their agents to ask the consent of the persons whose names they were proposing to use because, as they said, they felt that this was "rather bad form."

Why it should be regarded as bad form to ask the consent of any individual to the use of his name in this manner, and yet unobjectionable to use his name without his consent, I am unable to understand. However, from the correspondence it appears that a number of the proposed caricatures were ruled out as being libellous, but that the caricature of the plaintiff was passed by counsel as not being in itself defamatory.

While this correspondence was proceeding, there was a suggestion that Mlle. Suzanne Lenglen's caricature should be used in the course of the campaign. Mlle. Suzanne Lenglen is a well-known professional lawn tennis player. Early in June, 1928, the defendants suggested that Mlle. Suzanne Lenglen should be omitted, and that either Miss Helen Wills or Miss Betty Nuthall should be substituted. Miss Wills and Miss Nuthall are well-known amateur lawn tennis players. To this suggestion the defendants' advertising agents replied on June 4 in the following terms:

"You return the Suzanne Lenglen lay-out with the suggestion that we should feature either Helen Wills or Betty Nuthall instead. We feel that there are several things which make this undesirable. Firstly, both Betty Nuthall and Helen Wills are amateurs, and in tennis circles even more than in golf circles the amateur status must be very carefully guarded, hence if Cyril Tolley has any quarrel with us, it is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes."

It seems to me that this letter is a plain intimation by the defendants' own advertising agents that the natural result of using the names of these two ladies for the purpose of the defendants' advertising campaign would be to impugn their amateur status, and that for this reason it would be undesirable to use their names, although it would be safe to use that of Mlle. Lenglen, who is a professional. This can only be on the ground that the inference which would naturally be drawn from the appearance of such an advertisement would be that the persons whose names were used had consented to their use and had consented on such terms as were inconsistent with their position as amateurs. I think the jury were entitled to take this letter into account in determining what was the natural inference to be drawn from the publication complained of, and that there is to be found in this letter evidence entitling the jury to hold that the publication of the plaintiff's name as part of the defendants' advertising campaign did imply to the ordinary reader that the plaintiff had lent himself to the defendants' advertising scheme. If so, there was a case to go to the jury. Both sides are agreed that the summing up was not open to criticism, and the finding in favour of the plaintiff ought not, therefore, to be disturbed.

As to the damages, there has been no appeal from the decision of the Court of Appeal that these were excessive, and that a new trial is necessary. Whether or not the new trial should be limited to the question of damages, or whether it should extend to a re-trial of the whole case, is a matter of discretion. I cannot see in the facts of this case any ground for saying that the amount of the damages awarded is so excessive as to warrant the inference that the jury took a biased or mistaken view of the whole case. The imputation against the plaintiff was a most offensive one; it was given the widest possible publicity; when the defendants were given an opportunity to apologise and to contradict the imputation that the plaintiff had consented to the use of his name, they refused to avail themselves of it; and I think that the case is one in which a jury might properly give very substantial damages. I accept the decision that £1,000 is too much, but unless your Lordships are prepared to hold that in every case in which excessive damages are given there must be a re-trial of the whole case, I cannot see in the present case any sufficient ground for making such an order. In my opinion, the new trial should be limited to the assessment of damages. With regard to costs, the plaintiff must have the costs of the trial; in the Court of Appeal the defendants succeeded in their motion for a new trial, and in the result failed in their motion for judgment; I

A think each party should bear his own costs of that appeal. The plaintiff has succeeded in his appeal to your Lordships' House and the defendants must pay the costs. I move, your Lordships, accordingly.

B LORD DUNEDIN.—The sole question raised by this appeal is whether the case ought to have been withdrawn from the jury by the judge, and judgment entered for the defendants. It has been stated again and again, and is not in dispute, that the question for the judge is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury, if the judge so rules, to say whether it has that meaning.

C The most authoritative pronouncement on actions of this sort, because it is a judgment of this House, is to be found in *Capital and Counties Bank v. Henty* (1). Both parties in this case have appealed to it as an authority in their favour. I think the ruling canon in that case is to be found in the judgment of Lord SELBORNE, L.C. That was a case where, as here, the mere words used were not libellous. But Lord SELBORNE then proceeded to inquire what were the circumstances in which the document was published. In that case he held the circumstances did not and could not lead to any libellous imputation. The circular was directed to Henty's customers alone, and there were quite innocent reasons which would justify the circular. But he pointedly said that if the circumstances had been otherwise, if the circular had been placarded up or published to the world at large the effect might have been quite otherwise. Now, applying this method of reasoning to the present case, I find that the caricature of the plaintiff, innocent itself as a caricature, is so to speak embedded in an advertisement. It is held out as part of an advertisement so that its presence there gives rise to speculation as to how it got there, or in other words provokes in the mind of the public an inference as to how and why the plaintiff's picture, caricatured as it was, became associated with a commercial advertisement. The inference that is suggested is that the consent was given, either gratuitously or for a consideration, to its appearance. Then it is said, and evidence on that point was given and not cross-examined to, that, if that were so, the status of the plaintiff as an amateur golfer would be called in question. It seems to me that all this is within the province of a jury to determine. The idea of the inference in the circumstances is not so extravagant as to compel a judge to say it was so beside the mark that no jury ought to be allowed to consider it.

G I come to this conclusion on a consideration of the advertisement alone, explained with the evidence of the golf players and the golf secretary. There are here two separate propositions: (i) Would the caricature associated with the advertisement admit of a reasonable inference that the plaintiff had assented to be so depicted? That depends on the view taken of the picture, of its surroundings, and of its use. (ii) If that inference were drawn, would it be deleterious to the plaintiff's position as an amateur golfer, and do him harm? That depends on the evidence of the golfers. A great deal of argument was directed to the terms of the letter of June 4, which has been quoted by his Lordship on the Woolsack. I do not consider that to be material to the question before us. It may well have influenced the jury in coming to the verdict they did. For, to my mind, it shows clearly that the general proposition that amateur status might be called in question by association of an amateur with an advertisement was well before the eyes of the defendants and their advisers. But we are not concerned at present with the justice of the verdict, only with the question of whether there was a case for the jury to consider. I agree with the motion proposed.

I LORD BUCKMASTER.—If the advertisement, the subject of the alleged libel, were issued with the assent of the appellant, the evidence of Mr. Storey and Mr. Hobson shows that such conduct would seriously injure his position in golf clubs and as an amateur golfer. This evidence was not made the subject of challenge by cross-examination nor of dispute by rival evidence and, indeed, is in agreement with common experience. The whole question, therefore, is whether the advertise-

ment itself is capable of the inference that such assent either voluntarily or for reward had been obtained before its publication. Upon the face of it there is no statement to that effect and evidence to show that such was the reasonable inference was, I think, rightly rejected, for, if admitted on one side, evidence to contradict it must equally have been admitted on the other. The question, therefore, is whether the judge was bound to say that the publication was incapable of this meaning. I do not think that he was. All the circumstances of its issue must be considered and the first is that the picture is not a mere caricature, it is an advertisement, and it seems to me the question of whether a well-known and respectable trader would be assumed to have the effrontery to use a man's portrait and his reputation to advertise goods without his assent is exactly the class of question on which the opinion of a jury might well be invoked. If one man calls another a thief without more it might be vulgar abuse and not actionable, but if there are circumstances from which it might properly be inferred that, goods having been stolen, the man of whom the words were spoken was pointed to as the thief the words at once become actionable and it would be open to the jury to consider whether in the circumstances that was their true meaning.

In this case there is also some further help to be obtained from letters that passed between the defendants and the advertising agents. The letter referred to by SCRUTTON, L.J., of June 4, 1928, is certainly very significant. There had been a suggestion made that Miss Helen Wills or Miss Betty Nuthall should be substituted for an advertisement of which Miss Lenglen was the principal figure. The agency points out that this is very undesirable for the following reasons :

"Firstly, both Betty Nuthall and Helen Wills are amateurs, and in tennis circles even more than in golf circles the amateur status must be very carefully guarded, hence if Cyril Tolley has any quarrel with us it is more likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes."

It is impossible to read this letter without realising that the advertising agency were well aware that such advertisement might affect the amateur status of people both in golf and in tennis circles, and it is obvious that this can only happen if the advertisement suggested that the persons caricatured had assented to its publication. It is also worthy of notice that in the letter of the plaintiff's solicitors of March 14, 1929, after the proceedings had been started, an offer was made in the following terms :

"That if your clients will publish, in the same newspapers as the advertisement complained of appeared, a statement that such advertisement was inserted without Mr. Tolley's knowledge or assent, and that he, Mr. Tolley, received no payment directly or indirectly for the use of his name, our client will then be prepared to agree to an order staying proceedings, the defendants paying the taxed costs up to date."

To which the solicitors for the respondents replied offering a limited publication of a statement to the effect that the plaintiff had received no remuneration and adding that no one could think that remuneration had been paid. But they made no reference whatever to the suggestion that they should say the advertisement was without Mr. Tolley's knowledge or assent. The plaintiff's solicitors again wrote on May 14 and referred only to the question of remuneration, but their first letter was explicit, and the refusal to accept the statement lent strong colour to the suggestion that the publication in itself suggested assent, and that the defendants were not particularly willing to let the world know that such assent had not been obtained. The evidence to which I have referred does not depend upon the receipt of money, but on the fact that an amateur had lent himself to the advertisement of other people's goods. I think, therefore, there was sufficient for the jury to consider, and if that be so, their verdict, excepting as to amount, is unassailable. Upon this latter point the Court of Appeal have held that the damages are so unreasonable that on this ground alone a new trial is justified. This conclusion

A has not been made the subject of appeal, and upon that head, therefore, the new trial must be held, though I do not think it right that it should be assumed that the damages ought to be nominal or trivial. Substantial wrong has been done to the plaintiff and not one which is technical and insignificant.

LORD BLANESBURGH.—In this case, with no sympathy whatever for the respondents in the predicament in which they have become involved, I agree with GREER, L.J., and SLESSER, L.J. The appellant, in my judgment, failed at the trial to bring home to the respondents any actionable wrong. He made no case against them fit for the consideration of the jury. At the close of the evidence it had become apparent as it seems to me that the only reputation blunted by the publication of this caricature was that of the respondents responsible for it.

C The appellant in his evidence stated that he did not find anything offensive in the picture. Presumably that was his impression all along. It surprises me, but it suggests a sufficient explanation for these proceedings. Just because the appellant deemed the caricature inoffensive, so also might he suppose that the golfing world when they saw it would be tempted to conclude that he had consented to it, if no more. Hence this action. The respondents' advisers must have been D strongly tempted to challenge at the trial this charitable view of their clients' work. Challenge was so easy. But, of course, there were difficulties in their way and the forensic temptation was resisted. They did not contest the appellant's view of their clients' advertisement. But, nevertheless, that view was, I am convinced, profoundly mistaken. SCRUTTON, L.J.'s description of this thing is surely not a whit too severe. The caricature is a piece of offensive vulgarity, so vulgar indeed—

E and this is, to my mind, the fatal obstacle to the appellant's success in these proceedings—that it is almost beyond reason that anyone knowing anything of the appellant as he and his record were disclosed at the trial could for a moment have supposed or even suspected that he had had anything whatever to do with its publication. That publication was surely only another instance of the toll levied on distinction for the delectation of vulgarity. If the appellant's dissociation from

F the publication was thus apparently complete, and no witness was called to contest that view or to affirm the contrary, then the appellant's case as hitherto presented by him is at an end. For it is admitted that the caricature, vulgar though it be, is not in itself actionable. Had its subject been a distinguished statesman it seems to be agreed that it would have remained innocent. So, I suppose, if a great

G scientist or a scholar or a captain of industry had been enlisted, in like manner, into the service of chocolate. But it is, so it is suggested, defamatory of the appellant because he is a prominent amateur golfer. Upon him the caricature is a serious libel actionable as such. One naturally asks why. It seems anomalous that for some hidden reason it should be defamatory of a man in that character, while it would have remained legally harmless at the instance of these other persons not less well known and eminent. The question is searching because it

H has met with what I cannot help thinking is a somewhat confused answer. It is defamatory of the appellant, so it is said, because it is a publication calculated to imperil his amateur status. Again one asks why—and the answer is because it imports that he consented to its publication or was paid to allow it—and expert evidence is called to show that if such had been the fact he would have forfeited his amateur status and might have been required to resign from the golf clubs to

I which he belongs. The answer seems inconclusive, if not irrelevant. The fact that the consequences to an amateur golfer would have been so immediate and serious seems to supply a convincing reason why consent to such a publication should of all men not be imputed to him. If the expert evidence was called for the purpose of quantifying damage, how irrelevant it was to the case then being presented by the appellant. He actually appeared before the jury as the amateur golf champion in the year succeeding the publication of the caricature. Further, is it not obvious that no action in relation to his amateur status could have been taken against the appellant before his conduct in relation to this publication had

been challenged by some responsible authority? That it never was so challenged I assume. There was no reference at the trial to anything of the kind. But if it had been and if in answer he had declared, as I doubt not he would in terms appropriately indignant have declared, that not only had he never consented or been asked to consent to the publication, but that on the contrary he strongly resented the liberties taken with his name and personality, then there could have been no end to the challenge except an apology for having made it. As it seems to me, therefore, on the only case presented by the appellant, the caricature being per se not actionable—there was nothing left for the jury to consider. A B

But, my Lords, when I find that the jury awarded the appellant £1,000 damages, when there was, so far as I can see, no evidence, on the case presented, properly to instruct any damages at all, the conclusion is inevitable that if the jury were not merely venting their displeasure upon the respondents they were considering and adjudicating upon a very different case, not suggested even in the appellant's evidence and in no way proved. C

That case was, as I followed learned counsel, really implicit in his argument at your Lordships' Bar. It may, perhaps, thus be stated. There is a widespread belief, well or ill-founded, that among some gentlemen cricketers, amateur lawn tennis players, and other amateur athletes, including golfers, a practice obtains to utilise and exploit their amateur status for reward by, for example, assisting advertisement campaigns or pushing by the use of their name and personality the sale of proprietary articles, and that the respondents' caricature was such as falsely to represent to the public that the appellant was one of these athletes whose amateur status is believed to be a mere masquerade. I cannot doubt that such an allegation, if made and proved, would have amounted to a serious imputation on the honour of the appellant, and, not being justified, might well have instructed exemplary damages. But there is nothing in the caricature itself to suggest all that or any of it. In the old days an averment that the libel was published to people who knew of that belief would have been essential. The legislature has rendered it no longer necessary to set out on the record the facts and the colloquium necessary to support an innuendo. They are now only matter of proof at the trial, but the principle remains: per LORD BLACKBURN in *River Wear Comrs. v. Adamson* (2), and see also *Capital and Counties Bank v. Henty* (1). D E F

My Lords, there was no evidence at all adduced on this subject. None is supplied as I read it by the correspondence to which reference has been made. The appellant himself was the obvious witness on such a topic, and, while one may respect his reticence upon a matter so delicate, the gratification of a quite natural reserve is not to be purchased at the respondents' expense. Had evidence on the subject been tendered, the limits of this alleged belief might through cross-examination have been set. Did it get as far as a vulgar caricature like this; did it go beyond a letter or a photograph, signed perhaps, and in point of attractiveness not more truthful than was necessary? In this matter were amateur golfers ever even suspect? It would have been interesting to ascertain the limits of the alleged belief. But neither the belief nor its limits were expressed or made the subject-matter of evidence; and I have, I think, said enough to show that neither could have been within the judicial knowledge of the judge or within the worldly experience of a Middlesex common jury. If, therefore, this was the real case on which that jury adjudicated, such a case was entirely beyond their competence. There was no evidence upon it fit for submission to them for consideration or at all, and I reach from this approach also the conclusion that the respondents were entitled to judgment. I would dismiss the appeal. G H I

LORD TOMLIN.—The only question in this appeal is whether the learned trial judge was wrong in allowing the case to go to the jury. The law is not in doubt. It is for the judge to determine whether the writing or picture complained of is capable of a defamatory meaning and in this connection it is to be observed that that which is *prima facie* innocent may become capable of a defamatory meaning

A by reason of the circumstances surrounding its publication. If the judge determines that the writing or picture is capable of a defamatory meaning it is for the jury to say whether it is in fact defamatory. Here the thing complained of is a drawing in the nature of a caricature of the appellant, a well-known amateur golfer, with some added letterpress and other features establishing the identity of the person represented.

B remains whether it is capable of a defamatory meaning by reason of the circumstances surrounding its publication. It has been published by the respondents, a commercial company, as part of an advertisement used for promoting the sale of their goods. Having regard to the evidence (apart altogether from the correspondence between the respondents and their advertising agents) it is not, in my opinion, possible to say that the matter complained of in the circumstances of this case, and in the environment in which it appeared, might not have given rise in reasonable minds to the inference that the appellant had assented to this publication.

C Further, there was evidence that such an inference might be harmful to the appellant in view of his position as an amateur golfer. Upon this view of the matter I think the trial judge was right in not withholding the case from the jury, and I agree with the motion proposed.

D *Appeal allowed.*
Solicitors: *Cohen & Cohen; Pritchard, Englefield & Co., for Osborne, Ward, Vassall, Abbott & Co., Bristol.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

E

F

Re HAYDEN. PASK v. PERRY

[CHANCERY DIVISION (Luxmoore, J.), June 14, July 16, 1931]

[Reported [1931] 2 Ch. 333; 100 L.J.Ch. 381; 146 L.T. 303]

Will—Real estate—Gift of real estate to a class “or their issue”—Estate tail—Words of limitation—“Or” to be read as “and.”

G

By his will the testator bequeathed rents of some freehold property to his daughter C. for life, to be equally divided at her death between her issue, and, if no issue, “between her sisters or their issue.” A similar gift was made on the same terms to his daughter S. On his death, the testator was survived by four daughters, C., S., M. and E., M. being the only one to have issue. On a summons asking whether each of the sisters of C. and S. took estate tails respectively in remainder expectant on the deaths of C. and S. in an undivided third part of the property and whether, on the death of any of the sisters without issue and without having disentailed, the undivided third in which she took an estate tail reverted to the testator’s estate and descended to the testator’s heir-at-law as on an intestacy,

H

Held: (i) in construing a devise of real property to a class of persons “or their issue,” the words “or their issue” must be read as words of limitation and not of substitution, the word “or” being read as “and”; therefore, each of the three sisters of C. and S. took an estate tail in an undivided third part of the property of which C. and S. were tenants for life respectively.

I

Parkin v. Knight (1) (1846), 15 L.J.Ch. 209, followed; *Re Clerke* (2), [1915] 2 Ch. 301, and *Re Whitehead* (3), [1920] 1 Ch. 298, distinguished;

(ii) on the death of any such sister without issue and without having disentailed, the undivided third or thirds in which she took an estate tail reverted to the testator’s estate and descended to his heir-at-law as on an intestacy.

Notes. As to devises of real estate to a person and his issue, see 34 HALSBURY'S LAWS (2nd Edn.) 352-353, para. 396; and for cases on the subject, see 44 DIGEST 1157-1158, 10011-10020. A

Cases referred to:

- (1) *Parkin v. Knight* (1846), 15 Sim. 83; 15 L.J.Ch. 209; 6 L.T.O.S. 450; 10 Jur. 23; 60 E.R. 548; 44 Digest 1025, 8836. B
- (2) *Re Clerke, Clowes v. Clerke*, [1915] 2 Ch. 301; 84 L.J.Ch. 807; 113 L.T. 1105; 59 Sol. Jo. 667; 44 Digest 1025, 8840.
- (3) *Re Whitehead, Whitehead v. Hemsley*, [1920] 1 Ch. 298; 89 L.J.Ch. 155; 122 L.T. 767; 36 T.L.R. 129; 44 Digest 869, 7249.
- (4) *Read v. Snell* (1743), 2 Atk. 642; 26 E.R. 784, L.C.; 44 Digest 869, 7250.
- (5) *Harris v. Davis* (1844), 1 Coll. 416; 9 Jur. 269; 63 E.R. 480; 44 Digest 424, 2541. C
- (6) *Greenway v. Greenway* (1860), 2 De G.F. & J. 128; 29 L.J.Ch. 601; 45 E.R. 570, L.J.J.; 44 Digest 979, 8344.

Adjourned Summons.

By his will dated Dec. 3, 1875, the testator gave and bequeathed all rents from his freehold property therein described unto his daughter, Charlotte Hayden, for her own use and benefit and at her death to be equally divided between her issue, but if no issue then "between her sisters or their issue." A similar gift of the rents of other freehold property also described in the will was made to his daughter, Sarah Pask, for her own use and benefit and at her death to be equally divided between her issue, but if no issue then "between her sisters or their issue." After making some provision for his daughter, Mary Anne Perry, and some of her children and giving his household furniture to Charlotte Hayden, the residue of his personal estate was to be paid to his daughter, Emma Perry, and he appointed Charlotte Hayden and Charles Woodbridge executrix and executor of his will. D

The testator died on Nov. 1, 1877, leaving his four daughters named in his will him surviving. Charlotte Hayden died on March 14, 1921, a spinster. Mary Anne Perry died on Dec. 9, 1887, Sarah Pask on July 14, 1924, and Emma Perry on Sept. 11, 1911. The last three had married, Mary Anne Perry only having had issue, seven children, some of whom had married and had children and grandchildren. E

The defendant, Joseph Hayden Perry, was her eldest son and heir-at-law. At the death of Charlotte, her sister, Sarah Pask, and five children and eighteen grandchildren of Mary Anne Perry were living; and since the death of Charlotte two more grandchildren and two great-grandchildren of Mary were born. At the death of Sarah Pask five children and nineteen grandchildren of Mary Anne Perry were living, and since the death of Sarah Pask two great-grandchildren of Mary Anne Perry were born. F

This summons was taken out by the plaintiffs, the present trustees of the will and the present representatives of Charlotte Hayden, Sarah Pask and Emma Perry, asking, first, whether the two specifically devised properties were vested on the statutory trusts in the plaintiffs or the public trustee; secondly, (a) whether each of the three sisters of Charlotte Hayden took an estate tail in remainder expectant on her death in one undivided third part of the first devised property; (b) whether each of the three sisters of Sarah Pask took an estate tail in remainder expectant on her death in one undivided part of the secondly devised property; and (c) whether on the death without issue—and without having disentailed—of any of such sisters, the undivided third or thirds in which she took an estate tail reverted to the testator's estate and descended to his heir-at-law as on an intestacy. If the court should answer those questions negatively, then the following further questions arose: whether, on the death of Charlotte Hayden, the first devised property became divisible between her sister, Sarah Pask, and the issue of her deceased sister, Mary Anne Perry, and the personal representatives of her deceased sister, Emma Perry; whether, on the death of Sarah Pask, the issue of her deceased G

A sister, Mary Anne Perry, became entitled to the whole of the secondly devised property or whether the same became divisible between such issue and the personal representatives of her deceased sister, Charlotte Hayden, and the personal representatives of her deceased sister, Emma Perry; and those questions involved other questions concerning the respective interests of the children and remoter issue of Mary Anne Perry and the personal representatives of the other deceased sisters in the first and secondly devised properties respectively.

By an order of FARWELL, J., made on April 28, 1931, in answer to the first question raised by the summons, it was declared that the properties were vested in the plaintiff trustees on the statutory trusts. The summons now came on in respect of the remaining questions before LUXMOORE, J.

C *Eardley-Wilmot* for the plaintiffs.

Sir A. Underhill for the defendant, Joseph Hayden Perry.

Formoy for the defendant, Mary Evelyn Sustins, representing the great-grandchildren.

Horace Freeman for the defendant, Alfred W. Perry, representing the two classes of grandchildren living at the respective deaths of the two life tenants.

D *G. Ivor Phillips* for the defendant, Frederick W. S. Timms, representing the two classes of grandchildren who predeceased the life tenants.

F. E. Skone James for the defendant, Charlotte Perry, representing the two classes of children living at the deaths of the respective life tenants.

Cur. adv. vult.

July 16. LUXMOORE, J., read a judgment in which he stated the facts, and continued: The question to be determined is whether the words "or issue" appearing in the gift over are to be read as words of limitation or as words of substitution. In order to read them as words of limitation, it is necessary to read "or" as "and." Counsel for the defendant Joseph Hayden Perry relied on a decision of EVE, J., in *Re Clerke* (2) in support of his contention that, on its true construction, the gift conferred estates tail on each of the testator's three daughters in an undivided third part of the property expectant on the death of the tenant for life. In that case the testator, who died in 1870, gave certain freehold property to his son Holt Clerke for life, and directed that on his death the property should revert to his issue as he should by his will appoint, and in default of issue surviving Holt Clerke then to revert to his brother, Shadwell Henry Clerke, or his issue. EVE, J., held that this gift to Shadwell Henry Clerke or his issue gave to Shadwell an estate tail, the words being words of limitation and not of substitution. The real question argued in that case was whether the rules laid down in *Read v. Snell* (4), that a devise to "'A' or his heirs" gives "'A'" an estate in fee simple, and in *Harris v. Davis* (5) and *Greenway v. Greenway* (6), that a devise to "'A' or the heirs of his body" gives "'A'" an estate tail, had been altered in the case of wills coming into operation since the date of the Wills Act. EVE, J., considered the comments in the well-known textbooks on WILLS by MR. JARMAN, MR. VAUGHAN HAWKINS and MR. THEOBALD, and held that, notwithstanding the force of those comments, and although the rule had survived the mischief it was originally forged to avert, and was no longer necessary, yet he was unable to hold that it did not survive, and, accordingly, he held that Shadwell Henry Clerke took an estate tail.

Counsel on behalf of the defendant Mary Evelyn Sustins contended that the decision of EVE, J., ought not to be followed in this case, first, because SARGANT, J., had expressed doubts with regard to it, and, secondly, because the gift in this case was different to that in *Re Clerke* (2). In the latter case, the gift was to one person or his issue, while in the present case the gift is to a class of persons or their issue. The case on which he relied is *Re Whitehead* (3). In that case, the testatrix, who died in 1895, gave her residuary personalty and realty, after the death of an annuitant, to her brothers and sister, Francis, William, John, Ellen and Joseph "or their heirs in equal shares and proportions." The brother John was dead, to the knowledge of the testatrix, at the date of the will. It was

admitted that the words "or their heirs" must be construed as substitutionary so far as the residuary personalty was concerned. The question was whether they should be construed differently with regard to realty. SARGANT, J., said ([1920] 1 Ch. at p. 302):

"Apart from authority, there could, I think, be no doubt as to the proper answer to give to this question. The words 'or their heirs' are on their plain primary meaning substitutionary. They can be treated as words of limitation only by doing violence to the language by altering the word 'or' into 'and.' And further, the result of this alteration would be to render the three words in question superfluous and ineffective, since without them the words of gift are, under s. 28 of the Wills Act, 1837, amply sufficient to give the brothers and sister the fee simple or other the whole estate or interest which the testatrix had power to dispose of."

He went on to deal with the cases referred to before EVE, J., and with EVE, J.'s own decision, in *Re Clerke* (2), and pointed out that, in his view, the real objection to construing the words as words of limitation is the change of the plain meaning of the word "or" into "and" without any adequate cause as the law now stands, and he proceeded ([1920] 1 Ch. at p. 304):

"To my mind this last objection is the determining one, and, with much deference to the view of EVE, J., I cannot help declaring my own preference for the view of the text-writers I have mentioned, at any rate so far as regards a devise to 'A or his heirs.' Had I to decide a case precisely similar to that before EVE, J., I might perhaps be constrained to follow his decision for the sake of uniformity, leaving the matter to be reconsidered now or at some future period by a higher tribunal. But as the matter stands it is open to me to follow my own opinion. And this is particularly so in the present case, because of two special circumstances which are present here. In the first place the gift here is a conjoint gift of realty and personalty. Undoubtedly the gift of personalty must be construed as being substitutionary, and this is a strong reason for construing the gift of realty in the same way. And further, one of the devisees mentioned in the gift was known to the testatrix to be dead at the date of the will, so that it is hardly possible that in this case at least the testatrix meant the gift to be other than substitutionary."

I appreciate the force of the criticism of SARGANT, J., but I doubt whether that criticism, or the decision, either in the case before SARGANT, J., or in that before EVE, J., really applies to the present case. In the present case the gift is to a class or their issue. This is certainly different from a gift to a named person or his issue, or to a number of named persons or their issue. The testator has provided that, after the death of Charlotte and a failure of her issue, the freehold property is to be equally divided between her sisters or their issue. He has not said what is to be done when a sister dies without issue. Take the events that happened: one sister had issue, the others had no issue; the testator does not say that the issue are to take such shares as their parents would have taken. There is nothing to suggest how the issue are to take inter se. Quite apart from the rule discussed by EVE, J., and SARGANT, J., in the cases to which I have referred, it seems to me that there is, in the present case, an obvious reason why "or" should be read as "and," for by so doing you make sense of the words.

I think the case is really covered by the decision in *Parkin v. Knight* (1). In that case, the gift was of the testator's residuary estate, which consisted of realty and personalty, to his brother, Ephraim, to assist him in bringing up his nephews, and, when the youngest nephew attained twenty-one, the testator directed that the property was to be equally divided amongst his nephews, or their lawful issue, share and share alike. SHADWELL, V.-C., held that each nephew took an estate tail in an undivided fourth part. I hold that, on the true construction of the testator's will, each of the three sisters of Charlotte took an estate tail in an undivided third

A share of the freehold property of which the testator's daughter, Charlotte, was tenant for life.

The will also contained a devise of further freehold property to the testator's daughter, Sarah Hayden, for life, with remainder to her issue, and, in default of issue, he directed that that property was to be divided between "her sisters or their issue." The same construction must be applied to this gift, and I consequently hold that each of the three sisters of Sarah Hayden took an estate tail in an undivided third share of the freehold property of which the testator's daughter, Emma Hayden, was tenant for life; and, lastly, that, on the death, without issue—and without having disentailed—of any of such sisters, the undivided third or thirds in which she took an estate tail, reverted to the testator's estate and descended to his heir as on an intestacy.

C Solicitor: *Thomas Vincent Howells.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

D

SLINGSBY AND OTHERS v. DISTRICT BANK, LTD.

E [COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), November 17, 18, 19, 20, 30, 1931]

[Reported [1932] 1 K.B. 544; 101 L.J.K.B. 281; 146 L.T. 377;
48 T.L.R. 114; 37 Com. Cas. 39]

F *Bank—Duty to customer—Duty of customer to bank—Blank space left in cheque after name of payee—Insertion by X in space of "per [X's firm]"—Endorsement in name of payee only—Payment into account of company to which X indebted—"Material alteration"—Proper form of endorsement—Representation by customer of authority in X—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), ss. 60, 64 (1), 79, 80.*

G The plaintiffs were the executors of one H.T., deceased, and were customers of, and had an account with, the defendant bank. J.C. was the senior partner of C. & P., the firm of solicitors acting for the executors. At a meeting, at which J.C. was present, the executors decided to invest £5,000 in war loan. A cheque was made out in the handwriting of J.C. in favour of a firm of stockbrokers "or order," and crossed generally. A space was left between the name of the firm and the words "or order." The cheque was signed by the three executors present, and J.C. was directed to dispatch it to the stockbrokers. H J.C. took the cheque, and, after obtaining the signature of a fourth executor, inserted the words "per C. & P." between the payees' name and the words "or order." He then endorsed the cheque "C. & P." and paid it into the W. Bank, Manchester, to the account of a company of which he was chairman and to which he was indebted. The cheque was credited to the company's account. I In due course it was passed through the clearing house, and the defendant bank credited to the W. Bank and debited to the plaintiffs' account the amount of it. Before these events, some thirty cheques, signed by the plaintiffs, which had been filled up in the handwriting of J.C., had been presented to the defendant bank and duly paid. In an action by the plaintiffs claiming from the defendant bank damages for the conversion of the cheque, negligence, and breach of duty,

Held: (i) the alteration in the cheque was "not apparent" within the meaning of the proviso to s. 64 (1) of the Bills of Exchange Act, 1882, but the W. Bank were not holders in due course, as they were negligent in making no inquiries why a cheque payable to a firm of stockbrokers "per C. & P." was

paid into the private account of a company of which J.C. was chairman; the cheque had been "materially altered" within the body of the subsection; and, therefore, the cheque had been avoided;

(ii) the cheque was not properly endorsed: the endorsement, assuming the cheque was valid, should have been the name of the London stockbrokers "per pro C. & P.";

(iii) the defendant bank was not protected by the proviso to s. 79 of the Act since that section referred only to an addition to or alteration of the crossing of a cheque.

(iv) it was not "a usual precaution to prevent forgery" (see observation of LORD FINLAY in *London Joint Stock Bank v. Macmillan* (1), [1918] A.C. at p. 789) for a customer drawing a cheque to fill up the space before or after the name of the payee, and, therefore, there had been no breach of duty by the plaintiffs towards the defendant bank in this respect: observation of LORD FINLAY in *London Joint Stock Bank v. Macmillan* (1), [1918] A.C. 789, applied;

(v) the plaintiffs had not represented to the defendant bank that J.C. had any authority to act as he did, and, therefore, the case did not come within the rule laid down in *Lickbarrow v. Mason* (2) (1787), 2 Term Rep. 63, that "wherever one of two innocent persons must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it";

(vi) the act of J.C. did not come within the scope of his authority from the plaintiffs, either actual or ostensible, so as to make the plaintiffs liable for his acts: *Lloyd v. Grace, Smith & Co.* (3), [1912] A.C. 716, applied; and, therefore, the plaintiffs were entitled to succeed.

Per GREER, L.J.: The defendant bank was not protected by s. 60 of the Act of 1882, for that section had no application to the present case since the defect in the cheque which rendered it invalid was on the face of the cheque and not merely in the endorsement; nor was the bank protected by s. 80 of the Act of 1882, for that section only applied where the true owner of the cheque was somebody other than the drawer, and it did not apply to a cheque which had been avoided by a material alteration before its issue.

Notes. Considered: *Arab Bank, Ltd. v. Ross*, [1952] 1 All E.R. 709; *Marquess of Bute v. Barclay's Bank, Ltd.*, [1954] 3 All E.R. 365. Referred to: *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52; *Uxbridge Permanent Building Society v. Pickard*, [1939] 2 All E.R. 344.

As to the duty of and protection to bankers in collecting and paying cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 176 et seq., and for cases see 3 DIGEST 201 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

- (1) *London Joint Stock Bank, Ltd. v. Macmillan*, [1918] A.C. 777; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650, H.L.; 3 Digest 76, 159.
- (2) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed and venire de novo awarded sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57, H.L.; 6 Digest 456, 2911.
- (3) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 1 Digest 595, 2284.
- (4) *Slingsby v. Westminster Bank, Ltd.* (No. 2), [1931] 2 K.B. 583; 101 L.J.K.B. 291, n.; 146 L.T. 89; 47 T.L.R. 1; 36 Com. Cas. 61; Digest Supp.
- (5) *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins, Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.
- (6) *Lloyds Bank v. Chartered Bank of India, Australia and China*, [1929] 1 K.B. 40; 97 L.J.K.B. 609; 139 L.T. 126; 44 T.L.R. 534; 33 Com. Cas. 306, C.A.; Digest Supp.

- A (7) *Reckitt v. Midland Bank, Ltd.* (1930), *The Times*, November 25, 1930; on appeal, sub nom. *Midland Bank, Ltd. v. Reckitt*, [1933] A.C. 1; 102 L.J.K.B. 297; 148 L.T. 374; 48 T.L.R. 271; 76 Sol. Jo. 165; 37 Com. Cas. 202; Digest Supp.
- (8) *Slingsby v. Westminster Bank, Ltd.*, [1931] 1 K.B. 173; 100 L.J.K.B. 195; 144 L.T. 369; 47 T.L.R. 1; 36 Com. Cas. 54; Digest Supp.
- B (9) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 3 Digest 230, 631.
- (10) *Farquharson Bros. & Co. v. King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584, H.L.; 1 Digest 377, 828.

C

Appeal from a decision of WRIGHT, J., sitting without a jury.

The plaintiffs were the executors of one Harry Turner deceased, and as such had an account with the defendant bank. They employed as solicitors in the affairs of the estate a firm of Cumberbirch and Potts, the senior partner being James Cumberbirch, who, until the matters now in question occurred, was a man of good reputation in his profession. The executors met from time to time to decide on the administration of the affairs of the trust. On Dec. 4, 1929, at such a meeting, they decided to invest £5,000 in war loan, and a cheque for that amount was, at the meeting, drawn on their instructions in the writing of Cumberbirch in favour of a firm of London stockbrokers, John Prust & Co., who were to be instructed by Cumberbirch to purchase this stock; it was signed that day by three of the executors, and next day by the fourth, Mrs. Slingsby, and crossed generally. When so signed, the payees were John Prust & Co. There was a space, not filled up in any way, between that name and the printed words "or order." On Dec. 5 Cumberbirch, instead of posting the cheque to the brokers after Mrs. Slingsby had signed it, altered it, writing after the payee's name, John Prust & Co., the words "per Cumberbirch and Potts." None of the executors either knew of or authorised or assented to that alteration. There was a full stop after the name of the payees, and in the writing of the added words there was a slight slope. The cheque as originally drawn and with the alteration was all in the writing of Cumberbirch, except the signatures of the drawers. Cumberbirch then took the cheque to the Westminster Bank at Manchester, filled in a paying-in slip, signing it "James Cumberbirch," and paid it into the account at that bank of the Palatine Industrial Finance Co., of which he was chairman, and to which he was indebted, as being a payment on his own private account. The cheque was endorsed by him "Cumberbirch and Potts." The Westminster Bank, without any demur, accepted the cheque, and credited the company's account, who drew against it before it was cleared. The cheque was passed through the Manchester Clearing House, and credited to the Westminster Bank by the defendant bank, who debited it to the plaintiffs' account. Neither the cheque nor any proceeds of it went to John Prust & Co., who never received the instructions which the plaintiffs directed Cumberbirch to send them, and, indeed, knew nothing about the matter at all. The plaintiffs did not receive any scrip, but assumed that the matter had gone through correctly till March, 1930, when Cumberbirch's dishonesty was discovered. He had absconded, and had not been heard of since. Before the date of the presentation of this cheque to the defendant bank, about thirty cheques signed by the plaintiffs, but filled up in the handwriting of Cumberbirch, had been presented to the defendant bank and duly paid. Each of these cheques had been drawn in favour of a named payee, with no addition after the name.

On May 8, 1930, the plaintiffs issued a writ against the Westminster Bank. The action was tried by FINLAY, J., at Manchester Assizes, and he held that the plaintiffs could not recover the £5,000 from the Westminster Bank—not for conversion of the cheque because, by reason of the material alteration, it was not a valid cheque, but mere waste paper; not for conversion of £5,000, because there was no

conversion of any money belonging to the plaintiffs; and not for money had and received, because the money was not the money of the plaintiffs. FINLAY, J., also held, though he stated that in his view the question of negligence did not arise, that the Westminster Bank had acted without negligence, and so were protected by the terms of s. 82 of the Bills of Exchange Act, 1882 (*Slingsby and others v. Westminster Bank, Ltd.* (No. 2) (4)). A

The plaintiffs did not appeal against this decision, but issued a writ against the defendant bank claiming to be relieved from having the cheque debited to their account. They contended that the payment of the cheque was unlawful and made without their authority; that it had been made in disregard of an irregular endorsement; and that the defendant bank had been guilty of conversion, or, alternatively, of negligence. The defendant bank called expert evidence that the form "Pay A per B" was used on a cheque when a limited liability company, at the request of a shareholder, paid a dividend by cheque to the shareholder's bank; also where a solicitor was acting in a transaction for the sale of real property; in payment of rates; in connection with underwriters; and in taking up bills of lading. The witnesses expressed a view that for a cheque drawn "Pay A per B" the endorsement "B" was sufficient. This view was contrary to that stated in "The Journal of the Institute of Bankers" (December, 1930, at p. 270). WRIGHT, J., gave judgment for the plaintiffs, holding (i) that there had been a material alteration of the cheque within the meaning of s. 64 (1) of the Bills of Exchange Act, 1882, and that the alteration was a forgery; (ii) that the endorsement was not a proper endorsement of the cheque as it was when altered; (iii) that in leaving a space between the name of the payees and the words "or order," without drawing a line therein, the plaintiffs had not been guilty of any breach of duty as customers towards the defendant bank; and (iv) that the plaintiffs could not be held liable for the fraud of their agent, Cumberbirch, for he did not act within the scope of his authority, actual or ostensible, and that in any case, as the act was one of forgery, it must be outside the scope of that authority. The defendant bank appealed. B C D E

The Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), provides: F

"Section 60: When a bill payable to order on demand is drawn on a banker and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority." G

"Section 64: (1) Where a bill of acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers: Provided that where a bill has been materially altered, but the alteration is not apparent and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenour. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent." H

"Section 79: (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Pro- I

A vided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing

B having been obliterated or having been added to or altered otherwise than as authorised by the Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed or to his agent for collection being a banker, as the case may be."

C "Section 80: Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

D "Section 91: (1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority."

Cyril Atkinson, K.C., and W. Gorman for the bank.

Laski, K.C., Gandy and G. Corderoy for the plaintiffs.

Cur. adv. vult.

E Nov. 30. The following judgments were read.

SCRUTTON, L.J.—The executors of Harry Turner (deceased) brought an action against the District Bank, Ltd., where the executors' account was kept, to recover £5,000 in respect of a cheque dated Dec. 4, 1929, which they alleged to be wrongfully debited to their account. **WRIGHT, J.**, gave judgment in their favour and

F the bank appeals. Many points were raised on the appeal. One was as to the effect of a description of payee, which may be typified as "Pay A per B," on the liability of the bank as to the endorsement required, and the bank's duty of inquiry. The executors first brought an action against the Westminster Bank, the collecting bank, which **FINLAY, J.**, decided against the executors on grounds appearing in his judgment, to which I shall have to refer hereafter. The executors did not

G appeal against this decision. We were told that, the estate being largely devised in favour of charities, the Charity Commissioners had to be consulted, and the Attorney-General's department directed that no appeal should be brought, as an action could be brought against the present defendants, the paying bank.

The immediate facts are few and not in dispute. The executors had as their solicitors a firm of Cumberbirch and Potts, the firm and its senior partner, Mr.

H Cumberbirch, being of the highest local repute. Mr. Cumberbirch and his clerk from time to time drew forms of cheque for the executors to sign. All these cheques had been drawn in favour of a named payee with no addition following his name. Some of them had the blank following the name of the payee filled with a line so as to prevent addition. The great majority of the cheques had no such line. In December, 1929, the executors had money to invest, and determined to

I invest £5,000 in war loan through well-known brokers, John Prust & Co. Cumberbirch filled in a form of cheque, "Pay John Prust & Co.," leaving a blank after the name of this payee. He obtained the signatures of three executors on Dec. 4 and of the fourth on Dec. 5. He then fraudulently inserted after the name of the payee the addition "per Cumberbirch and Potts." This addition was, of course, in the same writing and undistinguishable from the description of the payee. I am satisfied there was no "apparent alteration" of the cheque as originally signed. The two things suggested as pointing to alteration were the full stop after the name of the original payee, and a slight slope in the writing of the addition, both facts, in

my opinion, too minute to be noticed on reasonable inspection. Cumberbirch had A
at the Westminster Bank a private account, and an account of a company of which
he was chairman, the Palatine Industrial Finance Co., Ltd., which on Dec. 5 had
a small credit balance of about £49. On the afternoon of Dec. 5, Cumberbirch
brought to the Westminster Bank the altered cheque and a paying-in slip. The
cheque was endorsed "Cumberbirch and Potts," no reference being made to John B
Prust & Co. The paying-in slip was, "Credit account of Palatine Industrial
Finance Co., Ltd. Current account." Cheques were drawn on this account on
December 5 and 6 for about £565, and on Dec. 7 the plaintiffs' cheque, having
been cleared, was paid by the District Bank to the Westminster Bank. Were it
not that FINLAY, J., has held that the Westminster Bank were not negligent in
making no inquiries as to why a cheque for a large amount apparently destined for
John Prust & Co. through the medium of Cumberbirch and Potts was paid into C
the private account, not of that firm, but of a company of which Cumberbirch was
chairman, I should be clearly of opinion that it could not be argued that the West-
minster Bank were not negligent: see *Slingsby v. Westminster Bank* (No. 2) (4).
I am of opinion, following the principles laid down in *Underwood, Ltd. v. Bank of
Liverpool and Martins* (5), *Lloyd's Bank v. Chartered Bank of India, Australia
and China* (6), and the recent decision of this court in *Reckitt v. Midland Bank* (7), D
now under appeal to the House of Lords, that the Westminster Bank were negli-
gent, and were not, therefore, holders in due course because they allowed Cumber-
birch, and the Palatine company, to draw against the cheque before it was cleared.
The cheque was presented to the District Bank with its endorsement "Cumberbirch
and Potts" and paid. Cumberbirch presently bolted; this and other frauds were
discovered and this action started in the circumstances already stated. Cumber- E
birch also paid a dividend warrant signed by one of the executors into his private
account at the Westminster Bank on Jan. 16, 1930. This did lead to inquiries by
the bank, but only inquiries of Cumberbirch who told a quite untrue story that it
was the repayment of money that the executor owed him. Again, FINLAY, J.,
found there was no negligence on the part of the bank, and again I should entirely
disagree with him: see *Slingsby and others v. Westminster Bank* (8).

A quantity of banking evidence was called about the form "Pay A per B," F
endorsed "B," and the banking witnesses said the endorsement was quite proper.
It appears that such a form is commonly used when a company at the request of
its shareholder pays a dividend by cheque to the shareholder's bank. The form
of such a cheque is not seen by the shareholder, and the bank is, of course, above
suspicion. It was said also to be used where a solicitor was acting in a property G
transaction; in payment of rates; in connection with underwriters; and in taking
up bills of lading. I personally have some experience with the two latter classes
of transaction, and I can only say that I cannot remember ever having seen such
a description of a payee before, and I gather that the two other members of the
court share my experience. I am sure the form is not one generally used except
in payment of dividends to banks. One of the banking witnesses, Mr. Hyde, said: H
"I do not think I have seen a cheque made out in this manner while I was at the
counter." It is not suggested that the executors authorised this form, and its
only importance is on the point, what endorsement such a description of payee,
"A, per B," requires. On this all the banking witnesses said that an endorsement
"B" was sufficient; one of them said "A" would be "a nominal payee," but was
unable to explain what he meant by that expression. When asked whether, if B I
endorsed over to C, C would be able to sue A, they appeared unable to answer.
They did agree that the form showed that it was intended that the amount of the
cheque was intended to get to A, but through the medium of B. The witnesses
were unanimous in their opinion, and when confronted with the opinions published
by the Institute of Bankers in their official handbook, all they said was that those
answers were wrong. I myself should take the view taken by SIR JAMES PAGET
(PAGET'S LAW OF BANKING, 4th Edn. at p. 251) that the proper form of endorsement
should be "A, per pro B," meaning "I, B, sign A's name by his procuration or

A authority." Section 91 of the Bills of Exchange Act, 1882, appears to me to show that the signature of any relevant party to the bill, such as a payee or endorsee, should be on the bill, though it may be placed there by an agent who has A's authority, and should state his authority, if he wishes to escape personal liability to subsequent endorsees as distinct from liability on warranty. This point was not pleaded in the first case before FINLAY, J., and he does not deal with it. I should
B add that FINLAY, J., does dismiss the earlier action on the ground stated in these terms:

"It was submitted by counsel for the defendant bank that the action, however put, was entirely misconceived. Whatever may be the rights, so it was argued, of the plaintiffs against their own bank, who have debited them, they
C can have no right to recover against the defendants—not in conversion of the cheque because the cheque was, by reason of the alteration, a mere valueless piece of paper; not in conversion of £5,000 because there was no conversion of any money of the plaintiffs; not for money had and received because the money was not the money of the plaintiffs. I have come to the conclusion that this submission is right and ought to prevail. It seems clear that the document,
D when it came into the hands of the defendant bank, was not a valid cheque at all. It had been avoided by the material alteration made in it. This being so, it seems to me that no action can be brought upon it against the defendants. They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail":

Slingsby and others v. Westminster Bank (No. 2) (4) ([1931] 2 K.B. at p. 585).
E I cannot understand this. There are, of course, difficulties as to how in law one should deal with money claimed by a customer from a bank because that bank has collected it from the customer's bank on a document which does not authorise such collection, but I thought that all those difficulties had been settled by the decision in *Morison v. London County and Westminster Bank* (9), followed by this court in *Underwood, Ltd. v. Bank of Liverpool and Martins* (5), in *Lloyds Bank v. Chartered Bank of India, Australia and China* (6), and in *Reckitt v. Midland Bank, Ltd.* (7), now under appeal to the House of Lords. *Slingsby and others v. Westminster Bank (No. 2)* (4) was, in my opinion, wrongly decided and should not
F be followed by any court in preference to these decisions of the Court of Appeal.

But the legal result on these facts begins earlier than endorsement. This cheque, having been signed by the executors in a form which gave Cumberbirch no rights,
G was fraudulently altered by Cumberbirch before it was issued, and, it was not disputed, altered in a material particular by the addition of the words "per Cumberbirch and Potts." The cheque was thereby avoided under s. 64 of the Bills of Exchange Act, 1882. A holder in due course might not be affected by an alteration not apparent, such as this alteration. But counsel for the District Bank did not contend that the Westminster Bank were holders in due course, and I am clear
H they were not. They could not, therefore, justifiably claim on the District Bank, and the cheque when presented to the District Bank was invalid, avoided—a worthless bit of paper, which the District Bank was under no duty to pay. This invalidity comes before any question of endorsement. Secondly, I am of opinion, as already stated, that, if valid, the cheque was not properly endorsed. The endorsement should have been "John Prust & Co. per pro Cumberbirch and Potts." Any
I attempt to prove a custom failed; the Bankers' Institute opinions show that the custom was not universal; there was no satisfactory evidence that the custom was known to business men outside the banking world, or that it was usual except in the case of dividend warrants paid to banks.

The defendant bank endeavoured to argue that the wording of s. 79 of the Act, "or to have been added to or altered otherwise than as authorised by this Act," protected them. The wording is clumsy, but, in my opinion, the section only refers to additions to or alterations of the crossing. The wording of s. 78, and the later words of s. 79, make this clear. I agree with the view on this point expressed

by SIR JAMES PAGET at p. 225 of his work on the LAW OF BANKING (4th Edn.). A
The protection given by ss. 80 and 82 is excluded, in my opinion, by the fact that
the alteration has made the paper a null and void document, no longer a cheque.

There remains the contention that the plaintiffs by their negligence in not drawing
a line in the blank after the payee's name have enabled the fraud to be committed
and cannot recover. LORD FINLAY's definition in *London Joint Stock Bank*
v. Macmillan (1) ([1918] A.C. at p. 789) of the relation between banker and B
customer is that "the customer is bound to take usual and reasonable precautions
to prevent forgery," the particular usual and reasonable precaution in that case
being to leave no opportunity for adding to the amount of money stated either in
words or figures. I am satisfied that it is not at present a "usual precaution" to
draw lines before or after the name of the payee. If this sort of case becomes C
frequent, it may become a "usual precaution," but no banking witness had ever
heard of a case like this before. The suggestion, in the words of ASHURST, J., in
Lickbarrow v. Mason (2),

"that wherever one of two innocent persons must suffer by the acts of a third,
he who has enabled such third person to occasion the loss must sustain it"

(2 Term Rep. at p. 70), is advanced. The answer is that given by LORD LINDLEY
in *Farguharson Bros. & Co. v. King & Co.* (10) ([1902] A.C. at p. 342) that the D
word "enabling" here can only apply where such party has in some way held out
or represented the third person as having authority to do the acts complained of.
In the present case, the plaintiffs have done nothing to represent to either bank
that Cumberbirch had any authority to act as he did. This supposed maxim has
been unsuccessfully put forward in each of the last three cases where Lord Terring-
ton has robbed Sir Harold Reckitt. Lastly, it was said that the decision of the E
House of Lords in *Lloyd v. Grace, Smith & Co.* (3) protected the defendants. I
understand that to be a case of a servant or agent using ostensible authority to do
a certain class of acts for his employer, who acts for his own benefit, with no notice
to the person injured of his wrongful action. In the present case, as far as the
Westminster Bank was concerned there was no ostensible authority and there was
notice putting that bank on inquiry; as far as the defendant bank was concerned F
there was no ostensible authority.

I have expressed my judgment in my own words having regard to the exhaustive
arguments addressed to us. I might, however, have been content to adopt the
careful judgment of WRIGHT, J., with which I substantially agree. The appeal
must be dismissed with costs.

GREER, L.J.—I need not repeat the facts proved at the trial of this action. G
The effect of the evidence may be sufficiently summarised as follows: (i) The
plaintiffs never signed any document which was in fact a mandate to the bank to
pay the cheque if it was endorsed by Cumberbirch and Potts and presented to the
defendants through a bank. (ii) The immediate parties to the cheque when drawn
were the plaintiffs, Messrs. Prust & Co., if and when they received the cheque, and H
the bank, if and when it was presented to them for payment. (iii) The cheque
never came into the hands of Messrs. Prust & Co. or of anyone having authority to
act for them. (iv) Before presentation through the Westminster Bank to the
defendant bank the cheque as signed was fraudulently altered in a material respect
by Cumberbirch. (v) Between the time when it was signed by the plaintiffs and I
the time when it was presented by the Westminster Bank to the defendant bank it
had never got into the hands of a holder in due course. Cumberbirch and Potts
clearly were not holders in due course, and it was expressly admitted by counsel
in their argument for the defendants that the Westminster Bank had not become
holders in due course.

The plaintiffs, never having in fact authorised the addition of the words "per
Cumberbirch and Potts," or in any way authorised payment to Messrs. Cumber-
birch and Potts, or to any bank receiving the proceeds on behalf of Messrs.
Cumberbirch and Potts, cannot be held bound to recognise the payment unless

A there is something in the Bills of Exchange Act, 1882, or the general law, which prevents them from relying on the contention that they never authorised the defendant bank to pay the £5,000 to, or on the order of, Cumberbirch and Potts. It appears at one time to have been contended that s. 60 of the Bills of Exchange Act, 1882, protected the defendant bank, but it seems clear that that section has no application to this case, because the defect in the cheque which rendered it
B invalid was on the face of the cheque and not merely in the endorsement. Under the provision of s. 64 of the Act the cheque was rendered void except as therein stated. The proviso to that section does not protect the defendant bank, because, if the cheque was restored to its original tenor, the bank clearly could not sue the drawers on it. With regard to the proviso to s. 79 I agree with, and need not repeat, the opinion as to the effect of this proviso stated in the judgment of
C WRIGHT, J., and in the judgment of SCRUTTON, L.J. The question whether s. 80 applies to protect the defendant bank in this case is one of some difficulty. The section is as follows:

D "Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

E In the first place s. 80 only applies to a case where the true owner is somebody other than the drawer, and in the second place I think that it does not apply to a cheque which has been avoided by a material alteration before its issue.

It is indisputable since the decision in *London Joint Stock Bank, Ltd. v. Macmillan* (1) that a customer owes to his bank a duty to exercise reasonable care in drawing cheques which he issues to a payee or bearer, and as SCRUTTON, L.J., points out, LORD FINLAY lays down that the test as to what care is required by law
F of a customer depends upon the answer to the question whether he has taken usual and reasonable precautions to prevent an unauthorised and material alteration of the cheque. In the present case a practice amongst bankers was proved that cheques were in certain cases drawn payable to one person "per" another person, and that in those cases the cheques were paid by banks when endorsed in the name of the latter person. Alterations to cheques by utilising spaces left by the drawer
G for the purposes of increasing the amount appearing on the face of the cheque are not uncommon. A reasonably careful drawer of a cheque observing blank spaces which would provide an opportunity of increasing the amount to any person handling the cheque who was sufficiently dishonest to commit a fraud would rightly be held to be guilty of want of reasonable care towards the bank, and he would be
H equally guilty of want of reasonable care if he signed the cheque without looking to see whether there were such blanks in it. I am not satisfied that a reasonably careful person drawing a cheque, knowing nothing about the practice of bankers among themselves to honour cheques in the form in which this cheque was when presented, would be guilty of the want of care required of a reasonably careful customer towards his bank. Whether there was such want of care in this particular case is a question of fact, and I agree with the learned judge, and with my brethren,
I that no breach of duty towards the bank was established by the evidence. I also agree with the opinion expressed by WRIGHT, J., in his judgment with regard to the wider protection of the bank against anything that might happen to the cheque before presentation, which commended itself to LORD SHAW, as appears in his speech in *London Joint Stock Bank, Ltd. v. Macmillan* (1).

The only point remaining to be considered is whether the defendants are entitled to succeed on the ground that, though the plaintiffs did not authorise the addition made to the cheque by Cumberbirch, they are liable on the doctrine of holding out, for the same reasons that a solicitor was held liable for the fraudulent acts of his

clerk in *Lloyd v. Grace, Smith & Co.* (3). I think this defence fails also. It is not part of the usual business of solicitors to write their clients' cheques, still less to alter them after they have been written. Every time a solicitor draws a cheque for signature he gets a particular authority to do a particular act. He does not draw his employer's cheques because that is within the apparent authority of solicitors generally, and indeed the argument before us was not based on this ground, but on the ground that the writing of the words "per Cumberbirch and Potts" was in fact the writing of Cumberbirch, who had written the words as they were when the cheque was signed, and the fact that they were added after signature was not apparent. The point is not one about which much can be said, but it seems to me to be impossible to hold that if I authorise a man to write out a document for me, it is, therefore, within his apparent authority to add something which alters the effect of that document. The act of writing the cheque is a mechanical act which is unimportant until the cheque is signed. I do not think there is any holding out to the bank that all the words on the cheque were written before the signature, or with the authority of the plaintiffs. Further, assuming that the plaintiffs are bound by the document as altered, I agree with WRIGHT, J., for the reasons stated in his careful judgment, that the endorsement was ineffective, and that the defendants cannot rely upon the payment made to an endorsee who is some person other than the payee. It seems to me that if the cheque had been signed in the form in which it was when altered, the plaintiffs could still say to the bank: "We never requested you to pay the sum in question, £5,000, to anyone except Messrs. Prust & Co. personally, or to Messrs. Prust & Co. endorsing the cheque by themselves or their duly authorised agent. Messrs. Prust & Co. did not come for the money, nor was the cheque endorsed by them or in their name by Cumberbirch and Potts acting as their agents." For these reasons, I agree that the appeal should be dismissed.

ROMER, L.J.—The questions arising upon this appeal appear to be as follows:

(i) Were the plaintiffs guilty of any breach of duty towards the defendant bank in signing the cheque in the form in which it was made out by Cumberbirch so as to bring themselves within the principle applied in *London Joint Stock Bank, Ltd. v. Macmillan* (1)? (ii) Are the plaintiffs liable for the fraud committed by their agent Cumberbirch in subsequently adding the words "per Cumberbirch and Potts" so as to bring themselves within the principle applied in *Lloyd v. Grace, Smith & Co.* (3)? (iii) Did the plaintiffs ever hold out Cumberbirch to the bank as their agent having authority to add the words in question? (iv) Assuming that for one or another of these reasons the bank were entitled as against the plaintiffs to treat the cheque as their cheque, was the bank justified in paying it upon the endorsement "Cumberbirch and Potts"? (v) Are the bank protected from liability by reason of s. 60 or s. 80 of the Bills of Exchange Act, 1882? (vi) Are the bank protected by s. 79 of that Act? All these questions (other than those numbered (iii) and (vi)) were carefully and fully considered by WRIGHT, J., and were decided by him in the plaintiffs' favour. In my opinion, he was right in so deciding, and, subject to one observation, I accept both his conclusions and the reasons upon which they are based, to which reasons I do not think that I can usefully add anything. The one observation to which I have referred is this. The learned judge, in dealing with s. 60 of the Act, expressed the view that the endorsement made by Cumberbirch was a forgery. The addition to the cheque made by him was undoubtedly a forgery. But, notwithstanding this, and notwithstanding the fact that the endorsement made by him was insufficient, and probably intentionally and fraudulently insufficient, I doubt whether it is accurate to say that the endorsement in fact made was a forgery, or made without authority. It cannot be denied that Cumberbirch could properly endorse the words "Cumberbirch and Potts" on a cheque drawn in their favour. This being so, s. 60 could not in any case afford a defence to the bank.

In these circumstances, it only remains for me to deal with questions (iii) and

A (vi), which I gather were not raised before the learned judge. Dealing first with question (iii), the defendants, as I understand it, put their contention in this way. They say that, before the presentation of the cheque in question in this case, some thirty cheques signed by the plaintiffs which had admittedly been filled up in Cumberbirch's handwriting had been presented to them and paid; that the plaintiffs in this way held out Cumberbirch as their agent for the purpose of preparing
B cheques for their signature; that the defendants were, accordingly, entitled to assume that everything appearing upon a cheque of the plaintiffs that was in the handwriting of Cumberbirch was placed there by him as their authorised agent before signature; and that the plaintiffs are precluded from denying that he had done so in the present case. But there was no evidence given by the bank to which our attention was called that suggested that the bank ever made any such
C assumption in fact or ever regarded Cumberbirch as being the authorised agent of the plaintiffs to fill up cheques for their signature, and even had they done so, the fact that the plaintiffs had, even on numerous occasions, employed Cumberbirch to prepare cheques for their signature cannot amount to a holding out by them of Cumberbirch as their general agent for that purpose. To the contention of the defendants upon this point I think that a sufficient answer may be given in the
D words of LORD LINDLEY in the case of *Farquharson Bros. & Co. v. King* (10) ([1902] A.C. at p. 341:

"I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist."

E It only remains to deal with the defence founded upon s. 79 of the Bills of Exchange Act, 1882. As to this it was contended before us by counsel for the defendants that in the present case a cheque had been presented to the defendants for payment which did not at the time of presentment appear to have been added to, or altered, otherwise than as authorised by the Act, and that the defendants, having paid it in good faith and without negligence, are, by the proviso to the
F section, relieved from all responsibility or liability. It is, in my opinion, clear that the proviso is dealing solely with cheques that have in fact been crossed, but on which the crossing has been removed or added to or altered otherwise than as permitted by the Act without there being anything upon the face of the cheque to draw the banker's attention to the fact. But for the proviso, the banker paying such cheque otherwise than to a banker, or, in the case of a specially endorsed
G cheque, paying it to the wrong banker, would or might have been liable to the true owner, even though he acted in good faith and without negligence. As I read the proviso, its object and effect is to relieve the banker of that liability. In my opinion, according to its true construction, the only responsibility or liability from which the proviso relieves the banker is the responsibility or liability arising by reason of the cheque having been originally crossed or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by the
H Act. If this be so, the section obviously has no application to the present case.

Appeal dismissed.

Solicitors: *Slater, Heelis, Sandbach, Marriott, Smiths, & Irvine*, Manchester; *Vaudrey, Osborne, & Mellor*, Manchester.

[*Reported by C. G. MORAN, ESQ., Barrister-at-Law.*]

NICHOLLS v. ELY BEET SUGAR FACTORY, LTD.

[CHANCERY DIVISION (Farwell, J.), March 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 1931]

[Reported [1931] 2 Ch. 84; 100 L.J.Ch. 259; 145 L.T. 113]

Nuisance—Defence—Pollution of river—Damage to plaintiff's fisheries—Plaintiff in possession—Right of defendant to set up jus tertii.

The plaintiff, claiming to be the owner of two several fisheries in a river, brought an action against the defendants, who owned a factory situated on the banks of the river above the fisheries in question, for an injunction to restrain them from polluting the river by the discharge into it of noxious elements so as to damage the fisheries.

Held: in such an action the defendants were not entitled to set up a jus tertii as a defence, the plaintiff's possessory right being sufficient to constitute a title to maintain the action.

QUÆRE whether the rule applied to every kind of nuisance action.

Notes. Applied: *Southport Corpn. v. Esso Petroleum Co.*, [1954] 2 All E.R. 561.

As to the parties to an action for nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 93 et seq., and for cases see 36 DIGEST (Repl.) 320, 321.

Case referred to:

- (1) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; 66 L.J.Ch. 529; 76 L.T. 584; 13 T.L.R. 390; 41 Sol. Jo. 490, C.A.; 25 Digest 4, 4.

Witness Action by Charles Thomas Nicholls, who claimed to be the owner of two several fisheries in the River Ouse, below Ely, in Cambridgeshire, for an injunction to restrain the Ely Beet Sugar Factory, Ltd., the owners of a factory for the manufacture of beet sugar, situate on the banks of the Ouse above the plaintiff's fisheries, from polluting the river by the discharge into it of noxious effluents, so as to damage the plaintiff's fisheries. The case is reported on the question whether, the plaintiff being in possession of the fisheries, the defendants were entitled in an action of this nature to dispute the plaintiff's title.

The fisheries commenced at Littleport Bridge, about four-and-a-half miles below the town of Ely, and together extended some six or seven miles to a place called Modney Drove. The plaintiff had purchased one of the fisheries in 1909 and the other in 1919, having held a lease of the latter fishery from 1902 until his purchase. He had, in the case of the first fishery, since 1909, and of the second since 1902, exercised acts of ownership by fishing himself, granting leases, and prosecuting persons who fished in the river without leave. The fisheries were of coarse fish. The defendants were a company incorporated in 1924, and they had established a factory on the banks of the river Ouse below the town of Ely and some considerable distance above the plaintiff's fisheries, and had begun to manufacture beet sugar in 1925. The manufacture of beet sugar is only carried on in each year for a period of about four months, from the end of September to the middle or end of January—called a "campaign"—but during that period it is carried on without intermission by day and night. After the end of January no work is done in the factory, except for the purpose of keeping it in proper condition. No complaint was made by the plaintiff, and no evidence was given as to the effect of the factory in the "campaigns" of 1925-6, 1926-7, and 1927-8, but the plaintiff alleged that in the "campaign" of 1928-9 great damage was done to his fisheries by the effluent from the factory, he made complaints to the manager of the factory, and it was proved that numbers of fish in the river were destroyed. He issued the writ in this action on Aug. 2, 1929. It did not appear that any serious steps were taken by the owners of the factory to remedy the nuisance caused by the effluent before the "campaign" of 1929-30, and it was proved that during that "campaign" a great number of fish in the plaintiff's fisheries were destroyed. In January, 1930, the

A Ouse and Cam Fishery Board prosecuted the defendant company for pollution of the river, and the company were convicted and fined £50. After this the defendant company made strenuous efforts to remedy the pollution, and spent large sums in carrying out works and introducing new machinery for that purpose. It appeared from the evidence that the measures taken were largely successful, and that during the "campaign" of 1930-31 there was little reason to complain of damage by the effluent, except on one or two occasions when there was a breakdown in the machinery.

The plaintiff delivered his statement of claim and the defendants delivered their defence, in which they denied the pollution, and challenged the title of the plaintiff and his right to bring the action.

C *Gover, K.C., H. Stuart Moore and Elkin for the plaintiff.*
Morton, K.C., and Daynes, K.C., for the defendants.

FARWELL, J., having held on the evidence that there had been pollution of the River Ouse by the defendants, continued: I want now to deal with the plaintiff's right to maintain this action. This is largely a question of law. I am satisfied, and find as a fact, that the plaintiff is and has been at all material times in possession of these two several fisheries, and the first question that I must determine is whether, the plaintiff being in possession of these fisheries, and being in possession on a good title from a person who, so far as he is aware, was the owner of the property, having brought this action, it is open to the defendant company to raise the issue of want of title in the plaintiff if, by raising that issue, they are only setting up a *jus tertii*. That is the first question to be determined.

E It is well settled that in an action for trespass a defendant is not entitled to set up a *jus tertii* as a defence. He is entitled to set up a title in himself. If he can show a better title than the plaintiff, that may be a defence; or, if he can show a better title in a third person, and can go on to prove that he acted on the authority of such third person, that again may be an answer to the plaintiff's title to maintain an action. But, in an action for trespass, the mere setting up of a

F better title of a third person is not open to a defendant at all. I do not think that counsel, who conducted the case with great ability on behalf of the defendants, seriously disputed that as a proposition of law. In the present case, of course, it would not be possible for the defendants to contend, if they did set up the title of a third person, that the acts which they did were done with his authority, because those acts, i.e., the pollution of this water, were *per se* illegal under the Salmon and Freshwater Fisheries Act, 1923. They are criminal acts, and, therefore, it

G would be impossible for the defendants to say: "I have done what I have done under the authority of somebody who has a better title than the plaintiff." What is said is that the defendants may set up a title in the Crown, and that in any case the rule as to the right to set up a *jus tertii* does not apply at all in an action for nuisance. It is, they argue, confined to actions of trespass, and this is not an

H action of trespass; it is an action of nuisance. So that, so far as this is an attempt to set up a title in the Crown, it does not appear to me that it really affects the matter. If this were an action for trespass I cannot see that it would affect the matter that the title which the defendant sought to set up was a title in the Crown, unless, of course, the defendant was claiming to do some act—for instance, to fish as a member of the public—in which case it would be open to him because he would be asserting his own title; but apart from this I cannot see that it would alter the rule, whether it was the Crown's or anyone else's title that was being set up, because it would not be open to the defendant to set it up at all. The moment that he attempted to set it up, unless he could show that he had himself some better title, or acted under the authority of someone with a better title, the matter would be at an end. He would not be entitled to set it up at all. Therefore, the fact that the title, which is said to be set up, is in the Crown does not seem to me on this part of the case a matter which is material.

I But a more difficult question, as it seems to me, is the second: Is this an action

of trespass, and, if it is not, does the rule apply to an action of nuisance? I think that counsel for the defence is right when he says, and I do not think that it is disputed by the plaintiff, that this is not strictly speaking an action of trespass. In the old days it would have been an action of trespass on the case, and not trespass. I think that that is quite plain. The act of the defendants complained of is not the discharging of something directly on the plaintiff's property, but it is the discharging of something on a property which does not belong to the plaintiff, but which is carried down to the plaintiff's property. That seems to me not, strictly speaking, an action of trespass at all. It is, properly speaking, what is now known as an action of nuisance, and would have been known in the old days as an action of trespass on the case. A B

Does the rule apply to such an action? It must be clearly understood that in what I am going to say on this part of the case I am confining myself strictly to actions of this kind. There are many kinds of nuisance actions—an action for infringement of ancient lights is a nuisance action, and there are many other kinds, and I am very far from saying that in every kind of nuisance action such a rule applies. I am not suggesting that for one moment. But in this case I am dealing with a nuisance action of a kind which is peculiar to itself and to other cases where there is pollution of this sort. It is not trespass, but it is, undoubtedly, very analogous to trespass. In my judgment, where a defendant is doing an act which is per se illegal, and, therefore, not one that he can be doing under the authority of any person, and he seeks in an action of this kind to set up the title of a third person, he is not entitled to do so. That, I think, has really been decided for me already by the decision of the Court of Appeal, binding on me, in *Fitzgerald v. Firbank* (1). In that case there was an action against the defendant for discharging into a stream water loaded with sediment. The plaintiff was a grantee by deed of the exclusive right of fishing, that is to say, it was his several fishery in the river in question. The defendants set up, among other things, that the grantor to the plaintiff had no title, and that, therefore, the plaintiff could not maintain the action. When the matter came before KEKEWICH, J., he disposed of that part of the case in very few words. He said: C D E F

"I should have thought without argument that this case would fall within the principle that a possessory right was sufficient to constitute a title to maintain an action in the nature of trespass. I am not impressed with that objection to the plaintiff's action."

As I understand it, KEKEWICH, J., there said that possession was enough in an action of that kind, which was an action in the nature of trespass. I do not understand KEKEWICH, J., to say that it was an action of trespass; he said that it was an action in the nature of trespass. The matter went to the Court of Appeal, and in that court it is true that the defendants took a different point. They suggested that the plaintiff had a right to catch fish, but no right to take them away. That argument did not find favour with the Court of Appeal, but that this question of the right of the plaintiff to maintain the action was not present to the minds of the Court of Appeal seems to me a suggestion which is impossible. I cannot believe that LINDLEY, L.J., LOPES, L.J., and RIGBY, L.J., having KEKEWICH, J.'s decision before them, and seeing from his judgment that he had dealt with this question, if they had had any doubt that he was right on the question of the right of the plaintiff to maintain the action, would not have said so when they affirmed his judgment. It does not appear from the report that this question was gone into and decided by the Court of Appeal, but the Court of Appeal dealt with it, as I read their judgments, on the footing that possession was enough, and, that being so, they had not to determine this question which was relevant to the plaintiff's right to maintain the action. LOPES, L.J., for instance, at the end of his judgment says: G H I

"If that is the case it is perfectly clear that there is a right of action in the plaintiffs, and that the judgment of the learned judge in the court below who so held is perfectly right."

A The learned lords justices did point out, as I understand their judgments, that the action was an action of nuisance, strictly speaking. None the less, they accepted the view of KEKEWICH, J., that it was an action of that particular kind in which possession was enough, and, that being so, that is a decision which binds me, and even if I did not agree with it, which I very respectfully do, I should be bound to say that the defendants were not entitled in this case to set up a *jus tertii*.

B

Judgment for plaintiff.

Solicitors: *Hutchinson, Sons, & Gomm; Morris, Ward-Jones, Kennett & Co.*

[*Reported by E. K. CORRIE, Esq., Barrister-at-Law.*]

C

CLARK v. DOWNES

D

[KING'S BENCH DIVISION (Lord Hanworth, M.R., and Romer, L.J., sitting as additional judges of the Division), March 2, 1931]

[Reported 145 L.T. 20; 29 L.G.R. 571]

Rent Restriction—Premises not within Acts—Purchase from Crown of dwelling-house subject to tenancy—Operation of Acts in rem.

E

As the Rent Restrictions Acts do not bind the Crown they do not apply to the purchaser from the Crown of a dwelling-house subject to a tenancy existing at the date of the purchase.

A house which was built by the Office of Works in 1915 for munition workers became vacant in 1923. In 1925 it was let to the tenant. In 1928 the Crown sold the property to the W. Estate, Ltd., who, in September, 1929, leased it to the plaintiff. The rental value of the premises brought them within the Rent Restrictions Act. On a claim for possession by the plaintiff,

F

Held: on the assumption that the Crown was not bound by the Rent Restrictions Acts, the house did not fall within the scope of those Acts when it was let; the Acts operated in rem and not in personam; and, therefore, the tenant was not protected by the Acts.

G

Notes Distinguished: *Wirral Estates, Ltd. v. Shaw*, [1932] All E.R.Rep. 43. Applied: *Clark v. Mead* (1933), 149 L.T. 308. Considered: *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K.B. 294; *Rudler v. Franks* (1947), 176 L.T. 326; *Territorial Forces Association v. Philpot*, [1947] 2 All E.R. 376. Approved: *County of London Territorial and Auxiliary Forces Association v. Nichols*, [1948] 2 All E.R. 432.

H

As to what premises are within the Rent Acts, see 20 HALSBURY'S LAWS (2nd Edn.) 312 et seq., and for cases see 31 DIGEST (Repl.) 634 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, and for the Rent and Mortgage Interest Restrictions Act, 1923, see *ibid.* 1033.

I

Case referred to:

- (1) *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452; 92 J.P. 199; 44 T.L.R. 761; 72 Sol. Jo. 533; 26 L.G.R. 609, C.A.; Digest Supp.

Appeal from Coventry County Court.

In 1915 His Majesty's Office of Works built houses for munition workers in Holbrooke Lane, Coventry. They became vacant after 1923, but in 1925 one of the houses was let to the defendant. On March 26, 1928, the Crown sold the property, including the house occupied by the defendant, to the Whitmore Park

Estate, Ltd., who, on Sept. 2, 1929, leased it to the plaintiff. The plaintiff having A
sought possession of the premises occupied by the defendant, the county court
judge refused to make an order for possession. The landlord appealed.

W. E. P. Done for the landlord.

C. Coley for the tenant.

LORD HANWORTH, M.R.—This appeal, which raises an interesting point, B
must be allowed. The point with which we have to deal arises from these facts.
There are some houses which are in the neighbourhood of Coventry which were
built by the Office of Works at a time when Coventry was a great munitions centre
during the war. On May 4, 1925, there was an agreement for a weekly tenancy
entered into between the Superintendent of His Majesty's Office of Works and the C
defendant, whereby the Office of Works let a house to the defendant. The tenant
entered into possession, and he remains in possession. On March 26, 1928, the
Office of Works sold these premises, subject to the tenancies already created, to the
Whitmore Park Estate Co. and on Sept. 2, 1929, the Whitmore Park Estate Co.
granted a lease of the premises to the present plaintiff subject to existing tenancies.
The plaintiff, who had thus by assignment become landlord of the defendant, gave D
the defendant notice to quit which expired on Nov. 25, 1929.

If the matter was not complicated by the Rent Restrictions Acts it is clear that
the plaintiff would be entitled to recover possession of the premises, but it was
argued before the county court judge that, having regard to the Rent Restrictions
Acts, the plaintiff is not entitled to recover possession, on the ground that these
are premises of a rental value to which the Act applies and that the tenant is E
entitled to rely upon the restrictions imposed upon the landlord to recover
possession. The point is a short one, and before the county court judge the argu-
ment was presented on the basis that the Crown was not bound by these Rent
Restrictions Acts. That assumption is made because it is presumed that the
legislature does not intend to deprive the Crown of any right or property unless it
expresses its intention to do so in explicit terms or makes the inference irresistible,
and so where the language of a statute is general and in its general sense would not F
deprive the Crown of any right or property the ordinary rule is that the Crown is
not so deprived. If and so far as any internal evidence is to be found in the Acts,
s. 12 (10) of the Act of 1920 points in the direction of the Crown not being bound.
That section says :

"Where possession has been taken of any dwelling-houses by a government G
department during the war, under the Defence of the Realm regulations, for
the purpose of housing workmen, this Act shall apply to such houses as if the
workmen in occupation thereof at the passing of this Act were in occupation
as tenants of the landlords of such houses."

It is obvious that that subsection is of limited application. It does not apply in H
the present case, but the argument is forcible that the necessity for putting it in
at all was that the Crown is not bound by the Rent Restrictions Acts. Proceeding,
therefore, upon the basis that the Crown are not bound, we have before us a case
in which a tenancy was created by the Superintendent of His Majesty's Office of
Works on May 4, 1925 (a date subsequent to the passing of the Rent Restriction
Act, 1923), to which the Rent Restrictions Acts do not apply. The reversion to I
that tenancy has passed through the hands of the Whitmore Park Estate Co. to
the present plaintiff; but always the assignment has been made subject to the rights
of the tenant created by the letting of May 4, 1925. It seems difficult to say that
one party to a letting can alter its nature, though that, of course, could be done
by statute.

Turning to the Rent Restrictions Acts, cases have been cited to us which clearly
indicate that their effect is in rem and not in personam. GREER, L.J., explicitly
states this in *Lloyd v. Cook* (1). That being so, these premises are in the
possession of the defendant, and when they came into his possession there was

A nothing which interfered with his occupation or enjoyment or his rights in them and equally so of the landlord at that time. If there were no Rent Restrictions Acts to be considered, when the notice to quit expired on Nov. 25, 1929, it was the duty of the defendant to give up possession; he did not do so, with the consequence that the plaintiff is now taking proceedings in the county court for possession. The learned county court judge refused to grant possession, on the
B ground that the right of the plaintiff was interrupted or interfered with by the Rent Restrictions Acts. The short point, however, appears to be this: How was that tenancy, which originally at the time of its granting was not within the Rent Restrictions Act, brought within the Act? It was said by counsel for the tenant that s. 12 (2) of the Act of 1920 effected that result. That section runs:

C "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed . . ."

but, as has been pointed out by ROMER, L.J., if these statutes do not apply or affect the rights of the Crown, one must except the cases where the Crown is the landlord or the tenant. It is impossible to read sub-s. (2) as being wide enough to embrace these premises; if so, one would be holding that the Act did apply and bind the
D Crown. Leaving out that section, one turns to s. 2 (2) of the Act of 1923, but that in terms refers to the cases where the landlord of a dwelling-house to which the principal Act applies is in possession, and so on. We are discussing the case on the basis that the principal Act does not apply to the Crown and, therefore, s. 2 does not in any way affect the Crown or operate at all, because we are not dealing with a case to which the principal Act applies.

E In these circumstances it appears that the right now exercised by the plaintiff is not hampered or restricted by the Rent Restrictions Acts and effect ought to be given to the notice to quit. The result is that the appeal must be allowed with costs, and there must be an order for possession in favour of the plaintiff.

F **ROMER, L.J.**—It is agreed by both parties to this appeal that the Rent Restrictions Acts do not affect the rights of the Crown. It is also agreed that having regard to the authorities these Acts must be treated as operating in rem and not in personam. That being so, it seems to me that we must read s. 12 (2) of the Act of 1920, which defines what houses are within the Acts, as though it in express terms said: This Act shall apply to a house other than a house belonging to the Crown. It has been laid down by the Court of Appeal that for the purpose of
G considering whether a house does or does not come within the provisions of that subsection the time to be regarded is not the time at which somebody is seeking to put in operation some rights in respect of the house or to resist some application made in respect of the house, but the time at which the house is let. That being so, it seems to follow that this house is not within the operation of the Acts, because clearly it was not within the operation of the Acts at the time of
H the letting. The argument for the tenant would, I think, be a good one so far as it is based upon the Act of 1920 if that Act operated not in rem, but in personam, because then one need not except from the definition clause houses belonging to the Crown. Houses belonging to the Crown would be within the definition clause, but, the Acts operating in personam and not barring the Crown, the Crown would not be subject to any of the restrictions imposed by the Acts in
I respect of houses belonging to the Crown, leaving the houses to become subject to the operation of the Act if and when some person other than the Crown was the person to be affected by the restrictive sections of the Act. But, even if the tenant could get so far, he would then, I think, be defeated by the provisions of s. 2 (1) of the Act of 1923, because in that case the house would be a house within the operation of the Acts and the Crown would be the landlord within the meaning of that subsection, although the Crown would not be subject to the operation of the restrictive sections of the Acts. However, as I have said, it is conceded, and rightly conceded, that these Acts operate in rem and not in personam.

I only want to add this. The Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts. If the learned county court judge is right and these houses became subject to the operation of the Acts, the moment they passed out of the ownership of the Crown it follows that the reversion to the houses while in the possession of the Crown was worth considerably less than it would have been but for the Acts. The Acts so construed, therefore, would prejudicially affect the property of the Crown. Having regard to what I have said, the Acts should, therefore, not be construed in that way. For these reasons I agree that both these appeals must be allowed with the consequences that the Master of the Rolls has indicated.

Appeals allowed.

Solicitors: *Andrew, Wood, Purves, & Sutton*, for *Varley, Gillitt*, Coventry;
Joseph S. Sheppard, Birmingham.

[*Reported by R. A. YULE, Esq., Barrister-at-Law.*]

BLUNDY, CLARK & CO., LTD. v. LONDON AND NORTH-EASTERN RAIL CO.

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.J.J.), January 14, 15, 16, 19, 20, February 9, 1931]

[Reported [1931] 2 K.B. 334; 100 L.J.K.B. 401; 145 L.T. 269;
20 Ry. & Can. Tr. Cas. 92]

Canal—Maintenance—Duty of proprietor—Reasonable care—Liability of proprietor for nonfeasance—Need for plaintiff to prove special personal damage—Regulation of Railways Act, 1873 (36 & 37 Vict., c. 48), s. 17.

Under the Regulation of Railways Act, 1873, s. 17: "Every railway company owning . . . any canal . . . shall at all times keep and maintain such canal . . . thoroughly repaired . . . and in good working condition . . . so that the whole of such canal . . . may be at all times kept open and navigable . . ." In December, 1928, a lock on a canal which had been acquired by a railway company some 150 years after its construction collapsed. In an action by the plaintiffs, users of the canal, for damages for being deprived of the use of the canal,

Held: (i) the company's duty under the statute to keep the lock in repair was not an absolute duty, but a duty to exercise all reasonable care and diligence to keep and maintain it in good order and condition;

(ii) the company was liable for nonfeasance, and not only for misfeasance;

(iii) for the plaintiffs to succeed in the action they must prove that they had suffered special and personal damage beyond that sustained by every member of the public, and that condition was satisfied by proof that they had suffered damage by being prevented from sending their goods by the canal as they had been accustomed.

Notes. Section 17 of the Regulation of Railways Act, 1873, was repealed in relation to Northern Ireland by the Statute Law Revision Act, 1954, of Northern Ireland.

Considered: *Guilfoyle v. Port of London Authority*, post, p. 365; *Harper v. Haden & Sons, Ltd.*, [1932] All E.R. Rep. 59.

As to maintenance of canals, see 27 HALSBURY'S LAWS (2nd Edn.) 330 et seq.,

A and for cases see 38 DIGEST 394 et seq. For Regulation of Railways Act, 1873, see 19 HALSBURY'S STATUTES (2nd Edn.) 814.

Cases referred to:

- (1) *Gibraltar Sanitary Comrs. v. Orfila* (1890), 15 App. Cas. 400; 59 L.J.P.C. 95; 63 L.T. 58, P.C.; 38 Digest 16, 86.
- B (2) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest 400, 1251.
- (3) *Winterbottom v. Earl of Derby* (1867), L.R. 2 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 31 J.P. 566; 16 W.R. 15; 26 Digest 293, 251.
- (4) *Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex. Ch.; 38 Digest 17, 90.
- C (5) *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 38 Digest 35, 209.
- (6) *Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (1867), L.R. 2 H.L. 175; 5 B. & S. 156; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.
- D (7) *Beckett v. Midland Rail. Co.* (1867), L.R. 3 C.P. 82; 37 L.J.C.P. 11; 17 L.T. 499; 16 W.R. 221; 11 Digest (Repl.) 151, 287.
- (8) *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; 43 L.J.C.P. 385; 31 L.T. 182; 38 J.P. 820; 23 W.R. 115, H.L.; 11 Digest (Repl.) 152, 289.
- (9) *Iveson v. Moore* (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt K.B. 10; 1 Salk. 15; Willes, 74, n.; 91 E.R. 1224; sub nom. *Jeveson v. Moor*, 12 Mod. Rep. 262; 36 Digest (Repl.) 312, 590.
- E (10) *Maynell v. Saltmarsh* (1664), 1 Keb. 847; 83 E.R. 1278; 26 Digest 453, 1686.
- (11) *Hart v. Basset* (1681), T.Jo. 156; 84 E.R. 1194; 26 Digest 452, 1674.
- (12) *Fineux v. Hovenden* (1599), Cro. Eliz. 664; 78 E.R. 902; 26 Digest 452, 1672.
- F (13) *Greasly v. Codling* (1824), 2 Bing. 263; 9 Moore, C.P. 489; 3 L.J.O.S.C.P. 262; 130 E.R. 307; 26 Digest 454, 1691.
- (14) *Paine v. Partrich* (1691), Carth. 191; 3 Mod. Rep. 289; 1 Show. 243; Comb. 180; Holt K.B. 6; 90 E.R. 715; sub nom. *Payne v. Partridge*, 1 Salk. 12; 1 Show. 255; 26 Digest 452, 1677.
- (15) *Chichester v. Lethbridge* (1738), Willes, 71; 125 E.R. 1061; 26 Digest 453, 1689.
- G (16) *Rose v. Miles* (1815), 4 M. & S. 101; 105 E.R. 773; 36 Digest (Repl.) 312, 601.
- (17) *Caledonian Rail. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; 46 L.T. 826; 46 J.P. 676; 30 W.R. 569, H.L.; 11 Digest (Repl.) 149, 274.
- (18) *Caledonian Rail. Co. v. Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, 276.
- H (19) *Hammond v. St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 38 Digest 25, 135.
- (20) *Lambert v. Lowestoft Corpn.*, [1901] 1 K.B. 590; 70 L.J.K.B. 733; 84 L.T. 237; 65 J.P. 326; 49 W.R. 316; 17 T.L.R. 273; 45 Sol. Jo. 295; 38 Digest 26, 141.
- (21) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest 42, 249.
- I (22) *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260; 93 L.J.K.B. 461; 130 L.T. 476; 88 J.P. 77; 22 L.G.R. 281, C.A.; 38 Digest 48, 280.
- (23) *Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex. Ch.; 38 Digest 17, 90.
- (24) *Boynton v. Ancholme Drainage and Navigation Comrs.*, [1921] 2 K.B. 213; 90 L.J.K.B. 75; 124 L.T. 54; 85 J.P. 33; 18 L.G.R. 610, C.A.; 38 Digest 37, 221.

- (25) *Baker v. Moore* (1696), cited in 1 Ld. Raym. at p. 491; 91 E.R. 1227; 26 A Digest 454, 1694.
- (26) *Wilkes v. Hungerford Market Co.* (1835), 2 Bing.N.C. 281; 2 Scott, 446; 1 Hodg. 281; 5 L.J.C.P. 23; 132 E.R. 110; 26 Digest 453, 1684.
- (27) *Martin v. London County Council* (1898), 79 L.T. 170; 14 T.L.R. 575; on appeal (1899), 80 L.T. 866; 15 T.L.R. 431, C.A.; 36 Digest (Repl.) 312, 600.
- (28) *Lyme Regis Corp'n. v. Henley* (1834), 1 Bing.N.C. 222; 8 Bl.N.S. 690; 2 B Cl. & Fin. 331; 1 Scott, 29; 131 E.R. 1103, H.L.; 44 Digest 83, 642.
- (29) *Ruck v. Williams* (1858), 3 H. & N. 308; 27 L.J.Ex. 357; 31 L.T.O.S. 167; 22 J.P. 420; 6 W.R. 622; 157 E.R. 488; 38 Digest 38, 226.
- (30) *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health* (1858), 8 E. & B. 801; 28 L.J.Q.B. 41; 4 Jur.N.S. 1298; 120 E.R. 298; sub nom. *Itchin Bridge Co. v. Southampton Local Board of Health*, 30 L.T.O.S. 256; 6 W.R. 223.

Appeal from an order of HAWKE, J., sitting with a special jury at Leeds Assizes.

The plaintiffs carried on business as gravel merchants, the gravel being obtained by dredging in the River Ure and carried away by barges on the river. The defendant company, who, at the material time was the authority charged by statute with the duty of maintaining the River Ure Navigation in good order, had acquired an interest in a canal and its locks 150 years after its construction. In December, 1928, one of the locks collapsed by reason of the fact that water had percolated through the soil on which the baulks supporting the floor rested and gradually washed it away. The plaintiffs, who were users of the navigation for the transport of their gravel, brought an action claiming damages against the defendants under s. 17 of the Regulation of Railways Act, 1873, for breach of their statutory duty to keep the canal in good working condition, and they also claimed damages for breach of agreement to repair the navigation. The defendants pleaded (i) that there was no evidence of any breach of their statutory duty, and (ii) that the duty was a public duty and they were not liable to pay damages to any individual claimant for misfeasance. At the trial the jury found in favour of the plaintiffs. Judgment having been given in their favour, the defendants appealed.

Pritt, K.C., and H. I. P. Hallett for the defendants.

du Parcq, K.C., and W. Stewart for the plaintiffs.

Cur. adv. vult.

Feb. 9. The following judgments were read.

SCRUTTON, L.J.—The plaintiffs, Blundy, Clark & Co., carry on a considerable business in the sale of gravel and sand, large quantities of which they obtain by dredging in the River Ure, and carry away by means of barges on that river. By a series of Acts, beginning in 1767, the navigation of the river has been improved by dredging and by the erection of locks and the provision of lock cuts. The duty to maintain it has been placed in the hands of various bodies from time to time, and was, at the material times in question in this action, imposed upon the London and North Eastern Rail. Co. In 1767 the River Ure, when navigable under the Act, was declared a "free navigation." All the King's liege people were to enjoy free passage along it, subject to payment of the tolls provided by the Act. Such tolls were only payable if the vessels passed through locks erected by the authority. A second Act repeated these provisions. In 1845 an Act, the Leeds and Thirsk Railway Act, 1845 (8 & 9 Vict., c. 104), incorporated the Leeds and Thirsk Railway and empowered them to purchase the navigation with all the rights attaching to it from the then proprietors. Section 36 of this Act imposed on the railway company a duty

"to keep and maintain the said River Ure navigation . . . and all the works thereto belonging . . . well and sufficiently repaired, dredged, cleansed, scoured, and in good order and condition . . . so that the same navigation, cuts and

A canals respectively, and every part thereof, may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same, and that without any unnecessary hindrance, interruption, or delay."

B This Act is, by s. 76, a "public Act." Various Acts to which we were not referred appear to have passed on this duty to the defendant company, who, it will be seen, only became interested in the canal and its locks 150 years after its construction. The duty is also imposed on the company by s. 17 of the Regulation of Railways Act, 1873. By s. 12 of the Railway and Canal Traffic Act, 1888, the Commissioners may award damages to applicants. It was, however, agreed that the later Act—that is, the Act of 1873—did not repeal or vary the earlier Acts, and that the power to obtain damages before the Railway Commissioners did not exclude the rights, if any, to obtain damages under the provisions of the Act of 1845. Counsel for the plaintiffs also agreed that the duty imposed by the Act of 1845 was not an absolute duty to keep in repair, but only a duty to use reasonable care to keep in repair, and that to make the defendant company liable for damages for not keeping the navigation in repair, he must show negligence on their part. There was to be no "unnecessary hindrance, interruption, or delay." If a lock over 160 years old collapsed, the company would not be liable under the statute unless by reasonable care on their part they could have foreseen and prevented its collapse. Error of judgment would not be sufficient, unless it was such an error as to be negligent. The company might also be liable if, after the lock had collapsed, they did not repair and restore it within a reasonable time; that is, if they were negligent in restoring it.

E A number of legal questions were raised as to whether the position of the plaintiffs was such that they could recover damages under the statute; but before these questions were reached there was a vital question whether the defendants had been negligent in their management of the navigation. The allegations of statutory default relied on by the plaintiffs were contained in paras. 4, 9, and 11 of the statement of claim and the particulars given thereunder. Paragraph 4 recites the Act. Paragraph 5 says:

F "The plaintiffs who, at all times material to this action, were desirous of continuing their user of the said navigation for the transport of the said sand and gravel, and who have always been ready and willing to pay the proper tolls in respect of such transport, have suffered damage, by reason of the negligent failure by the defendants to maintain and keep the said navigation well and sufficiently repaired and in good order and condition so as to keep it at all times open and navigable for the use of persons, who like the plaintiffs, were or might have been desirous to use and navigate the same."

G Warnings have been alleged, para. 9 says:

H "Notwithstanding such warnings and/or knowledge the defendants failed and/or neglected to carry out their statutory duties and obligations and/or their said agreement as hereinbefore set out, with the result that in the month of December, 1928, the said lock partially collapsed; it became impossible to open the gates, and the plaintiffs' sand and gravel business, as then carried on, was stopped."

I Then para. 11 alleges that, because timely reparation work had not been undertaken by the defendants,

"the plaintiffs were prevented from transporting their said sand and gravel to the said city of York via the said navigation, and their user of the same was limited to the carrying of the said sand and gravel obtained by dredging in certain only of their boats and barges to Boroughbridge and no further. Other of their boats and barges, being on the York side of the said lock at the time when the defendants closed the said lock, were thereby rendered useless to the plaintiffs."

Paragraph 4 of the particulars gives detailed particulars of the respects in which the defendants were said to have neglected to carry out their statutory duties. The particulars under para. 11 allege:

"Notwithstanding the defendants knew or ought to have known that cracks were developing in the walls of the said lock, they failed to take any or any sufficient steps by underpinning the said walls or otherwise to prevent further subsidence and/or cracking of the said walls, or to repair the said walls in any way. The said reparation work ought to have been done during the said period referred to in para. 4 (a) hereof";

and when one turns to para. 4 (a) it says:

"The defendants so failed and/or neglected to carry out their statutory duties for a long period prior to the said Dec. 13, 1928. The extent of the said period is unknown to the plaintiffs, but it is known to the defendants and/or their engineers. The said period began prior to the said Dec. 8, 1927."

These were particulars of default before the lock collapsed. Delay in remedying the collapse was alleged in para. 13, and the particulars thereunder (7a).

On these points the jury gave the following answers. Question (i): "Did the railway company prior to the year 1928 negligently fail to take proper steps for the maintenance and repair of Milby Lock?" Answer: "Yes." Question (ii): "If 'Yes,' would the taking of such proper steps have prevented the closing of the lock?" Answer: "Yes." Question (viii): "Did the defendants fail to reconstruct the lock with reasonable despatch after it collapsed?" Answer: "Yes." Question (ix): "If 'Yes,' how long was the delay?" Answer: "Four months." Question (x): "Did the defendants cause any unnecessary hindrance, interruption or delay in reconstructing Milby Lock, and if so, for how long?" Answer: "Yes, four months." On the matter covered by questions (viii), (ix) and (x), the delay in reconstruction, it appeared that the delay alleged was not in the actual reconstruction after the lock had been unwatered, or freed from water by the construction of a cofferdam, but was in the proceedings between the collapse of the lock and the commencement of reconstruction. The jury found this delay to be four months, and the defendants admitted a delay of two months, though they argued that, for legal reasons to be referred to later, the plaintiffs could not recover damages for this delay.

Milby Lock, which collapsed in December, 1928, was about 160 years old. Its sides were substantial masonry walls 24 ft. from their top to the wooden floor of the lock. As we now know, though no one knew it at the material times before the lock collapsed, the walls rested on the wooden floor; the wooden floor rested on substantial horizontal baulks of timber 2 ft. apart across the lock whose ends just projected beyond the outer side of the walls. But instead of these baulks resting, as would be the ordinary method of construction, on substantial piles driven vertically for a considerable depth into the soil underneath, the floor, and the baulks supporting the floor, with the walls built on the floor, rested simply on the alluvial soil of Yorkshire. In the course of 160 years the water coming down the lock cut percolated through the soil which supported the lock, deck, and walls, and gradually washed it away, both under and between the walls. The result was a gradual and uneven settlement down, which, with the unstable foundations, caused the walls to shift and begin to come together. It is to be observed that no one in 1920-8 knew of this absence of piles. When the water was lowest in the lock there was 5 ft. of muddy water over the floor. To examine the foundations from the inside the lock would have to be de-watered, that is, the water shut out by cofferdams, which would involve a month's closing of the waterway, the floor taken up and investigations made between and below the baulks of timber 2 ft. apart to ascertain what else, if anything, was under the walls. If the investigation was made from the outside, 24 ft. of soil at least would have to be dug away to ascertain what was under the deck, baulks and walls. If, as was supposed, the walls rested on piles, removal of the soil immediately under the lock by percolation

A of water would be immaterial so long as the deep-driven piles were supported at a distance beneath the lock.

These being the actual and undisputed facts of construction, it becomes necessary to examine carefully the evidence called by the plaintiffs, to see what were the signs alleged as putting the defendants on inquiry, to see what was happening to the lock, and what it is alleged the defendants could and should have done to keep the lock in repair, and what repair was possible except complete reconstruction of the lock, or operations which would take as long as complete reconstruction and which would not be final. And, of course, in considering whether the verdict of the jury was supported by no evidence, or was against the weight of evidence, one must assume that the jury understood what the plaintiffs' witnesses said, and accepted it.

C The plaintiffs' business on the Ure was originally carried on by conveying the gravel and sand dredged above Milby Lock down the river to York in their barges. The bargemen apparently worked the locks themselves. In 1927, eighty-one barge-loads of the plaintiffs' gravel of about 50 tons each went down, about 4,000 tons in all. In the beginning of 1928, the plaintiffs were considering and ultimately decided on a change of method, by which they would discharge some of their gravel above Milby Lock, and by an electric transporter carry it to the defendants' station D yard at Boroughbridge, thence to be forwarded by rail to various places. The rest of the gravel would still go down the river through Milby Lock in barges. The transporter was ready to work about the middle of November, 1928. The lock collapsed on Dec. 13, 1928. Before its collapse, 128 barge-loads had gone through the lock in 1928, over 5,000 tons in all. Any reconstruction of the lock in 1927 or 1928 would have entirely stopped this traffic, as the transporter was not ready to E work till just before the collapse of the lock. When that collapse happened, the landing of gravel above the lock and its transmission by rail was not stopped, and in fact during 1929, while the lock was closed for reconstruction, 25,000 tons of gravel were landed and dispatched by rail. So far as this tonnage was intended for York, it would have been cheaper, and it would have been the intention of the plaintiffs, to send it by water through Milby Lock, but the rest of the gravel would F have been sent by rail whether the lock collapsed or not, and was not affected by the collapse. Unless repairs could have been effected earlier which would have saved reconstruction, the plaintiffs by reconstruction before 1928 would have had all their business stopped. After the end of 1928 they only lost such part of their business as they would have sent by water, and on which they had to incur extra cost in sending it by rail. The large quantity they would anyhow have sent by G rail was not damaged by the collapse of the lock.

It now becomes necessary to consider (i) the nature of the signs and warnings, neglect of which is said to show that the defendants were negligent; (ii) the nature of the repairs it is said the defendants should have done on receiving these warnings; (iii) whether these repairs, if done, would have prevented the collapse of the lock or the necessity for its reconstruction. The signs and warnings were said to H be (a) the appearance of cracks in the walls inside and outside the lock; (b) the appearance on Sept. 27, 1927, of a large hole in the soil outside the lock wall on the south side, and in May, 1928, of a large hole in the soil outside the lock wall on the north side; (c) difficulties during 1927 and 1928 in opening and shutting the lock gates and in moving backwards and forwards the swingbridge for passengers over the lock. (a) As to cracks: there was any amount of evidence as to one big I crack at the lower end of the lock. Two barge-masters said it had been there for twenty years, and that a projection in connection with it had caught a man's boat and drowned him many years ago, and that the projection had then been removed and some pointing and clamping put in the crack. There was contradictory evidence as to other cracks existing before the two or three months preceding the collapse of the lock. The theory put forward by the plaintiffs was that through the cracks water ran out of the lock, and might wash away earth at the side of the walls and so cause subsidence. But as the lowest water level was 5 ft. up the lock, there was no reason why, if there were piles supporting the walls as was supposed,

such water running out of the lock itself should get down to the foundations of the piles well below the bottom of the lock. It might wash away earth near the deck, but it would not affect the stability of the piles on which the deck was supposed to rest. It was said, when the plaintiffs' experts were pressed as to what the defendants ought to have done when they saw cracks, that they ought to have pointed them. But it seems clear that this remedy would not have reached whatever cause was causing the cracks. The cracks were there before the leakage; the leakage could not have caused the cracks. The plaintiffs' experts, seeing the lock after its collapse, say that the cracks show that the soil had subsided. But what caused the subsidence? Not the cracks; they were the effect, not the cause. If so, pointing them would not remove the cause of the subsidence, which originally caused the cracks. It seems obvious that the cause of the subsidence was the underground water flowing down the lock and washing away the soil under the deck and baulks, which were assumed to be resting on piles, but which were really resting on the soil which was gradually, in the course of 160 years, being washed away. (b) As to holes: the two holes where the soil fell in at the end of 1927 and the spring of 1928 showed clearly that something was causing the soil under the holes to fall away and cease to support the soil above it. But the soil under the holes was not supporting the lock wall, except in so far as it helped the wall to resist the outward pressure of the water in the lock. There was no evidence of the wall moving outward because of the loss of soil supporting it laterally. A hole 6 ft. deep on the top of the ground would hardly show absence of soil more than 24 ft. down where the piles were supposed to be. (c) As to swingbridge and lock gates: it is clear that in 1928 some movement of the walls inwards caused the swingbridge when being shut or opened not to fit accurately into its recesses on either side. This was, in August, 1928, attributed by those on the spot to the weight of horses grazing on the towpath and crossing the swingbridge. Attempts were made by trimming the bridge and the stone of the recesses to make things right. It was evident in September, 1928, that this was not sufficient and plans were prepared and material got ready to tie the walls by metal ties to large blocks of concrete in the ground outside the lock. But before that could be done, further movements showed subsidence and motion inward of the walls, and the lock had to be closed. As to the lock gates, at the time the difficulty in 1928 was attributed to the leakiness of the gates or obstruction of the cloughs preventing the level of water inside and outside the gates being kept, but there is no doubt now the facts are known that slight movement of the walls not suggested to amount to more than 2 in. laterally at the top would account for the difficulty.

These being the signs and warnings, what do the plaintiffs suggest the defendants should have done with this very old lock? The first suggestion was pointing the cracks, but the plaintiffs' experts admit that if there was subsidence due to underground percolation from the up-river to the down-river side of the lock washing away the foundations, pointing the cracks caused by the subsidence would not stop the percolation or the subsidence it caused. Then they suggest that the walls should have been underpinned to stop the subsidence. When cross-examined as to the nature of this process, they say that the lock should have been closed and de-watered by cofferdams; that then on the inside of the walls the deck should have been taken up, piles should have been driven down between the baulks which were 2 ft. apart, so that the top of the piles was at or below the level of the walls on the lower side of the baulks; that outside the walls piles should have been driven down through 24 ft. of earth, so that again their top was below the foundation of the walls; that then, somehow, cross timbers should be put under the walls on the tops of the two sets of piles, so as to support either the walls or the baulks (I am not sure which), and they finally admit that this process would probably be as long and as costly as complete reconstruction, and would involve stopping all traffic on the canal for at least six months. The question then seems to be whether it is negligent with an old lock or building of which you do not know the underground construction, not to close it and investigate by expensive

A and dilatory methods what is happening underneath, at a time when, though there are cracks and slight movements, it is apparently doing its work all right; or whether it is sufficient to watch its movements closely and to continue using it, until observations show clearly that it is dangerous. Closing a navigation for six months is a serious matter; the defendants might well be liable to an action for closing it unnecessarily, when it was doing its work satisfactorily.

B Some light is thrown on the matter by the judgment of the Privy Council delivered by LORD WATSON in *Gibraltar Sanitary Comrs. v. Orfila* (1). There the question was as to alleged negligence in not examining and discovering that the foundations of an old wall, which subsequently fell and injured the plaintiffs' property, were insufficient. The work is described by LORD WATSON (15 App. Cas. at p. 405):

C "At the trial of the cause, it was proved that neither the road, nor the retaining wall which was necessary for its support, had been constructed by the Sanitary Commissioners, and that both had existed from a period beyond human memory. After the fall occurred it was discovered that the original construction of the base of the retaining wall was defective. The foundation of the wall is said by the witnesses to have been wanting in thickness and solidity, and it was rested on the rough slope of the rock, instead of a transverse cutting being made into the face of the rock for its reception."

D The duty with regard to it is stated (15 App. Cas. at p. 413):

E "Their Lordships desire to add that, assuming the commissioners would have been liable, in respect of their failure to strengthen the foundations of the wall, on its being proved that they were negligently ignorant of its defects, there was, in their opinion, no evidence of such negligence to go to the jury. No doubt the result showed that its foundations were or had become insecure, but until the result occurred no one suspected it. Captain Buckle says that a special inspection would have disclosed the danger; but the witness was himself the engineer of the Sanitary Commissioners for a period of three years, and at the time the propriety of making an inspection never occurred to him. It is obvious that no examination, short of taking down the foundations of the wall, would have led to the discovery of its defects; and although Captain Buckle, in his re-examination, does say that, in his estimation, 'the locality called for special examination,' he is evidently speaking in the light of actual experience; and not a single circumstance is suggested, either by him or any other witness, which would indicate to a person of ordinary prudence the necessity or propriety of making an examination of that kind."

G Accordingly, it was held that there was no evidence to go to the jury of the negligence of the commissioners. These remarks seem very relevant to the present case.

H I have dealt with this question upon the plaintiffs' evidence alone, but it must be borne in mind that there was a large body of evidence by the defendants as to the state of things found when the lock was de-watered—no piling; soil washed away underneath and between the walls; springs coming up under the decking; cracks watched and showing no expansion till late in 1928. I have read all the evidence carefully, some of it several times, and I have come to the conclusion that, considering the age of the lock, the unknown nature of its foundations, the fact that it had stood safely for so many years, the slight indications of danger, and the serious position if the lock were closed for lengthy underground investigation which might turn out to be unnecessary, there was no evidence on which the jury were justified—when they were being wise after the event, in finding negligence in people who were pardonably in ignorance of the position before the event. The second finding of the jury especially seems to me to show that they had not understood the evidence of the plaintiffs' experts, that pointing and tying back would not prevent the subsidence, and underpinning must close the lock.

So far, I have only dealt with negligence alleged before the collapse of the lock. A There was a further claim for negligence in commencing the reconstruction after the lock had been de-watered and the exact position ascertained. Negligence in the reconstruction was not alleged; but it was alleged there was negligent delay in ascertaining and deciding what to do. It was not unnatural that a railway company, faced with the proposal to spend £8,000 in reconstructing one lock only of a navigation which had only, as a whole, yielded £500 a year, took considerable time B in seeing if they could avoid the expenditure. A great deal of evidence was given on the subject which I have considered; and the defendants appear to admit some delay; the jury, in their eighth, ninth and tenth findings, assess the delay at four months. I do not think the court can interfere with this finding. Subject to the legal questions next to be considered, the plaintiffs would, therefore, be entitled, if there is an actionable breach of the statute, to damages caused by the delay of four C months.

The defendants' legal objections to the plaintiffs' right to claim damages were based, as I understood, on two propositions: (i) That the defendants, as a public authority in the nature of a highway authority, were, under the decision of *Cowley v. Newmarket Local Board* (2), only liable for misfeasance, not for nonfeasance, and failure to repair was only nonfeasance; (ii) that for breach of the obligation of D such authority as to a public right, only those who showed particular or special damage beyond that sustained by every member of the public could sue; and that the plaintiffs had shown no such particular right. *Winterbottom v. Earl of Derby* (3) was cited.

On the first question, the principle of liability of a company empowered by statute to create a canal or navigation free to everyone on payment of tolls was stated by the Court of Exchequer Chamber in *Lancaster Canal Co. v. Parnaby* (4), E an action for damage to a person who had paid tolls, by an obstruction not caused by the company in the canal, which the company had not removed. This was nonfeasance. TINDAL, C.J., giving the judgment of the court, stated the principle thus (11 Ad. & El. at pp. 242, 243):

"The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench G in thinking that a duty of this nature is imposed upon the company."

This principle was adopted and approved by the House of Lords in the well-known case of *Mersey Docks Trustees v. Gibbs* (5), also a case of nonfeasance—failure to dredge the entrance to a dock, whereby the plaintiffs' vessel suffered damage. The principle was in that case extended from a company maintaining works for its own H profit derived from tolls receivable under statute from all the public using the navigation, to a public authority not authorised to make profit out of its tolls. These cases show that the defence that the defendant company, being by statute bound to use reasonable care to maintain a public navigation and entitled to receive tolls from the users of the navigation, are not liable for nonfeasance, cannot succeed.

I On the second point, that the plaintiff could not succeed because he suffered no particular or private special damage by the closing of the lock, but only the general damage which every member of the public, trying to use the navigation and the lock, would suffer, fails, in my opinion, on the facts proved and the decided cases. The contention was supported as similar to the decision in *Winterbottom v. Earl of Derby* (3), following and purporting to apply the decision of the House of Lords in *Ricket v. Metropolitan Rail. Co.* (6). In the former case, the plaintiff claimed that the defendant had obstructed a public highway so that he (the plaintiff) was

A compelled to go round by a longer and less convenient road. But it was held that, as this was true of every member of the public, the plaintiff was not entitled to maintain the action as he had no particular damage other than that of every member of the public. In *Ricket's Case* (6) (a decision under the Lands Clauses Act), it was held that the plaintiff's property was not "injuriously affected" because streets leading to his premises were temporarily blocked, whereby, though his house was not structurally affected, he lost customers. Decisions under the Lands Clauses Act become relevant, because, as pointed out by WILLES, J., in *Beckett v. Midland Rail. Co.* (7), to establish a claim under the Lands Clauses Act there must be proved four things, of which the second was that the damage done to his land by the works authorised by the special Act was such that before the special Act he could have maintained an action. Consequently, every decision on a claim under the Lands Clauses Act involved a decision whether the cause of the damage was actionable by the then plaintiff if there were no special Act authorising it. The fact complained of was the narrowing of a public highway in front of the plaintiff's house, whereby his light was diminished, access to his house was affected, and its pecuniary value diminished. Structurally, like the public house in *Ricket's Case* (6), his house was uninjured. His house was held to be injuriously affected; and this decision was approved by the House of Lords in *Metropolitan Board of Works v. McCarthy* (8), where the act complained of was the closing of a way of access to the Thames, which he, as a member of the public, had a right to use, and by the closing of which, under the special Act, his house was diminished in value by loss of a means of access, though it was not structurally affected. The position of the present plaintiffs was that, paying tolls, they had brought barges on to the navigation which could not get out of the navigation above Milby Lock because the lock was closed, and that they carried on on the navigation a trade in gravel, which in certain parts of the navigation they could not profitably exercise because the cheap method of carriage by the navigation was barred to them by the closing of the lock, and the carriage of the gravel by landing it above the lock was commercially impossible to certain places such as York.

As to cases in which the Lands Clauses Act was not involved, the decisions collected by ERLE, C.J., in his judgment in the Exchequer Chamber in *Ricket's Case* (6), show, in my opinion, that the facts in the present case would constitute particular damage sufficient to entitle the plaintiff to maintain an action for infringement of a public right unless the subsequent decisions of the House of Lords on the Lands Clauses Act cases overrule them. ERLE, C.J., says (5 B. & S. at p. 159):

"The action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed, but the following cases exemplify its application. In *Iveson v. Moore* (9) the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay. In this case the law on actions for obstruction of highways is well discussed. In *Maynell v. Saltmarsh* (10) the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart v. Basset* (11) the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by LORD HOLT in *Iveson v. Moore* (9). In *Fineux v. Hovenden* (12) the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasly v. Codling* (13) the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine v. Partrich* (14) the plaintiff's damage was not actionable, and the example of actionable damage is put thus:

'A particular damage to maintain this action ought to be direct, and not consequential; as, for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway.'

In *Chichester v. Lethbridge* (15) the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose v. Miles* (16) the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods overland. In all these cases the plaintiff was exercising his right of way and the defendant obstructed that exercise and caused particular damage thereby directly and immediately to the plaintiff."

In *Iveson v. Moore* (9) the decision of LORD HOLT against the right of action, as reported in LORD RAYMOND'S REPORTS, was subsequently reversed by the judges sitting in Serjeant's Inn. The cases under the Lands Clauses Act, relevant for the reason already stated, I find it very difficult to reconcile. LORD BLACKBURN, in the latest case of *Caledonian Rail. Co. v. Walker's Trustees* (17), goes through them in a way which relieves me of the necessity of referring to them in detail. He comes to the conclusion, as I understand his judgment, that the decisions of the House of Lords in *Caledonian Rail. Co. v. Ogilvy* (18) and in *Ricket's Case* (6) are not consistent with the decisions in *McCarthy's Case* (8) approving *Beckett's Case* (7), and therefore he follows "the later and more deliberate decision," that is, *McCarthy's Case* (8). The House of Lords in the *Caledonian Case* (17), following *McCarthy's Case* (8), did allow the claimant under the Lands Clauses Act to recover compensation, and, therefore, decided that the matter of which he complained would have given him a cause of action for particular damage before the Act authorising it was passed. Now the plaintiff there complained of the closing of a public highway and substituting for it a lengthier road of a steeper gradient than the way closed, whereby the access to his house was injured. This result appears to me to support the conclusion I have arrived at in the cases decided independently of the Lands Clauses Act.

The result is that the legal objections to the plaintiffs recovering damages for delay in reconstruction fail. The claim for damages as to negligence before reconstruction fails as, in my opinion, there is no evidence on which the jury could find negligence before the collapse of the lock; but the plaintiff is entitled to damages for unjustifiable delay in commencing the reconstruction of the lock after its collapse.

[His Lordship referred to an allegation made by the plaintiffs that the defendants were in breach of an agreement for the repair of the canal which the parties had made in 1927, held that there was no evidence of such an agreement, and concluded:] The result is that the judgment must be set aside except so far as it gives the plaintiffs judgment for damages for the four months' delay in commencing reconstruction, which I understand is referred to a special referee.

GREER, L.J.—I have arrived at a similar conclusion for similar, though not identical, reasons.

With regard to the claim based on breach of statutory duty the defendants contended (i) that there was no evidence of any breach by the defendants of their statutory duty; (ii) that the duty was a public duty, similar to the duty to repair highways, and the defendants were not liable to pay damages to any individual claimant for nonfeasance; (iii) that, in any event, they could only be sued for breach of their statutory duty by those who could prove special or peculiar damage beyond what was suffered by the general public, and the plaintiffs had failed to give evidence of any such damage.

[Dealing with the question of the alleged contract, his Lordship said:] I think that the more reasonable view to be taken of the conversation on Dec. 8 is that it was not intended or understood to be contractual, but that it amounted to nothing

A more than preliminary negotiations. I am satisfied that neither by actual authority nor by holding out or estoppel as pleaded had the persons present at the interview any authority to make the alleged contract.

The question involved in the claim for damages for breach of statutory duty is one of considerable difficulty, and it is not easy to reconcile the numerous decisions on the subject. Inasmuch as the answers to the second and third questions were B necessary to determine whether the defendants are liable to pay damages in respect of the four months' delay caused by their negligent delay in commencing or completing the work after the lock was closed, it is necessary for this court to deal with all three points. It was rightly admitted that the defendants' statutory duty to keep the lock in repair was not an absolute duty: see *Hammond v. St. Pancras Vestry* (19) and per LORD ALVERSTONE, C.J., in *Lambert v. Lowestoft Corpn.* (20).

C Their duty was to exercise reasonable care to keep and maintain the lock in good order and condition, so that it should at all times be kept open and navigable for the use of all persons desiring to use and navigate the same without any unnecessary hindrance, interruption or delay. It is established by the evidence of Mr. Silcock, one of the experts put forward by the plaintiffs, and, therefore, vouched by them as an expert to be relied on, that the collapse of the lock could not have D been prevented by any work that would have taken less time than reconstruction.

He suggested underpinning, but admitted that this would have necessitated the closing of the lock for the same length of time as reconstruction. At one period of his evidence Mr. Silcock suggested tying back as a method of dealing with cracks, but in the course of his examination-in-chief, he said: "I should point out that tying back would not prevent the settlement which took place in this case. You E had a definite drop of the walls on both sides." He then suggested underpinning.

The only importance of pointing, he admitted, would be to see whether further movement continued. As there cannot be any doubt that further movement did continue at Milby Lock, this seems immaterial. He also said that partial underpinning would only be a palliative, and that complete underpinning would cost F more than reconstruction. It seems clear, therefore, that in his view reconstruction at some time or other was necessary. The question then arises whether the defendants were negligent in not reconstructing earlier than they did. Their duty was to keep the navigation open without any unnecessary hindrance, interruption, or delay. As long as the lock was capable of doing its work it was unnecessary to close it. In my judgment, as nothing but reconstruction would avail, it was not negligence to postpone reconstruction as long as it could be safely postponed.

G Reconstruction would interrupt the navigation as long at one time as another. Indeed, the longer it was postponed the shorter time it was likely to take, as contractors' machinery and methods of work undoubtedly improve from time to time. In my judgment, there was no evidence on which the defendants could be held liable for the delay in deciding to close the lock for reconstruction; there was no evidence entitling the jury to answer questions (i) and (ii) in the affirmative; and H if they had discovered the cause of subsidence earlier than they did it would still have been prudent to postpone the closing of the lock.

It remains for me to consider whether the plaintiffs are entitled to damages on the ground that the defendants were guilty of negligence in that they took four months longer to do the work than was reasonably necessary. There was evidence on which the jury could so find. Two contentions were put forward by the defendants as an answer to this as well as to the larger claim, and it is necessary to I deal with them. They contended that the statutory duty to repair is a public duty, and that the defendants could not be sued for damages arising from a breach of their duty to the public. They argued that the freedom from liability for non-feasance of statutory highway authorities was not peculiar to highway authorities, but applied to all cases where the duty imposed by the relevant statute was a duty to the public generally; that the duty to keep the Ure navigation in repair was a duty imposed for the benefit of "all persons desirous to use and navigate the same,"

just as the duty to repair the roads in any district is a duty to all persons who desire to use the roads. They relied, in support of their contention, on cases like *Cowley v. Newmarket Local Board* (2), *Glossop v. Heston and Isleworth Local Board* (21), and *Hesketh v. Birmingham Corpn.* (22). It may well be that where a duty is imposed on public non-trading corporations they cannot be made liable to individual citizens or ratepayers for damages arising from their failure to carry out their statutory duties, and that the only remedy in such cases is by indictment or mandamus, or by some special proceedings provided for by the statute creating the duty. But it is too late to apply any such rule to the breaches of duty by canal companies, railway companies, or dock companies. The decisions in *Lancaster Canal Co. v. Parnaby* (23), *Mersey Board v. Gibbs* (5), and *Boynnton v. Ancholme Drainage and Navigation Comrs.* (24) are all cases in which it was held that failure to perform a statutory duty by a company taking tolls for its services rendered them liable to pay damages to persons who suffered special damage as a result of the company's breach of statutory duty.

It was further contended for the defendants that the damages claimed by the plaintiffs were not in respect of special or peculiar damages within the meaning of the cases which have laid down that a plaintiff cannot recover for a breach of a public duty unless he can establish that he has suffered "special" or "peculiar" or "private" damage. The cases on this subject are not very easy to reconcile. But, in my judgment, the weight of authority is in favour of the view that the plaintiffs' losses, through their inability to use the canal for delivering their goods to their customers at places beyond Milby Lock, and the greater expense they incurred in sending them by road or rail, constitute special damage for which they are entitled to recover on the ground of the defendants' breach of their public duty. If it be proved that a defendant has, by his acts or unlawful omissions, been guilty of a breach of any right which is the private or personal right of a plaintiff, such a defendant is, of course, clearly liable to pay damages to the plaintiff. If, on the other hand, the acts or omissions alleged are breaches of rights which the plaintiff has in common with all His Majesty's subjects who have occasion to exercise those rights, the plaintiff has no remedy by an action for damages, unless he can establish that he has suffered special or peculiar damage beyond what is suffered by the rest of His Majesty's subjects. What amounts to such special or peculiar damage is a question of some difficulty, but happily it is not necessary in this case to give an accurate definition of the word "special" or "peculiar" damage in this connection. There is ample authority for the proposition that if a trader whose premises adjoin a highway is in the habit of using the highway for the purposes of his trade and suffers damage to his business by the defendant's action in unlawfully obstructing the highway, the damage to his business is special damage, respecting which he is entitled to recover by action against the person so committing a breach of the public rights. In *Iveson v. Moore* (9) the material facts alleged in the pleading which were held to give a right of action were, that on May 14 the plaintiff had 200 loads of coal dug out of a colliery, and that for a whole month he was prevented from taking the coal in his carts to his customers. Two judges held that the action was well laid and two thought it was not. On appeal to the Court of Exchequer Chamber it was unanimously held that the plaintiff was entitled to succeed (see 12 Mod. Rep. at p. 267). It does not appear from the report that the plaintiff's carts had been actually taken as far as the obstruction and were then unable to get through. It seems to me that the case means that at any rate where a colliery company has coal ready to be taken over the highway for the purposes of sale or delivery to customers, and that highway is obstructed so that this cannot be done, the company is entitled to damages without proving that they had their coals actually on the highway and there met with the obstruction. In the judgment of GOULD, J., the decision in *Baker v. Moore* (25) is stated to the effect that the owner of property could recover damages on the ground that a highway which was the approach to some of his houses had been obstructed, with the result that he lost his tenants. In *Hart v. Basset* (11) it was held that the defendant, who had

- A obstructed and stopped up the most convenient highway for the plaintiff to carry his tithes to his barn, whereby he was compelled to take them by a longer and more difficult way and incurred expense thereby, was liable. This was held to be particular damage, occasioned to the plaintiff by a breach of public rights. *Greasley v. Codling* (13) is a case where a plaintiff who wanted to use a highway—obstructed by the defendant—for the purpose of carrying coals, by reason of the obstruction
- B had to go by a longer way so that he was damaged by being unable to make the same number of journeys per day, and it was held that the plaintiff could recover without having in any other respect proved special damage. In the judgment of BURROUGH, J., the question is stated to be whether the inconvenience complained of is a general or a particular inconvenience of the party complaining. In *Chichester v. Lethbridge* (15) it was held that a plaintiff, proving that the defendant obstructed him by a ditch and a gate across a highway whereby he was obliged to go a longer and more difficult way, and that the defendant opposed him when attempting to remove the nuisance, was entitled to succeed. In *Rose v. Miles* (16) it was held that a plaintiff who had his barges stopped by an obstruction in a waterway by the defendant, and had therefore to take the loads out of the barges and send them by road at greater expense, had suffered special damage,
- D which entitled him to recover. In this case he appears to have been actually prevented from taking the barges through, but it hardly seems possible to think that there would have been any difference in the result of the action if, instead of taking the barges up to the obstruction, he had them ready but did not take them because he knew that the obstruction was there and would not be removed. In *Wilkes v. Hungerford Market Co.* (26) it was held that the defendants, who had
- E obstructed a highway for a longer period than was justified by their statutory powers, were liable to pay damages to a bookseller whose shop adjoined the highway, and who proved loss of custom due to the unauthorised obstruction. In *Ricket v. Metropolitan Rail. Co.* (6) LORD CHELMSFORD, in the course of his speech, throws grave doubt on the correctness of the decision in *Wilkes v. Hungerford Market Co.* (26), but I do not think it can be said to have been overruled, and it
- F is in accord with the earlier authorities to which I have referred, and having regard to the subsequent decision of the House of Lords in *Metropolitan Board of Works v. McCarthy* (8), I think it ought to be regarded as correctly decided. If the diminution in value of business premises, due to an unauthorised obstruction, gives the owner a good cause of action, it seems to me that the interference with his business which gave rise to the loss in value ought a fortiori to be regarded as
- G particular damage giving him a cause of action.

These cases would afford ample authority for the decision in the plaintiffs' favour of the point under consideration. They, from time to time, during part of the relevant period, loaded their barges, took them as far as the lock, and as they could not take them any further transferred them to rail at greater expense. In addition to that, they may be able to prove that they were unable to take considerable quantities of gravel which they had or could have had ready to put upon their barges to customers who could only be, or could only conveniently be, reached by navigation below lock. But it is said that there are modern cases which establish that the damage that they claim is not special or peculiar. In *Winterbottom v. Earl of Derby* (3), where the plaintiff proved that by reason of the defendant obstructing a public footpath he had incurred expense in removing the obstruction,

I it was held that he had not suffered such damage as entitled him to recover for the breach of the public rights. KELLY, C.B., treats the question as if it were whether the plaintiff has suffered anything more than an inconvenience common to all who happened to pass that way, and in the course of his judgment he says (L.R. 2 Ex. at p. 322):

"I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained damage peculiar to himself, his trade or calling,"

and CHANNELL, B., says (L.R. 2 Ex. at p. 323):

A

"The plaintiff cannot maintain this action without showing that he has suffered damage beyond and in excess of what other people have suffered."

Assuming that these tests are correct, it seems clear that the plaintiff in the present case has suffered some damage peculiar to him in his trade or calling, or, to use the words of CHANNELL, B., "has suffered damage beyond and in excess of what other people have suffered." Whether the law was rightly or wrongly applied in this case it is unnecessary to determine, because, even if it be good law, it is no authority against the plaintiff's right to succeed in the present case. B

The decision mainly relied upon by the defendants on this part of their argument was *Ricket v. Metropolitan Rail. Co.* (6). In that case the plaintiff claimed compensation under the Railway Clauses Acts because he said his property had been injuriously affected. He was the owner of an inn, the access to which had been made more inconvenient for his customers by that which would have been an unlawful obstruction to a highway if it had not been authorised by the company's statutes. It has long been well-established law that in order to be entitled to compensation under the Railway Clauses Acts or the Lands Clauses Acts it must be proved that but for the statutory authority to do the act in respect of which compensation is claimed, the claimant would be entitled to damages at common law. In *Ricket's Case* (6) it was held (i) that the plaintiff claiming compensation had not suffered any peculiar damage which would have entitled him to succeed in an action for damages at common law; and (ii) in any event he had not proved that his land was injuriously affected. It is difficult to reconcile this case with the decision of the Court of Appeal in *Beckett v. Midland Rail. Co.* (7), which was approved by the House of Lords in *Metropolitan Board of Works v. McCarthy* (8), or with the decision of the House of Lords in the last-named case, but, be this as it may, *Ricket's Case* (6) is not an authority against the plaintiff's claim in the present case. In *Ricket's Case* (6) what the plaintiff had to establish was, first, that his property was injuriously affected, and, secondly, that the damage occasioned to him by the injurious affection of his land was such as he could have recovered at common law, and it may well be that the true explanation of that decision is that it does not involve any decision that he could not have recovered at common law for the damage to his trade by reason of the obstruction, but that the damage to his property by reason of the obstruction was too remote to be taken into account as special damage caused by the obstruction. The question whether he could have recovered for damage to his trade was not material to the decision in that case—the question being whether he could have recovered for damages to his property. As I have said, it is difficult to reconcile all the words used in the speeches in the two cases in the House of Lords. In *McCarthy's Case* (8) it was decided that the diminished value of the plaintiff's property was the direct consequence of the taking away of the draw-dock, and that he could, but for that fact, have recovered this damage, namely, the damage to his property, as peculiar and special damage occasioned to him by breach of the public rights. As I have said, it is difficult to reconcile except on the ground that no diminution in value of the public-house was in fact proved in *Ricket's Case* (6), and that in any event it was too remote on the special facts of the case, whereas the diminution in value of the plaintiff's property was proved in *McCarthy's Case* (8) to be the direct and immediate result of the closing of the dock. In my judgment, it is the law that where a plaintiff has property near a highway which he uses for the purposes of his business, and such highway, whether a canal or a roadway, is unlawfully obstructed, and he is thereby put to greater expense in the conduct of his business, or suffers loss by the diminution of his business, he is entitled to recover damages as a person who has suffered special or peculiar damage beyond that which has been suffered by other members of the public wanting to use the highway or waterway. D E F G H I

A For these reasons I think the appeal should be allowed, and the judgment varied by ordering that the inquiry as to damages be limited to damages occasioned by the four months' delay in re-building the lock.

B **SLESSER, L.J.**—The statutory obligations on the defendant company are to be found in two Acts of Parliament in practically identical terms so far as the matters here material are concerned. The first is the Leeds and Thirsk Railway Act, 1845, s. 36, and the second, the Regulation of Railways Act, 1873, s. 17. In so far as the argument in the court below and the pleadings appear only to refer to the earlier Act, I quote the material section from that Act. It is as follows :

C “And be it enacted, that the Leeds and Thirsk Rail. Co. shall and they are hereby expressly directed and required from time to time and at all times from and after the making of any such purchase, lease, contract, or agreement as aforesaid, to keep and maintain the said River Ure navigation, from its junction with the River Swale to the Borough of Ripon, and the cuts and canals and all the works thereto belonging, and every part thereof respectively, well and sufficiently repaired, dredged, cleansed, scoured and in good order and condition, and preserve the supplies of water to the same, so that the same navigation, cuts, and canals respectively, and every part thereof, may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same, and that without any unnecessary hindrance, interruption, or delay.”

E The language of this section and of the corresponding section of the Act of 1873 makes it clear that this is not a case where there is imposed an absolute duty to keep the canal repaired at all events, but only a duty of using all reasonable care and diligence. This distinction, which is vital to the determination of the degree of liability imposed by statute, is made very clear in *Hammond v. St. Pancras Vestry* (19). There a question arose concerning the liability of a vestry under the Metropolis Local Management Act, 1854, for an injury resulting to an individual from the disrepair of a sewer. The material language of s. 72 of the Act of 1854 is that :

F “Every vestry . . . shall cause the sewers vested in them to be constructed covered and kept so as not to be a nuisance or injurious to health and to be properly cleared, cleansed and emptied . . .”

G —language no less onerous than that in the Canal Acts. **BRETT, J.**, said (L.R. 9 C.P. at p. 322) :

H “The question therefore is, what is the proper construction of the Act of Parliament. That, as it seems to me, will dispose of both points: for both turn upon the construction of s. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute. The words of s. 72 are susceptible of either meaning, that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which, even with the exercise of the utmost care and diligence, may not always be capable of being done. . . . I It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute; but if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance

of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed."

There is much other authority to support the view that, where a statute does not in terms impose upon a public body an absolute duty, it is necessary to show negligence or want of reasonable care if the plaintiff is to succeed. In the leading case of *Mersey Docks Trustees v. Gibbs* (5) LORD CRANWORTH, L.C., says (L.R. 1 H.L. at p. 122):

"Where such a body is constituted by statute, having the right to levy tolls for its own profits in consideration of making and maintaining a dock or a canal, there is no doubt of their liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench and their decision was affirmed in the Court of Error in *Lancaster Canal Co. v. Parnaby* (4). The ground on which the Court of Error rested the decision in that case is stated by TINDAL, C.J., to have been that the company made the canal for their profit, and opened it to the public upon the payment of tolls; and the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property."

LORD ALVERSTONE, C.J., in *Lambert v. Lowestoft Corpn.* (20) states the matter positively thus ([1901] 1 K.B. at p. 594):

"It is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of a statutory duty unless it has been negligently performed."

Finally, on this head: "An action upon the case does not lie where a man has not sufficient notice of his duty: COMYN'S DIGEST (Action upon the case for misfeasance).

Section 36 of the Leeds and Thirsk Railway Act (from which through other statutes the railway company derive their title to the canal and their rights and duties) contains two obligations—the first one, to keep every part of the canal well and sufficiently repaired and in good order and condition, and, secondly, to keep it open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance or delay. The jury have found, as to the duty arising on the first limb of the section, that the railway company, prior to 1928, negligently failed to take proper steps for the maintenance and repair of Milby Lock and that the taking of such proper steps would have prevented the closing of the lock—a thing which happened in December, 1928—and as to the duty, on the second limb, that the defendants caused unnecessary delay or hindrance in reconstructing Milby Lock by four months. The finding as to the first duty is a finding of negligence on the obligation cast upon the defendants which, if maintainable on the evidence, would amount to a finding of a breach of their statutory duty. But I have come to the conclusion for the reasons given by my Lord, which I need not repeat because of my precise agreement with them, that there is no evidence on which the jury could properly so find, and, consequently, for failure to show reasonable care on the part of the defendant company in the repair of the lock, the plaintiffs are unable to maintain their allegation of breach of the first statutory duty and so cannot succeed on this part of their case. There remains the second finding, of failure to perform the statutory duty on the second limb, "to keep open and navigable the canal without unnecessary hindrance, interruption or delay." Again I find myself in agreement with my Lord, that in this matter there was evidence on which the jury were entitled to find that four

A months' delay had been negligently caused. The defendants themselves conceded, as I understand them, two months' unnecessary delay. But even on this finding of negligence of failure to comply with the latter limb of s. 36 it was, nevertheless, for other reasons objected that the plaintiffs could not succeed—first, because they were so sufficiently similar in nature to a highway authority that, under the decisions applying to such authorities, they would only be liable for misfeasance and not for nonfeasance, and, secondly, that in any event the plaintiffs could not show that they had suffered such sufficient or particular special damage beyond that incurred by the public at large to enable them to sue.

As to the first contention, the highway doctrine, the cases of *Lancaster Canal Co. v. Parnaby* (4), and the specific reference to the liability of canals in *Mersey Docks Trustees v. Gibbs* (5) (where LORD CRANWORTH, L.C., says (L.R. 1 H.L. at p. 122):

C “Where such a body is constituted by statute, having the right to levy tolls for their own profit, in consideration of making or maintaining a dock or canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in good repair”

D make it unnecessary to enter into an examination of the highway cases or to speculate whether the immunity there conferred arises out of an avoidance of multiplicity of actions or an incapacity to sue the inhabitants at large or for any other reason. This point, in my view, has been definitely decided against the defendants in *Parnaby's Case* (4) as approved by the House of Lords in *Mersey Docks Trustees v. Gibbs* (5).

E The second defence on this head, that the plaintiffs have failed to show particular and special damage, is more difficult. I do not think it necessary in the present case to attempt to reconcile such cases as *Iveson v. Moore* (9) (in which it was held, according to WILLES REPORTS (p. 74), that on the matter being reserved for the opinion of the judges they agreed in the opinion of TURTON, J., and GOULD, J., that an action lay upon proof of special damage more than the rest of the King's subjects by the obstruction of a way which was the only way to come to the coal pits of the plaintiff) and *Wilkes v. Hungerford Market Co.* (26) (where a bookseller suffered loss in business in consequence of passengers having been diverted from the thoroughfare by the defendants continuing an unauthorised obstruction across it for an unreasonable time), on the one hand, and the disapproval of these cases by the majority of the Law Lords in *Ricket v. Metropolitan Rail. Co.* (6). Despite the fact that these cases turned essentially on the Lands Clauses Acts and Railway

F G Clauses Acts it would certainly appear, according to WILLES, J., in *Beckett v. Midland Rail. Co.* (7), that *Wilkes v. Hungerford Market Co.* (26) must now be regarded as overruled: see also KENNEDY, J., in *Martin v. London County Council* (27). I prefer to base my judgment here on the fact that this canal is not a public highway, and, though a “free navigation,” is also a navigation for which the plaintiffs paid tolls and, on the facts, suffered the arrest of their barges and in

H I respect of which any argument based upon the exclusive general right of the public does not apply, for, though the language of the Canal Acts speaks of the whole of such canal being kept open and navigable for the use of all persons desirous to use and navigate the same, yet, as I think is indicated by the opinion of the judges expressed by BLACKBURN, J., in the *Mersey Docks Case* (5), the defendants in the present action are not servants of the public in the sense that a surveyor of highways is. Such an officer may well be responsible to a person sustaining injury from the parish ways being out of repair, but other authorities may be in a different position. Even before the decision in the *Mersey Docks Case* (5), companies working a canal were held liable as commercial adventurers trading for profit. Further authority for the conclusion that the plaintiffs have here shown particular damage may be found in *Rose v. Miles* (16). There the plaintiff declared that before and at the time of committing the grievance he was navigating his barges, laden with goods, along a public navigable creek and that the defendant wrongfully moored a barge across and kept the same so moored from thence hitherto, and

thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod the plaintiff was obliged to convey his goods a great distance overland and was put to trouble and expense in the carriage of his goods overland. Thus, the facts were very similar as regards the damage to the plaintiff, though the cause of the damage was different from that in the present case. It was held that there was such a special damage that an action upon the case would lie. LORD ELLENBOROUGH, C.J., said (4 M. & S. at p. 103):

"The plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed."

BAYLEY, J., said (4 M. & S. at p. 104):

"The defendants in effect have locked up the plaintiff's craft whilst navigating the creek, and placed him in a situation that he unavoidably must incur expense in order to convey his goods another way."

Rose v. Miles (16) was cited by counsel for the plaintiff in *Ricket's Case* (6), and, although the House threw doubt upon the decision in *Wilkes v. Hungerford Market Co.* (26), and, inferentially, on *Iveson v. Moore* (9), no criticism was made of *Rose v. Miles* (16) which appears to me to be good law. *Lyme Regis Corp'n. v. Henley* (28) decided that where letters patent bound the mayor and burgesses to repair the banks and seashore an action would lie by an individual for direct and particular damage suffered by him. PARK, J., delivering the opinion of the judges for the consideration of the House of Lords, pointed out (3 H. & N. at p. 349) that the King in granting the charter had remitted part of an ancient rent and that this showed consideration for the grant. In *Ruck v. Williams* (29) the Commissioners for Improving the Town of Cheltenham under an Act of Parliament, neglected to put a flap over an old sewer, whereby water flowed from the new sewer back into the old one and caused damage to the plaintiff. It was argued that the commissioners were not liable to action for nonfeasance. MARTIN, B., held that if the commissioners thought proper to make a new sewer communicating with the plaintiff's premises and omitted to give him the protection he had before, there was a damage immediate and consequent upon it and such damage or negligence as to entitle him to maintain this action. In every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created: per LORD CAMPBELL in *Southampton and Itchin Bridge v. Southampton Local Board of Health* (30). Finally, BLACKBURN, J., in the *Mersey Docks Case* (5), points out that (L.R. 1 H.L. at p. 107):

"It is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation and/or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

In my opinion, there is evidence that, by the defendants failing to repair within a reasonable time, as found by the jury, the plaintiffs have suffered direct special and particular loss. Their barges which were upon the canal were immobilised and their business interfered with by reason of the fact that the method of the conveyance of their gravel on which they had relied and for which they had paid tolls and were prepared in the future to pay tolls was denied to them. They are, therefore, entitled to succeed on this part of their claim and, for the reasons I have above stated, on this part only.

Appeal allowed.

Solicitors: I. B. Pritchard; Steavenson & Couldwell, for Smithson, Teasdale, & Hewitt, York.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

R. v. KYLSANT

[COURT OF CRIMINAL APPEAL (Avory, Branson and Humphreys, JJ.), November 2, 3, 4, 1931]

[Reported [1932] 1 K.B. 442; 101 L.J.K.B. 97; 146 L.T. 21;
48 T.L.R. 62; 75 Sol. Jo. 815; 23 Cr. App. Rep. 83;
29 Cox, C.C. 379]

Criminal Law—Company—Director—Publication of false prospectus—No positive false statement—False impression conveyed by statements accurate in themselves—Concealment of true position of company—Larceny Act, 1861 (24 & 25 Vict., c. 96), s. 84.

A prospectus may be "false in a material particular" within the meaning of s. 84 of the Larceny Act, 1861, if by a number of statements a false impression with regard to the financial position of a company is intentionally conveyed, although each statement taken by itself is true.

A prospectus for a debenture issue set out the dividends paid by the company for the preceding seventeen years, but omitted to state that the company had sustained losses during that period and that the dividends had been paid out of income of a non-recurring character.

Held: there was ample evidence on which the jury could find that the document was false in a material particular in that it conveyed a false impression regarding the position of the company.

Notes. Considered: *R. v. Bishirgian*, *R. v. Howeson*, *R. v. Hardy*, [1936] 1 All E.R. 586. Referred to: *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 All E.R. 631.

As to offences by directors, see 6 HALSBURY'S LAWS (3rd Edn.) 190–199, and for cases see 15 DIGEST (Repl.) 1114–1116. For Larceny Act, 1861, s. 84, see 5 HALSBURY'S STATUTES (2nd Edn.) 742.

Cases referred to:

- (1) *Aaron's Reefs v. Twiss*, [1896] A.C. 273; 65 L.J.P.C. 54; 74 L.T. 794, H.L.; 9 Digest (Repl.) 109, 519.
- (2) *Gluckstein v. Barnes*, [1900] A.C. 240; 69 L.J.Ch. 385; 82 L.T. 393; 16 T.L.R. 321; 7 Mans. 321, H.L.; 9 Digest (Repl.) 37, 51.
- (3) *Peek v. Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 9 Digest (Repl.) 102, 466.

Appeal against conviction.

The appellant, who had been the chairman of the Royal Mail Steam Packet Co., was charged (inter alia) that he, as a director of that company, published a prospectus, which he knew to be false in a material particular, inviting subscriptions to a debenture issue, with intent to induce persons to subscribe or advance money to the company, contrary to s. 84 of the Larceny Act, 1861. He was convicted on this charge at the Central Criminal Court, and was sentenced by WRIGHT, J., to twelve months' imprisonment in the second division. On other counts, which charged him with publishing accounts which he knew to be false in material particulars, he was acquitted.

The prospectus was published on June 29, 1928, and related to an issue of £2,000,000 5 per cent. debenture stock at the price of £92 10s. per cent. It contained a statement that the capital of the company authorised by royal charter was £25,000,000; the capital issued and fully paid was £8,800,000; and there was an existing 4½ per cent. debenture stock of £1,400,000, a 5 per cent. debenture stock (not including the present issue) of £3,100,000, a reserve fund of £1,450,000, and an insurance fund of £1,311,755. The object of the issue, it was stated, was to

provide additional capital for a new freehold building, and for the general purposes of the company. The prospectus then proceeded: A

"The interest on the present issue of debenture stock will amount to £100,000 per annum. Although this company, in common with other shipping companies, has suffered from the depression in the shipping industry, the audited accounts of the company show that during the past ten years the average annual balance available (including profits of the insurance fund), after providing for depreciation and interest on existing debenture stocks, has been sufficient to pay the interest on the present issue more than five times over. After providing for all taxation, depreciation of the fleet, &c., adding to the reserves and payment of dividends on the preference stocks, the dividends on the ordinary stock during the last seventeen years have been as follows" B

—and then was set out a table of the dividends paid from the year 1911 to the year 1927 inclusive, those dividends varying from 5 up to 8 per cent., and down, in 1926, to 4 per cent., but in 1927 again rising to 5 per cent. The prospectus did not state that for a number of years preceding it the company had sustained losses on its trading and investment income, after allowing for depreciation; or that the dividends for those years had ultimately been paid out of income of a non-recurring character derived from the abnormal years of the 1914–18 war. C

The Larceny Act, 1861, provides: D

"Section 84: Whosoever, being a director . . . of any body corporate or public company, shall make, circulate or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour . . ." E

Sir John Simon, K.C., J. E. Singleton, K.C., and Wilfrid Lewis for the appellant. *The Attorney-General (Sir William Jowitt, K.C.), D. N. Pritt, K.C., and Eustace Fulton* for the Crown. F

The arguments and the material portions of the summing-up appear sufficiently from the judgment.

Cur. adv. vult. G

Nov. 4. The judgment of the court was delivered by

AYORY, J.—The indictment in this case is under s. 84 of the Larceny Act, 1861. It charged the appellant in the first two counts with publishing accounts which he knew to be false in material particulars, he being a director of the Royal Mail Steam Packet Co., with intent to deceive shareholders; and in the third count it charged him that he as a director of that company issued a prospectus which he knew to be false in a material particular, inviting subscriptions to a debenture issue, with intent to induce persons to subscribe or advance money to the company. H

Before the appellant pleaded, an application was made by learned counsel, Sir John Simon, on his behalf, that further particulars should be given by the prosecution of the matters alleged to be false in the several documents. The learned judge adjourned his decision on that application till he had heard the opening of the case for the prosecution. The case having been opened by the learned Attorney-General for the prosecution, at the close of that opening the learned counsel, Sir John Simon, said: I

"With regard to the request I made earlier in the day, I have been following closely what the Attorney-General has said, and I have his assurance that what he proposes to submit at the end, after the evidence is called, is what he has opened here. I think it is only reasonable to say that that gives me the

A particulars I am entitled to, and I do not wish to put the Crown to any further trouble."

In order to appreciate the effect of that concession, it is necessary just to look at one or two passages in the opening of the learned Attorney-General, where he said :

B "Now, members of the jury, let me make this observation to you about that document [the prospectus]. I am not for a moment going to consider detailed words and phrases. Think of the type of person to whom this was addressed. It was addressed to the prospective investor, and presumably the prospective investor of a more or less cautious type. This is not anything like a gamble. This is almost gilt-edged stock, debenture issue of the Royal Mail. Consider what you are addressing to him. See how this document strikes him and must have been intended to strike him. What is the relevance of setting out the past at all? Why say that you have been earning—and say it in leaded type—more than £500,000 a year, unless it be that you obviously mean anybody to draw this conclusion: 'From what has taken place in the past you may legitimately draw an inference as to what will take place in the future.' It is quite obvious to every one of us that that is the object. Now, could you possibly, on the facts of this case, as you know them, draw any inference as regards the future, from the fact that during these years these sums of money had been expended in dividend? That is the simple point. If this company has been throughout these years, with all the figures and all the relevant facts that I have opened to you, expending millions, five to six million pounds, and each year there has been a deficit, is it not utterly dishonest—and I do not mince my words—utterly dishonest, to put a document before a prospective investor and say to him: 'Now this is what we have done in the past,' and imply to him: 'What we have done in the past is a fair indication of what you may reasonably expect we shall do in the future?'"

Following on that observation the learned Attorney-General quoted from the opinion of the late LORD HALSBURY in *Aaron's Reefs v. Twiss* (1), to which we shall have occasion to refer later. When one bears in mind those passages of the opening, and the concession which was made by the learned counsel that that supplied him with sufficient particulars of this indictment, the issue before the jury was accordingly defined, and the trial on that issue proceeded. We are not saying, of course, for a moment, that that concession as to particulars in any way precluded the learned counsel from his further argument on the proper construction of s. 84 of the Larceny Act, 1861.

G In the result, the appellant was acquitted on counts 1 and 2, and he was convicted upon count 3. In case it should be thought that there is any apparent inconsistency in the verdict of the jury, we think it right to say that with regard to counts 1 and 2 the jury may have thought that existing shareholders had some information from the published accounts which the outside public had not, particularly in view of the fact that in the profit and loss accounts for those years and previous years there had been some indication of what was called an "adjustment of taxation reserves," a somewhat abstruse expression which gave rise to considerable discussion during this case.

H Coming to count 3, on which the appellant was convicted, the prospectus in question was issued on June 29, 1928. The subscription list was opened on July 3, and closed on or before July 4. It was an issue of 5 per cent. debentures at £92 10s., and in fact it was oversubscribed. The material portions of the prospectus are first of all the statement of the capital issued and fully paid, of the existing debenture stock, and of the reserve fund of £1,450,000, and the insurance fund of £1,311,755; and on p. 2 of the prospectus, after setting out the history of the company and stating that the object of the issue was to provide additional capital for a new freehold building and for the general purposes of the company, proceeded :

I "The interest on the present issue of debenture stock will amount to £100,000 per annum. Although this company, in common with other shipping com-

panies, has suffered from the depression in the shipping industry, the audited accounts of the company show that during the past ten years the average annual balance available (including profits of the insurance fund), after providing for depreciation and interest on existing debenture stocks, has been sufficient to pay the interest on the present issue more than five times over. After providing for all taxation, depreciation of the fleet, etc., adding to the reserves and payment of dividends on the preference stocks, the dividends on the ordinary stock during the last seventeen years have been as follows :—

Then it sets out a table of the dividends paid from the year 1911 to the year 1927 inclusive, those dividends varying from 5 up to 8 per cent., and down in the year 1926 to 4 per cent., in 1927 again showing 5 per cent. One purpose for which this issue was made appears to have been to pay off an overdraft of £500,000 at the bank, which had been agreed with the bank in the year 1926. That overdraft, granted in 1926 for a period of three or six months, had been renewed from time to time for short periods on the promise of this new issue being made, out of which the bank hoped to be repaid the overdraft.

We now come to consider the grounds of appeal in this case, which are : (i) That there was no evidence that the appellant made or published or concurred in making or publishing a written statement which was false in any material particular. (ii) That there was no evidence that he made or published that prospectus knowing it to be false in any material particular. (iii) That there was no evidence that he made or published that prospectus, which he knew to be false in a material particular, with intent to induce persons to entrust or advance property to the Royal Mail Steam Packet Co. The third ground is immaterial, because it is now admitted that if the prospectus was published, and if it was false, and known to be false, there can be no question that it was published with intent to induce persons to entrust or advance property to the company. These grounds of appeal were supplemented by the further ground that the learned judge at the trial had misdirected the jury, and that he ought to have directed them that there was no evidence that the prospectus contained any false statement, and the notice of appeal sets out certain extracts from the summing-up of the learned judge, which it is complained were in fact wrong, amounting to a wrong direction in law. These are long extracts, and they are, as I have said, only extracts. It will be necessary to refer to some other passages in the summing-up to which exception is not specifically taken.

These are the passages which are complained of, in which the learned judge said, referring to the section :

“These are the words which it is said require some consideration, and I confess I think they do. It is these words :

‘make, circulate or publish, or concur in making, circulating or publishing any written statement or account which he shall know to be false in any material particular.’

What exactly does that mean? The conclusion that I have arrived at is this, that it is not limited to a case where you point to a written account or written statement and say : Here are certain figures, here are certain words which are false. I think that is to narrow unduly the words ‘in any material particular.’ It is perfectly true that a criminal Act, which carries with it the penalties of the criminal law, must be strictly construed, but it must be reasonably construed, and, in my judgment, to construe this Act in that way would be to shut out a type of fraud in connection with written documents or written accounts which may be of the utmost importance, and that is the type of fraud which may be found in a document, not fraudulent in the sense of what it states, but in the sense of what it conceals or omits. You may have a definite and positive falsehood in a document, and when that obviously is the case—where in respect of the words pertaining to that specific falsehood you could say ‘This is a material particular’—it is for the judge to say what is material,

A but clearly I am taking a case, as indeed in this case, where what is alleged is definitely material. It may be said, where you have specific words or figures containing a falsehood which you can put your finger on and say: 'It is false in a material particular, and it is in this material particular,' but I think the language which is used means more than that, according to its reasonable interpretation. It will cover the case where you have a written statement

B which is false, not in any specific words or any specific figures which it contains, but which is false in the way in which a document may be fraudulent, namely, where you may take every word and every figure, and say: 'There is nothing false about this, there is nothing false about that,' but the document as a whole may be false, not because of what it states, but because of what it does not state, because of what it implies. Of course, that type of falsity,

C which is indeed the type of falsity in the main in question here, is more difficult to establish than the case where you can point to a specific false word in a sentence, because where the falsity consists in a fraudulent desire to create a false impression, while keeping accurately to the limited facts which appear in the document, you have to show affirmatively that there was a deliberate intent to create a false impression. If you have a definite falsehood, that

D speaks for itself. A man who has told a definite falsehood or written a definite falsehood may perfectly well be able to show that though it was false he did not know it was false, or, in certain cases, though he knew it was false, he did not intend to deceive anybody, but made a false statement, an inaccurate statement thinking it was substantially true, though he knew all the facts which ought to have told him it was untrue. That is a much simpler case than

E where you have a case in which a written statement is alleged to have been false in the sense that it was concealing the true facts. Then you have to show before you can get any further at all that it was a deliberately concocted instrument, the instrument of a definite scheme to defraud or to deceive, as the case may be, and therefore in order to prove a case of fraud of this latter type, fraud as it were by concealment, the intent of the parties must be established at the outset. But to construe s. 84 so as to exclude from its ambit that type of fraud in a written statement of account is, in my judgment, to limit unduly the scope of the enactment, to exclude from it some of the most important types of false documents which in this class of case may have to be dealt with, and which, I think, is the guiding feature, to do an injury to the language—the language must be construed reasonably, according to its natural

G meaning, and in my view having regard to the whole of this section, its purpose and its character, I think the construction which I have given to it is the true construction."

Then there follows another long extract from the summing-up of the learned judge, which it is not necessary to read in full, but which contains this passage,

H which is complained of as being wrong in law, amounting to a wrong direction.

"Was the form which was adopted here, and which erred by reticence, deliberately adopted with an intention to deceive? Was it not merely a case of prudent and well-advised reticence, but a case of malignant, deliberate, wicked and treacherous deceit in order to defraud? This is one of those difficult cases, but not impossible cases, which have occurred from time to time in the course of company transactions, where a document has been put forward in order to be acted upon (prospectuses and other things), and put forward in such a form that though it stated every fact correctly, fact by fact, and everything was correctly stated by the card, yet the true effect of what was said was completely false and completely misleading. That result might be achieved with the best of intentions, and by a man who, while his mind was fixed on attaining his object and floating an issue, and while he was in a sense thinking of what was best to achieve that object, was not thinking and was not conscious to himself that he was going to mislead people, and that he was going to induce them to

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subscribe to the issue under a belief which was completely false and completely delusive. People sometimes say to themselves: 'Well, this is all I need tell. I will only tell as little as is necessary, but what I will tell I will tell quite accurately, and then I can quite fairly and honestly leave it to the person who reads this prospectus to make up his own mind.' That is to say, he may have no dishonest intent, he may have perhaps no real consciousness that what he is doing is delusive and mischievous. He may, of course, be in some cases, if he is under a legal obligation to disclose all the relevant facts, liable to a civil action. Here you are not concerned with the civil liability, you are concerned with the offence under this Act as stated in the indictment."

The learned judge again reads the charge in the indictment, and proceeds:

"Of course, that means that he fraudulently, with wicked intent, and deliberately published that with that wicked design of defrauding. That again is a question entirely for you. Do you think that this was a document which by accident or design, innocently or criminally, did mislead people? Do you think that people invested on the faith of this document, and in the belief that it contained all that it ought to contain, whereas if they had been told the true facts they would not have put money into this concern at all, because they would have wanted some guarantee as to the earning capacity of the company?"

That passage is followed by a further passage, in which the learned judge said:

"As we all know, though a debenture holder in a sense is secured, indeed, in fact, is secured on the assets which, in certain events, he may realise, which he may enter into possession of in certain events, yet the man who takes debentures is not thinking of that; he wants to take a debenture which is sure as to the assets and which is also likely to be a useful debenture to him and yield him an income year by year, an income which will come in due course from the earnings of the company, and, therefore, it seems common sense that a man would not invest in a company at a time when it had a record of unfruitful working for some years past, however much it may have had of the special credits to keep it going and to provide dividends. That may be perfectly true, but, as I say, you have to go on a step further, you have to consider the really anxious aspect of this account; you have to consider, assuming that you are satisfied that it was in truth and in fact a misleading document, was it deliberately concocted, was it deliberately put together with the intention of stating certain things and not stating other things so that anyone reading what was said, not knowing what was not said, would be deluded and deceived as to the true nature of the company. It is said by Lord Kysant that he knew what the position had been, he knew what the earning capacity had been, and he would say: 'There is a well-secured asset here. We are in the trough of the wave now, or we are just coming from the trough of the wave, and things will soon improve again, and then all will be well.' That is a matter which you will have to take into account. You will bear in mind that it is always possible to be wise after the event, but, on the other hand, you will consider whether there was such necessity at this time for obtaining further money as to form a motive for deceit. Even that will not be enough. You must satisfy yourself, before you can find Lord Kysant guilty, that not only was there a motive, but there was an actual intention, a deliberate and criminal intention, to obtain from the investor money which he would not have parted with if he had known the true facts. It is not a question here whether what was done was done within strict business lines. It is not a question whether what was done was strictly honourable. It is a question whether an offence was committed under this penal section which carried with it in the event of conviction the consequences which inevitably flow from conviction under the criminal law."

A A little lower down, he adds these words :

"In the main it is quite obvious that this is, letter by letter, word by word, an accurate document, so far as it goes, and it can only be found [probably it should read: 'it can only form'] the basis of a charge of fraud if you are satisfied, as I have said more than once, that there was this deliberate and wicked and criminal intent to concoct a false and misleading document."

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It is convenient now to refer to one or two authorities which, in our view, support the view of the law expressed by the learned judge in his summing-up. In *Gluckstein v. Barnes* (2) LORD MACNAGHTEN said, giving his opinion in that case, which concerned a company and its prospectus ([1900] A.C. at p. 250) :

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"My Lords, it is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood."

In *Peck v. Gurney* (3), a case where the House of Lords was considering the effect of the prospectus of the company which was formed to take over the business of Overend and Gurney, LORD CHELMSFORD, in giving his opinion, said (L.R. 6 H.L. at p. 386) :

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"It cannot be denied that if the condition of the firm of Overend and Gurney had been disclosed the result must have been their stoppage, and no hope could have been entertained of establishing a joint stock company upon the basis of a concern in such a state. The foundation of the projected company was, therefore, necessarily laid in concealment; and to render the scheme attractive to the public, the promoters were not only compelled to hide the truth, but to give such a colour to the statements put forth in the prospectus as to render them (though perhaps literally true), yet, in the sense in which they must have known the statements would be understood by the public, really false."

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F In the same case, LORD CAIRNS, in giving his opinion, said (L.R. 6 H.L. at p. 402) :

"[The first question in the case is:] Did the respondents, in the prospectus issued as to the company, make representations which, in point of fact, were untrue? [And he says, further:] This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

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Lastly, we come to the case, which was quoted by the learned Attorney-General in his opening, of *Aaron's Reefs v. Twiss* (1), in which LORD HALSBURY, in giving his opinion, said this ([1896] A.C. at p. 281) :

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"Inasmuch as the jury have found that, I think, upon very good evidence in the prospectus itself [that is, that it was calculated to induce persons to invest money] it remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again I say I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Now, if you

look at the whole document taken together, knowing what we now know and what the jury had before them, I suppose nobody can doubt that this was a fraudulent conspiracy. I observe that one or two of the learned judges below used very plain language upon it, and remarked upon the fact that Mr. Gilbert, who seems to have been the head and front of it, was not subjected to an inquiry in a criminal court. But, be that as it may, the question before your Lordships now is whether the jury were justified in finding with these facts before them what they did find. It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation? I do not care by what means it is conveyed, by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."

A later on he says, dealing with that particular case ([1896] A.C. at p. 284):

"The whole of this transaction seems to me to have been fraudulent to the last degree, and I entirely concur with those learned judges who, in very plain language, said that the persons engaged in this transaction were guilty of a fraudulent conspiracy, and might have been indicted for it."

In the opinion of this court, those passages are sufficient to support the summing-up so far as it consisted in any direction on the question of law arising in this case. It is true that they are opinions expressed in civil proceedings, but we think that the principles which are there laid down are none the less applicable in this case, particularly in view of the fact that in the last case LORD HALSBURY had in mind and gave expression to his view as to the criminal law as well as the civil law. In the present case we find that the learned judge on more than one occasion specifically called the attention of the jury to the distinction which they must bear in mind between a possible civil liability and a criminal liability, and in the opinion of this court there was ample evidence upon which the jury could come to the conclusion that this document, the prospectus, was false in a material particular, in that it conveyed a false impression, the falsity in this case consisting in putting before intending investors as material upon which they could exercise a judgment as to the existing position of the company, figures which apparently disclose the existing position but in fact conceal it. In other words, the document implied that the company was in a sound financial position, and that a prudent investor could safely invest in its debentures. This implication arises particularly from the statement that the dividends have been regularly paid over a term of years, although times have been bad, a statement which is entirely misleading when the fact that they were paid not out of current earnings but out of earnings in the abnormal war period is omitted.

The further question is whether there was evidence upon which the jury could properly find that the appellant knew that this document was false. If there was evidence that the document was false in the particulars already indicated, there was ample evidence upon which the jury could find that the appellant knew of its falsity, knowing as he did of the means by which the dividends had been paid; and it is not, and cannot be, disputed that the prospectus was published with intent to induce persons to entrust or advance money to the company, which was sufficient to satisfy the section. But the learned judge told the jury, in the passage that I have already read, that upon this third count also they must find the intention to defraud, and he repeated this, after the jury had retired, and sent their written question to him. In these circumstances the jury must be taken to have found that what was done in this case was done with an intent to defraud.

A In the result we come without hesitation to the conclusion that in the summing-up, regarded as a whole, there was no misdirection, that there was ample evidence upon which the verdict of the jury can be supported, and that this appeal must be dismissed. I intended to add, with reference to what took place after the jury had retired and asked a question of the learned judge, that in the opinion of the court the direction to the jury by the learned judge that the intent to deceive necessarily involved a fraudulent intent, because fraud involved an intent to deceive, was too favourable to the accused, and that he ought to have told them that on this third count it was sufficient if they found an intent to induce persons to subscribe or advance money to the company.

Appeal dismissed.

C Solicitors: *Holmes, Son, & Pott; Director of Public Prosecutions.*
[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

D

WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY AND DONOVAN

E [COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), May 7, 1931]
[Reported [1932] 1 K.B. 194; 101 L.J.K.B. 26; 146 L.T. 1;
95 J.P. 208; 29 L.G.R. 633; [1926-31] 2 B.R.A. 926]

Rating—De-rating—Industrial hereditament—Bespoke tailoring business—Retail outfitter's shop—Fitting and work rooms—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), s. 3 (1).

F The respondents, bespoke tailors and outfitters, occupied a hereditament which was registered as a workshop under the Factory and Workshop Acts, 1901-20, and consisted of a three-storied building used, on the ground floor, partly as an outfitter's shop and partly as a place for showing customers cloth and for storing cloth, and, on the upper floors, as fitting rooms and workrooms.

G **Held:** a unified business being conducted on one hereditament could not in law be dissected, and the work carried on in the workrooms must be treated as ancillary to the retail trade or business of the premises, and, therefore, the hereditament fell within s. 3 (1) (a) of the Rating and Valuation (Apportionment) Act, 1928, and was not entitled to be de-rated.

Finn (Wimbledon Revenue Officer) v. Kerslake (1), post, p. 242, applied.

H **Notes.** Considered: *Toogood & Sons, Ltd. v. Green*, [1932] All E.R.Rep. 309; *McGowan v. Osgoldcross Assessment Committee, West Riding of Yorkshire*, [1936] 2 All E.R. 170.

As to de-rating of factories and workshops, see 27 HALSBURY'S LAWS (2nd Edn.) 439 et seq., and for cases see DIGEST SUPPS., tit. Rates and Rating, case no. 226a et seq. For Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 167.

I Cases referred to:

- (1) *Finn (Wimbledon Revenue Officer) v. Kerslake*, post, p. 242; [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 46 T.L.R. 601; 28 L.G.R. 550; [1926-31] 2 B.R.A. 743, C.A.; on appeal, post, 242; [1931] A.C. 457; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926-31] 2 B.R.A. 886, H.L.; Digest Supp.
- (2) *Inland Revenue v. Gunn, Collie, and Topping*, 1930 S.C. 389; Digest Supp.
- (3) *Inland Revenue v. Wigtownshire Assessor*, 1930 S.L.T. 381; Digest Supp.

- (4) *Turpin v. Middlesbrough Assessment Committee*, post, p. 242; [1931] A.C. 446; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926-31] 2 B.R.A. 886, H.L.; Digest Supp.

Appeal from the decision of the Divisional Court (LORD HEWART, C.J., AVORY and MACNAGHTEN, JJ.), on appeal from Somerset Quarter Sessions on a Special Case stated under the Rating and Valuation Act, 1925, s. 31 (5).

At quarter sessions the revenue officer for the Taunton Assessment Area appealed against the decision of the Taunton Assessment Committee to include in the special list for the rating area of the borough of Taunton as an industrial hereditament, the hereditament therein described as follows:

"Occupier: Messrs. Sibley and Donovan.

"Premises: Shop, workrooms, &c., Cheapside.

"Net annual value: £205 (£59 industrial user, £146 non-industrial user)."

The following facts were proved or admitted. The hereditament, which was situated in one of the principal streets in the shopping centre of Taunton, consisted of a three-storied building known as Nos. 4 and 5, Cheapside, Taunton, and was in the sole occupation of the respondents, Messrs. Sibley and Donovan, bespoke tailors and outfitters. Messrs. Sibley and Donovan commenced business at No. 5, Cheapside in 1911, and until December, 1927, they carried on at No. 5 only a business consisting of the manufacture and sale of men's suits, breeches, and overcoats which were ordered by customers on the premises and elsewhere. They never have carried on the business of ready-made tailors on this hereditament. In December, 1927, Messrs. Sibley and Donovan purchased the premises known as No. 4, Cheapside because they had insufficient room for the tailoring business, and opened on the ground floor of No. 4 a shop in which they sold shirts, collars, socks, hats, ties, and other similar articles not made on the premises. The upper floors of Nos. 4 and 5 were occupied and used as appears hereafter.

The said hereditament was now occupied and used as follows. (i) Two front shops turned into one on the ground floor with a total frontage of 35 ft. to the main thoroughfare and a depth of 32 ft. (average) to a side street. The shops comprised two show windows, one showing cloth and the other displaying general outfitting, hats, ties, umbrellas, etc. The ground floor of No. 5 was used for interviewing customers, showing materials, and storing the cloth from which the suits were made. The ground floor of No. 4 was used entirely for the outfitting business. (ii) First floor—(a) two fitting rooms; (b) office; (c) cutting room used for the cutting out of cloth for the making of suits, breeches, and overcoats and for cutting trimmings; (d) a small store room in connection with the outfitting business. (iii) Second floor—(a) and (b) two workrooms, each 11 ft. 6 in. by 9 ft., used for the making and ironing of garments; (c) and (d) two workrooms, each 12 ft. by 9 ft.; (e) one workroom, 14 ft. 6 in. by 8 ft., used at times as a store for wrappings, collapsible cardboard boxes, and for packing the garments made on the premises; (f) one workroom, 12 ft. by 7 ft. 6 in., used for the making of garments. (iv) Third floor—Five workrooms, (a) 11 ft. 6 in. by 11 ft. 6 in.; (b) 11 ft. 6 in. by 11 ft. 6 in.; (c) 12 ft. by 7 ft. 6 in.; (d) 12 ft. by 9 ft.; (e) 14 ft. 6 in. by 8 ft. Of these, four were used for the making of garments and one as a cutting pattern room in which patterns used by the cutters were stored; (f) one stock room, 11 ft. 6 in. by 9 ft., used as a repository for waste cloth cuttings. (v) Basement—two cellars. The said hereditament was occupied and used as enumerated above, solely in connection with the occupiers' business as bespoke tailors and outfitters. The only parts used for the purposes of the outfitting business were the ground floor of No. 4 and the room (d) on the first floor. The number of persons employed on the said hereditament was twenty-nine in addition to the two principals. Of these twenty-six were engaged in tailoring and three in the outfitting department. The two principals were solely engaged in tailoring. In 1928 wages paid to employees engaged in making garments amounted to £2,457 and to employees engaged in the outfitting department

A £452. In 1929 the wages so paid were £2,390 and £474 respectively. In 1928 the gross turnover was as follows: tailoring 77·2 per cent., outfitting 22·8 per cent. (The outfitting department has not yet shown a profit.) In 1929 the gross turnover was as follows: tailoring 76·6 per cent., outfitting 23·4 per cent. Of the customers of the tailoring business 70 per cent. lived outside the borough of Taunton and of this 70 per cent., 30 per cent. outside a radius of twenty miles. B Of these customers some gave their orders and were fitted on the premises at No. 5, others gave their orders and were fitted at their own residences, and many repeat orders were received by post. The said hereditament was registered as a workshop under the Factory and Workshop Acts, 1901-20.

The revenue officer contended that the hereditament was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for purposes not those of a factory or workshop, and/or was primarily occupied and used for one of the following purposes or for a combination of such purposes, that is to say: (i) the purposes of a retail shop; (ii) the purposes of retail trade and/or business which were not the purposes of a factory or workshop; (iii) that, if the said hereditament be occupied and used as a factory or workshop, nevertheless it was not occupied D and/or used for the purposes of a factory or workshop in that such occupation and/or user was incidental and/or ancillary to other purposes which were not the purposes of a factory or workshop, namely, those of a retail shop and/or retail trade and/or business. The respondents contended that the primary use and occupation of the hereditament was as a workshop for the manufacture of clothes and not for any of the purposes referred to in the proviso to s. 3 (1) of the Act E of 1928.

Quarter sessions found, in so far as it was a question of fact, that the hereditament was a workshop within the meaning of the Factory and Workshop Acts, 1901-20, and was occupied and used as such, that it was occupied and used partly as a retail shop, but mainly as a workshop where suits, breeches, and overcoats were cut, made up, and finished to order, and that the fact that a large proportion F of the suits, breeches, and overcoats were sold on the said hereditament did not deprive the hereditament of the benefits of the Act of 1928 or render the primary use and occupation of the hereditament anything other than that of a workshop. They came to the conclusion, therefore, that the hereditament was an industrial hereditament within the meaning of the Act of 1928, and gave judgment in favour of the occupiers with costs, ordering that the said hereditament should remain in G the special list.

The Divisional Court held, following the decision of the Court of Appeal in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1), that the hereditament was an industrial hereditament and ought to be entered in the special list. The revenue officer appealed.

H *The Attorney-General (Sir William Jowitt, K.C.), Wilfrid Lewis and Colin H. Pearson* for the revenue officer.
J. D. Casswell for the occupiers.

J **SCRUTTON, L.J.**—This case under the Rating and Valuation (Apportionment) Act, 1928, comes before us in this way. When the Divisional Court gave the decision which is appealed against they followed the decision of the Court of Appeal in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) and a decision of a majority of the Court of Session in *Inland Revenue v. Gunn, Collie, and Topping* (2). Between the time of the Divisional Court's decision and the appeal coming before this court, the House of Lords has reversed the decision of this court and expressed an opinion in favour of the minority judgment of LORD HUNTER in the Scottish court instead of the majority judgment with which this court agreed.

I It is contended on behalf of the occupiers that, in view of certain facts to which I will refer, the decision of the House of Lords in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) does not affect the decision in this case. This question of

a shop being on the premises where the things sold are manufactured—that is to say, a hereditament with a factory or workshop on it and a retail shop—there arose in the case of a bakery. It is admitted, as I understand, that, if the bakery which makes the bread and confectionery is on one hereditament and the shop is on another, the hereditament containing the bakery, which is a workshop or factory, can be de-rated. The question is: What is to happen when the bakery that makes the bread and confectionery, and the shop which sells all or some of it, are on the same hereditament? Under s. 3 (1) of the Act an industrial hereditament is a hereditament occupied and used, inter alia, as a factory or workshop. There follows a proviso that a hereditament is not an industrial hereditament if, though used as a factory or workshop, it is primarily occupied and used for certain purposes, one of which is the purposes of a retail shop. Without saying for the moment anything as to whether that question is a question of fact or law, a practice has been followed in many of these de-rating cases by which instead of having the Case stated by a judicial tribunal, the parties themselves have agreed the Case, and as, of course, neither of them was ready to agree to a finding which would have stated them out of court, the Case came up to the judicial tribunal with no finding of fact whether the hereditament was primarily occupied or used for any particular purpose, and this gave great embarrassment to the court. When the bakery case came before this court there was no finding in the case about “primary purpose,” and this court had to deal with the matter as best they could in the absence of such a finding. This court, agreeing with a decision of the majority of the judges in the Scottish case of *Inland Revenue v. Wigtownshire Assessor* (3), accepted the view of LORD SANDS, namely (1930 S.L.T. at p. 384):

“The bakehouse is vital. The whole fabric, dwelling-house, and retail shop depend upon the bakehouse, and, therefore, I am unable to hold that, as in contrast with the baking of bread, either retail sale or residence, is primary.”

Accordingly, we affirmed the tribunal which had apportioned, giving the bakehouse de-rating and the shop no de-rating.

The *Wimbledon Case* (1) went to the House of Lords, and the decision of the Court of Appeal was reversed in a judgment which was stated to be the judgment of the whole House. As I understand that decision, the House of Lords took a view that you could not dissect a unified business which was conducted on one hereditament. That must have been, not a decision of fact, but a decision of law. LORD DUNEDIN said (post, p. 261):

“The bakehouse at the back of the shop which makes the goods for the retail business is an ordinary part of a retail baker’s shop and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker’s shop.”

Nothing is said about the fact that if that bakehouse had been in another hereditament it would have been de-rated as a factory or workshop.

The decisions of the Court of Appeal on fact are not binding on any other court of appeal, or, indeed, on anybody. The decision of the House of Lords on fact is not binding on the House of Lords, or on anybody else. The decision of the House of Lords on law is binding on the House of Lords itself, and, of course, on any subordinate tribunal. While I have great difficulty, if I may very respectfully say so, in understanding the decision of the House of Lords, I take them to be deciding as a matter of law, because they have no power to make any finding on matters of fact, that when there is a workshop and a shop on the same hereditament you cannot dissect them—to use the language used, i.e., “the dissection of a unified business is not justified.” What the House of Lords will say when they get a case of a large factory which sends its goods to other shops to be sold, but has a small shop on the premises which sells a part of them, I must leave to their Lordships to determine. They will probably discover some satisfactory way of explaining the language which has been used in this case, but as the judgment

A stands it appears to me to bind us in the present case, because the present case is this: Shops in a street at Taunton, one of which is an outfitting shop and adjoining it a shop to which customers come to give orders for bespoke tailoring. Orders may also be given by post to that shop. The upper floors of that shop are occupied by the workmen, who cut the goods according to order. A finding of fact by quarter sessions was that the hereditament was occupied and used partly as a retail shop, but mainly as a workshop. I think that the decision of the House of Lords must be that as a matter of law you cannot dissect the hereditament in that way. There being what the House of Lords calls a unified business on it, namely, taking orders for bespoke tailoring and making the things so bespoken, you cannot dissect that, and you must treat the workshop as ancillary to the retail trade or business. That, as a matter of law, binds us, and it is not of much use for any individual member of the court to say he does not understand it, still less to say he does not agree with it, and I think in those circumstances the decision of the House of Lords compels us to allow this appeal.

GREER, L.J.—I think we are compelled by the decisions of the House of Lords in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) and *Turpin v. Middlesbrough Assessment Committee* (4) to hold that this appeal must succeed. In appeals to this court, and from this court to the House of Lords from the decision of a judge of the High Court sitting alone, the court has the power to reverse the judge below on a question of fact, but on appeals which arise out of Cases Stated, the court, whether the Court of King's Bench, the Court of Appeal, or the House of Lords, have no jurisdiction to find the facts. If the facts are insufficiently found in the Case, whether the Case comes to the court under Baines Act by agreement, or whether it comes as stated by a recorder or a chairman of quarter sessions, none of the courts has any power to find the facts, and if the facts are insufficiently stated the Case must go back to the tribunal which by statute is the tribunal of fact. I say that because it has an application to the interpretation of the judgments given by the House of Lords in the two cases that I have cited. They must be treated as judgments on questions of law. In the case most like the present one—*Finn (Wimbledon Revenue Officer) v. Kerslake* (1)—the law laid down appears to me to be this. Upon the facts there stated no court could, as a matter of law, come to any other conclusion except the conclusion that the premises in question were primarily used as a shop. If that is accurate, as a matter of law in relation to the facts stated in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1), it is, in my judgment, a fortiori applicable to the facts stated in the present Case.

The occupiers here carry on a shop in which they conduct two businesses, one the business of an outfitter and the other the business of a bespoke tailor, but there is only one rateable hereditament in which both those businesses are carried on. For the purpose of carrying on their business as bespoke tailors and selling all retail garments that are made on their premises they use their shop. They also use it for selling their outfitting articles. It seems to me that they are in exactly the same position from the point of view of s. 3 as was the bakery in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1). In one respect this case is stronger against the occupiers than it was against the baker in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1), because in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) a very large proportion, I think the larger proportion, of the loaves that were made in that part of the premises which was used for factory purposes were delivered from what I will call the factory side of the premises, and not from the shop at all; but on the facts of this case, all the business that was carried on by the bespoke tailor in the sense of taking orders, complying with those orders by manufacturing the goods, and delivering the goods, took place on the unified premises, and there was no separate portion of the business that could possibly be suggested as being carried on from the factory side of the unified premises. It does not matter whether the minds of the judges of this court entirely follow the reasoning of the House of Lords in the cases that they have decided; if the facts

of the case are in essence similar to those in the cases decided by the House of Lords, we are bound to follow the judgment of the House of Lords in the cases cited. For these reasons I agree that this appeal must be allowed. A

SLESSER, L.J.—I agree. In order to ascertain exactly what the House of Lords have decided in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) it is necessary to consider shortly what is the history of the interpretation of s. 3 in so far as it refers to a hereditament on which there is a factory or workshop, on the one hand, and a retail shop, on the other, both on the same hereditament; and it is necessary to consider the history of the decisions that there have been upon that point. B

The first case which discussed this matter was *Inland Revenue v. Gunn, Collie, and Topping* (2), and there it was held by the majority of the court that you could, in a case where the whole of the product of the workshop was disposed of through the medium of the retail shop, dissect the two purposes so that it might be possible, in the facts of the particular case, to hold that the hereditament as a whole was not primarily occupied for the purpose of a retail shop, and, therefore, fell within the general definition of "industrial hereditament" in s. 3 (1) as being used as a factory or workshop. That view was followed by this court in *Finn (Wimbledon Revenue Officer) v. Kerslake* (1), which was not a case of a tailor's shop with a workshop for producing clothing afterwards to be sold, but was a case of a bakehouse and a bakery. The House of Lords, in dealing with that case, appears to me not only to have said that this court was wrong as a matter of law in the view to which they came, but also to have indicated that in their opinion the decision of the majority of the Scottish court was also wrong, and that the decision of LORD HUNTER was right. The decision of LORD HUNTER, which, as I read it, was approved by their Lordships, was that the subjects there, that is, the workshop and selling premises, ought to be treated as a retail shop. It may be said that nothing was manufactured or adapted for sale in any part of the premises except for the purpose of satisfying the requirements of customers to whom goods have been sold retail. In *Finn (Wimbledon Revenue Officer) v. Kerslake* (1) LORD DUNEDIN, who in his speech gave the opinion of the whole of their Lordships, said (post, p. 261): C D E F

"In the present case, the hereditament is all occupied and used for the one trade or business, namely, a retail trade or business in bread and confectionery. . . . Similarly, the bakehouse at the back of the shop . . . is an ordinary part of a retail baker's shop, and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop." G

In the present case the facts which are found show, without any question, that the whole of the product of the workshop was used, to use LORD DUNEDIN's words, "for the purposes of a retail shop." It is true, as is stated in the Case, that some of the customers give their orders and are fitted at their own residences, and repeat orders are received by post, but the earlier words indicate that such orders are given through the shop, and there is no finding of fact that any of the products of this workshop are used except for the purpose of supplying the shop or orders which come through the shop. H

It seems to me that it has now been laid down by the House of Lords as a matter of law that where on a hereditament a product comes from a factory or workshop and is then disposed of through a retail shop, the hereditament is occupied and used for the purpose of the retail shop. In their Lordships' view, the question whether it is primarily occupied or not does not now seem to arise. Once you have what their Lordships call a unified business, they hold that the dissection of such a unified business, such as would be necessary were one to consider which purpose was primary and which secondary, is not justified. That is, therefore, entirely a matter of law. The facts of this case on these essential I

A matters differ in no way from those of the Scottish case of *Inland Revenue v. Gunn, Collie, and Topping* (2), nor from the bakery case of *Finn (Wimbledon Revenue Officer) v. Kerslake* (1). That being so, we are bound by the decision of the House of Lords to hold that this is of necessity occupied and used for the purposes of a retail shop. That is a matter of law and not of fact, and consequently this appeal must be allowed.

B Appeal allowed.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co., for Alms & Young, Taunton.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

C

D

Re STALMAN. STALMAN v. JONES

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 20, 1931]

[Reported 145 L.T. 339]

E

Will—Signature—Position—Will on one sheet, with signature and attestation at top above dispositions—Wills Act Amendment Act, 1852 (15 & 16 Vict., c. 24), s. 1.

F

A person who desired to make a will requested a friend to write down her wishes for the disposal of her property after her death. The writing occupied a single sheet of paper, there was no room at the end of the writing for a signature, and so the proposed testatrix signed at the top of the sheet.

Held: that the document was not a valid will as it was directly within the prohibition in the Wills Amendment Act, 1852, that no signature should be operative to give effect to any disposition or direction which was underneath or which followed it.

G

Notes. Considered: *In the Goods of M. M. Smith*, [1931] P. 225; *In the Estate of W. E. Roberts*, [1934] All E.R.Rep. 62. Applied: *Re Harris, Murray v. Everard*, [1952] 2 All E.R. 409. Referred to: *In the Goods of Hornby*, [1946] 2 All E.R. 150.

As to the place of the testator's signature on a will, see 34 HALSBURY'S LAWS (2nd Edn.) 58 et seq.; and for cases see 44 DIGEST 251 et seq. For Wills Act Amendment Act, 1852, see 26 HALSBURY'S STATUTES (2nd Edn.) 1354.

H

Cases referred to:

- (1) *In the Goods of Wotton* (1874), L.R. 3 P. & D. 159; 43 L.J.P. & M. 14; 30 L.T. 75; 38 J.P. 328; 22 W.R. 352; 44 Digest 256, 830.
- (2) *In the Goods of Gilbert* (1898), 78 L.T. 762; 44 Digest 257, 836.
- (3) *In the Goods of Gee* (1898), 78 L.T. 843; 44 Digest 256, 828.
- (4) *In the Goods of Kimpton* (1864), 3 Sw. & Tc. 447; 3 New Rep. 691; 33 L.J.P.M. & A. 153; 10 L.T. 137; 28 J.P. 552; 164 E.R. 1340; 44 Digest 256, 835.

I

Appeal from a decision of FINLAY, J., at Liverpool Assizes.

The deceased, Margaret Jane Stalman, wishing to make a will, asked a friend, Nathan Taylor, to write out her wishes. Mr. Taylor took a single sheet of paper and wrote her wishes down, but when it was finished the writing had reached to

the bottom of the sheet. Mrs. Stalman thereupon signed her name at the top and A
Mr. and Mrs. Taylor duly witnessed it. The document was then as follows:

"Signed MARGARET JANE STALMAN.

Witness NATHAN TAYLOR, 87, Rullerton Rd., Wallasey.

CATHERINE TAYLOR,

3, Sleepers Hill,

Anfield,

Liverpool.

March 14/1930.

I, Margaret Jane Stalman (née Jones) hereby make the following bequests:—
To my husband Victor Percy Stalman I leave the shop at present standing in
my name together with whatever stock contained therein. Should my husband
desire to part with the said business, I desire that my brother Herbert
Llewellyn Jones (Bertie) to have the first option of the purchase. To my
brother H. L. Jones my half of the shares held jointly in L'pool Gas Co. (about
£370). All other money in War Savings Certificates, Co-operative and Post
Office Banks to be equally divided between my sister Sarah Elizabeth
Rawsthorne, and my brothers John Owen Jones, Robert David Jones, and
H. L. Jones. My clothes I wish to go to my sister S. E. Rawsthorne. My
jewellery to my niece Olwyn Rawsthorne. I also wish that should any of the
above brothers and sisters desire to possess any of the things contained in my
home that they should have what they desire.

[End of writing and bottom of sheet.]"

Margaret Jane Stalman died on March 27, 1930, without issue or parent. The
district registrar of Liverpool marked the document intended to be her will "Pro-
bate refused" after he had had an intimation from the Principal Probate Registry
that, in the opinion of the senior registrar, the document was not a valid testa-
mentary instrument. On July 18, 1930, the husband brought this action against
the brothers and sisters, claiming as the lawful husband and one of the persons
entitled in the event of an intestacy to share in the estate of Margaret Jane
Stalman to have the document pronounced against, and to have a grant of letters
of administration to the estate to him. On Mar. 23, 1931, FINLAY, J., at Liverpool
Assizes, decided that the document was a valid will, though admitting he would
have felt great difficulty in coming to that decision but for the decisions in *In the
Goods of Wotton* (1) and *In the Goods of Gilbert* (2), in which wills had been held
to be duly executed where the signatures of the testator and witnesses were on the
first page and the dispositions followed on later pages. The husband appealed.

By s. 1 of the Wills Amendment Act, 1852:

"Every will shall, so far only as regards the position of the signature of the
testator . . . be deemed to be valid . . . if the signature shall be so placed at or
after, or following, or under, or beside, or opposite to the end of the will, that it
shall be apparent on the face of the will that the testator intended to give effect
by such his signature to the writing signed as his will . . . ; but no signa-
ture . . . shall be operative to give effect to any disposition or direction which
is underneath or which follows it, nor shall it give effect to any disposition or
direction inserted after the signature shall be made."

W. L. Blease, for the husband, cited *In the Goods of Gilbert* (2) and *In the
Goods of Gee* (3).

Harold Brown, for the defendants, cited *In the Goods of Kimpton* (4).

LORD HANWORTH, M.R.—This appeal should be allowed. The question is
whether this document of March 14, 1930, can be admitted to probate. The lady
died on March 29, 1930, and she left no other testamentary disposition. It is said
that this is not a testamentary document which can be admitted to probate. The
action was heard before FINLAY, J., at assizes. The court does not regard these

A documents with a critical eye, but is disposed to attempt to allow them to have full weight and validity in law.

B The Wills Act, 1837, required that a will should be signed at the foot or end thereof, and the Wills Amendment Act, 1852, recited that the law with respect to the execution of wills required further amendment and gave, by s. 1, larger liberty for the signing of testamentary documents. Though that section gives a wide geographical liberty to where a signature could be placed the liberty given does not go so far as to say that the signature may be placed at the beginning. In fact, the last four lines provide that no signature shall be operative to give effect to any disposition or direction which is underneath or follows it. There is, therefore, an express provision that words following a signature cannot be operative.

C Here we have what is clearly a testamentary disposition, but it is not signed at the bottom or side or in any of the places in which liberty is given by the Act of 1852 for it to be signed; it is signed at the very top of the paper, and though, no doubt, witnessed by two persons, the effect is that all the dispositions which follow that signature are invalid as a will, the Act of 1852 expressly prohibiting any disposition which is underneath or follows the signature. No words could be more explicit or plain to cover the facts in this case.

D FINLAY, J., following *In the Goods of Wotton* (1), found himself able to give effect to this document as a will. That case was followed in *In the Goods of Gilbert* (2), but in those cases there were several sheets of writing, and it was found possible to treat the signature as coming at the end by regarding the pages in the document as intended to be taken in a different order from the normal one. The question is how far the decisions in those two cases can be carried. Here we cannot overlook the fact that the signature is as close to the top of the page as it can be and all the disposition follows and is underneath the signature. The cases cited to us do not justify us in departing from the plain meaning of the words in s. 1 of the Wills Amendment Act, 1852. The declaration asked for in the statement of claim, therefore, will be made that the court pronounces against the disposition as a will.

F LAWRENCE, L.J.—I agree. This testamentary disposition is on one page which is signed at the top and the whole of the disposition follows the signature. In these circumstances there is no room for the application of the cases cited to us such as *In the Goods of Wotton* (1). The present case is directly within the last few lines of s. 1 of the Wills Amendment Act, 1852—"which is underneath or G which follows it." I am unable to see how the effect of that enactment can be avoided in the present case.

ROMER, L.J.—I agree.

Appeal allowed.

H Solicitors: Hyman, Isaacs, Lewis, & Mills, for Herbert J. Davis, Berthen, & Munro, Liverpool; Potter, Sandford, & Cosgrove, for W. T. Husband & Son, Liverpool.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

A

WOOLF v. WOOLF

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Hill, J.),
March 31, November 4, 1930]

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.),
February 17, 1931]

B

[Reported [1931] P. 134; 100 L.J.P. 73; 145 L.T. 36;
47 T.L.R. 277, P.D.A. and C.A.]

Divorce—Adultery—Evidence—Duty of court to act on clear evidence—Hotel bill and register—Admission by husband—Proof that husband stayed night in hotel with other woman and was in bed with her in the morning—Refusal of husband to identify other woman—No evidence of adulterous inclination or association—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178 (3).

C

If evidence is given in good faith which, in all but the most unusual circumstances, is clear evidence of adultery, it is the duty of the court to act upon it and grant a decree nisi to an innocent petitioner unless the King's Proctor can bring forward cogent evidence to rebut the obvious presumption of adultery.

D

An innocent woman's husband, who had left her in January, 1929, wrote her a letter in July, 1929, enclosing a hotel bill, confessing "misconduct," and requesting a divorce. It was proved that the husband had signed the hotel register, that he and another woman had spent at least two nights alone together in a bedroom at the hotel, and had been found in bed together there in the morning by the chambermaid. The husband refused to disclose the name or address of the other woman, despite the repeated requests of the wife's solicitors, the trial judge and the King's Proctor. Enquiries by the King's Proctor to ascertain the name and address of the woman and whether the husband had associated with any woman were without result, nor was there any evidence to suggest that the husband was of an adulterous disposition. On appeal against the dismissal of the wife's petition for divorce on the ground of the husband's adultery with the unknown woman at the hotel,

E

F

Held: the court ought to be satisfied with the evidence, and so was obliged by s. 178 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, to pronounce a decree nisi.

G

Notes. Section 178 (3) of the Judicature Act is now the Matrimonial Causes Act, 1950, s. 4 (2). Referred to: *Wyatt v. Wyatt*, [1937] 3 All E.R. 885.

As to the onus of proof of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 237, para. 445, text and notes (d) and (e); as to when adultery will be inferred, see *ibid.*, para. 446; and as to hotel cases, see *ibid.* 238, para. 447. For the cases on the subject see 27 DIGEST (Repl.) 314, 2624-2625, and 324, 2692-2694; and for the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

H

Cases referred to:

- (1) *Loveden v. Loveden* (1810), 2 Hag. Con. 1; 161 E.R. 648; 27 Digest (Repl.) 315, 2634.
- (2) *Allen v. Allen*, *Allen v. Allen and Bell*, [1894] P. 134; 63 L.J.P. 78; 70 L.T. 326; 42 W.R. 230; 10 T.L.R. 161; 38 Sol. Jo. 128; 6 R. 585, C.A.; 27 Digest (Repl.) 505, 4483.

I

Appeal by a wife petitioner from a decision of LORD MERRIVALE, P., dated Nov. 4, 1930, dismissing her petition for divorce on the ground of adultery.

Mrs. L.W. prayed for the dissolution of her marriage with Mr. E.B.W. on the ground of his adultery with a woman unknown at Rock Gardens Hotel, Bognor, in July, 1929. The marriage had taken place on April 11, 1926, at the Western Synagogue, St. Giles, London. There was no defence.

A When the case was heard by HILL, J., on March 31, 1930, the petitioner said that after 1928 the married life became unhappy, and her husband left her in January, 1929. She received a letter from her husband, dated Rock Gardens Hotel, Bognor, July 22, 1929, in which he said:

B "As we have both been separated from each other some months now I think it is only fair to both of us that I should give you grounds for divorce. I have therefore enclosed a hotel bill as evidence where misconduct took place. I trust that will be sufficient and thus release us both, when each of us can find our own happiness."

In reply to a request for the name and address of the woman in question the respondent wrote:

C "I have gone carefully into the matter with regard to the name and address of the woman with whom I stayed at the hotel on July 20, 21, and 22, 1929, and I am sorry to inform you that I will not, under any circumstances whatever, divulge the name of the lady in question."

D It was proved that the respondent had signed the hotel register, and that he and a woman not his wife slept at least two nights in a room at the hotel, in which there were two single beds. When the chambermaid went into the room in the morning they were in bed. A clerk to the petitioner's solicitors, who (in accordance with a recent requirement of the court) asked the respondent to disclose the identity of the woman, said that the respondent firmly refused to do so.

Noel Middleton for the petitioner.—I ask for a decree nisi with an order for costs.

E HILL, J.—No. The man had better be applied to again for the name, and he had better be told I require it. Then if he still refuses I shall consider whether I shall invite the King's Proctor to assist in inquiries for the name. [His Lordship then pointed out the expense which the husband could incur by persisting in his refusal, and referred to the evidence set out above.]

F On April 10, 1930, the case again came before HILL, J. A letter was put in from the respondent in which he expressed regret "that the judge declined to make my decree nisi."

The clerk to the petitioner's solicitors gave evidence of further fruitless inquiries to ascertain the identity of the woman.

G HILL, J.—I shall ask the King's Proctor to help me. At present I do not know whether the man has gone about to manufacture a case. I do not know whether it is a bogus case or not until inquiries are made.

Middleton.—Our further inquiries have indicated that we cannot get any further information.

HILL, J.—It is not your duty to put on an inquiry agent to watch the man. It does not rest with you. You have done everything you can, but the King's Proctor can help me. It may cost the man a very large sum of money before it is finished.

H Middleton.—We are in some difficulty about these cases and do not know exactly to what extent inquiries must be made. If it would be in any way possible to get this matter dealt with in the registry under a rule before a case comes into court it would be a convenience to us. Men co-respondents have to be served as parties under the statute and the rules unless we get leave in the registry to dispense. Where husbands are charged with adultery there is no corresponding section relating to women being made named co-respondents. All the rules say at present is that where you name a woman you must serve her, except by leave of the registrar. Could not a decree be made, pending the result of the King's Proctor's inquiries?

I HILL, J.—No. If a decree is made I will shorten the time for making the decree absolute. [His Lordship referred to the suspicion aroused by the respondent's conduct, and concluded:] I will send the papers to the King's Proctor for inquiries. The costs of to-day and of the inquiries made so far will fall upon the husband, and also the costs of the King's Proctor if the wife gets a decree.

SIR MAURICE HILL having meanwhile retired from the bench, the case was restored to the list and came before LORD MERRIVALE on Nov. 5, 1930. A

The shorthand note of the previous proceedings was read.

Victor Russell for the King's Proctor.—The King's Proctor has made such inquiries as are open to him and he has been unable to find out the name of the woman. He has interviewed the respondent, who has maintained his refusal to disclose the name. The King's Proctor has also made inquiries to ascertain whether he has associated with any particular woman and no result has been arrived at. B

LORD MERRIVALE.—The King's Proctor does not offer any opinion to the court or make any submission?

Russell.—He merely leaves the matter in your Lordship's hands. C

Middleton for the petitioner.

LORD MERRIVALE stated the facts and continued: There is no sort of indication that the respondent was likely to be guilty promiscuously of adultery. There is no evidence, although careful inquiry has been made by the King's Proctor, of any kind of intimate association with a woman other than his wife—much less of illicit association—and he represents the woman in terms which suggest that, whoever she may be, she is a woman of high and scrupulous character. D
Ought the court to come affirmatively to the conclusion, without any evidence of inclination on the part of the respondent either to be an adulterer generally, or to have an adulterous intimacy with some woman, that he had committed adultery because he says (that is what it amounts to): "I went to Bognor with a woman. I shall not tell you who she was. We lived together at an hotel and the chambermaid saw us in the same bed?" If the respondent had shown an adulterous inclination generally or with regard to one woman, or an intimate association with one woman, and she had been identified, or there were reasons to believe she was the woman in question, what seems to me to be the missing link would be supplied. E
It is not supplied.

[His Lordship considered the arguments of counsel for the petitioner, and concluded:] I am bound to say I do not find proofs which establish that he [i.e. the respondent] has committed adultery. F

If there is any action I can take short of dismissing the petition which will enable the petitioner to proceed further if she finds grounds for proceeding, the last thing I would wish to do would be to penalise her in any way. I find that the alleged adultery is not proved, and upon the hearing the petition fails. On the specific allegation the finding is against the petitioner. G

Middleton.—If we can find any other evidence a supplemental petition would probably be necessary. I really do not think any expense would be saved.

LORD MERRIVALE.—In those circumstances my obvious duty is to dismiss this petition. As to costs, these proceedings were taken and maintained at the instance of the respondent. The King's Proctor's inquiries have been necessary because of his action. He has maintained the course he originally took for reasons which are no doubt sufficient from his view of the facts down to this moment, and has put the petitioner to a great deal of expense. I am assuming that the petitioner acted in good faith. I see no reason to assume the contrary. He has also put the public authorities to expense in respect of the inquiries which it became the duty of the King's Proctor to make. I direct that the costs of the petitioner and of the King's Proctor be taxed as between solicitor and own client, and those costs shall be paid to the petitioner or her representatives, and to the King's Proctor by the respondent. H
I

The wife appealed.

Rayner Goddard, K.C., and *Noel Middleton* for the appellant, the petitioner.

The respondent was not represented.

A *Victor Russell and William Latey*, for the King's Proctor, did not actively oppose the granting of the petition.

B **LORD HANWORTH, M.R.**—This court fully recognises the grave responsibility and serious difficulties which confront the judges of the Divorce Court in administering the law of divorce. Serious efforts must be made to prevent collusion, by which parties may wrongly obtain divorce by devices which prevent a true knowledge of the facts coming before the court. I need hardly say that if we were merely dealing with a question of the discretion exercised by the President, who has an unrivalled experience in dealing with these cases, we should hesitate long before altering his decision. But this case does not depend solely on the exercise of discretion. The President has added something to the law, and upon that the appeal comes before this court. [His Lordship stated the facts, as set out above, and having referred to the President's reference to there being no proof of an adulterous inclination by the respondent, continued:] That, I think, is a ruling of law not justified by the authorities. The petitioner has not got to show adulterous inclination generally. In my opinion, if evidence is given in good faith, which under all but the most unusual circumstances is clear evidence of adultery, it is the duty of the court to act upon it, unless the King's Proctor can bring forward cogent evidence to rebut the obvious presumption. In *Loveden v. Loveden* (1) **SIR WILLIAM SCOTT** said that it was not necessary to prove the direct fact of adultery for (2 Hag. Cons., at p. 2):

E "If it were otherwise, there is not one case in a hundred in which that proof would be obtainable; it is very rarely indeed that the parties are surprised in the direct fact of the adultery. In every case almost the fact is inferred from circumstances which lead to it, by fair inference as a necessary conclusion; and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights."

That passage has been quoted with approval in the Court of Appeal by **LOPES, L.J.**, in *Allen v. Allen and Bell* (2). He says ([1894] P. at p. 252):

F "To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances."

G It seems to me that, human nature being what it is, adultery must be inferred here. The husband was twenty-five, and no more, and he had been married, and there is no reason to assume that his sexual appetite was less than that of a normal healthy man. I think that to say that an adulterous inclination should be proved is to lay an unjustifiable burden upon the petitioner. The case is one of an innocent woman proving opportunity for adultery and the fact that the parties slept two nights in the same bedroom. In this case the court ought to be satisfied that adultery has been proved. Subsection (3) of s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, says:

H "If the court is satisfied on the evidence that the case for the petitioner has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce."

I I think the court ought to be satisfied with the evidence, and that the words of that subsection come into operation, and for these reasons I think that, in accordance with the law, there must be a decree nisi.

LAWRENCE, L.J.—In this case I find myself unable to agree with the judgment of the President. It is clear from sub-s. (2) of s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, that a wife can present a petition for divorce without making the woman with whom the adultery is alleged to have taken place a respondent. It is desirable that the woman should be named where possible,

and with the object of finding out who the woman was HILL, J., directed further inquiries to be made by the wife's solicitors and the King's Proctor. These inquiries proved abortive, and the husband adhered to his resolve not to disclose the name of the woman. The evidence clearly negatived any connivance on the part of the wife, and the only question is what is the true inference to be drawn from the undisputed facts? In my opinion the only inference that can properly be drawn is that the husband committed adultery, and on this point I do not desire to add anything to what has been said by the Master of the Rolls. Both HILL, J., and the President were naturally suspicious because the husband was evidently anxious to obtain a divorce and took steps to induce the wife to commence divorce proceedings against him, but that fact does not prevent the wife obtaining a divorce if, in fact, the husband had committed adultery, provided that she had not connived. The motive which induced the husband to commit adultery cannot in my judgment deprive the wife of her right to obtain a divorce if he, in fact, did commit adultery. I agree that the appeal should be allowed.

ROMER, L.J.—I agree. The President was greatly affected by the fact that the husband wrote about "my decree nisi"; was not shown to be of an adulterous inclination; and refused to disclose the name of the woman. It is clear that the husband was anxious to divorce his wife, and it is clear that the wife was anxious to divorce her husband. The only question was whether she had proved the act of adultery. She adduced all available evidence; nothing was kept back by her. Her evidence was accepted, and it was evidence from which the court, until quite recently, were always in the habit of presuming adultery.

Speaking for myself, I see no reason why, at the present time, that salutary rule should not be followed. What difference it would have made if the name had been disclosed I am at a loss to see. It was said that the woman in question might have been some near relative, but that can be entirely ruled out. It is almost incredible in the circumstances that the woman can have been a near relative of the respondent. It seems to me that the name of the woman is in no way material. I agree that the appeal must be allowed.

[After consultation with counsel, the court ordered that, in view of the delay which had occurred, the decree nisi should be made absolute within fourteen days.]

Appeal allowed: decree nisi pronounced.

Solicitors: *Gisborne & Co.; the King's Proctor.*

[Reported by WILLIAM LATEY, Esq., and GEOFFREY P. LANGWORTHY, Esq.,
Barristers-at-Law.]

A

GRIST v. GRIST

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 13, 1931]

B

[Reported [1932] P. 1; 101 L.J.P. 1; 146 L.T. 82; 48 T.L.R. 2; 75 Sol. Jo. 725]

Divorce—Costs—Wife's costs—Abortive trial—Postponement of order until suit finally disposed of.

C

Although it is a general rule that in divorce proceedings the wife is entitled to be paid such costs of the trial as are not unjustifiably incurred, the court has a discretion to postpone the making of an order as to the wife petitioner's costs of an abortive trial (in which the jury have disagreed) until after the suit has been finally disposed of.

D

Waudby v. Waudby and Bowland (1) (1901), 84 L.T. 571, 829; on a second trial (2), [1902] P. 85; *Kemp-Welch v. Kemp-Welch and Crymes* (3), [1910] P. 233; *Silver v. Silver and Grenfell* (4), [1924] P. 163; and *Sanders v. Sanders* (5), [1911] P. 101, considered.

E

Notes. As to the court's discretion to postpone an order for payment of the wife's costs of an abortive trial, see 12 HALSBURY'S LAWS (3rd Edn.) 382, para. 888, and 401, para. 893, text and note (1); and for cases on the subject see 27 DIGEST (Repl.) 560, 5118–5119. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, see 18 HALSBURY'S STATUTES (2nd Edn.) 486.

Cases referred to:

F

(1) *Waudby v. Waudby and Bowland* (1901), 84 L.T. 571; 65 J.P. 344; 49 W.R. 672; 17 T.L.R. 490; on appeal, 84 L.T. 829; 17 T.L.R. 620; 45 Sol. Jo. 615, C.A.; 27 Digest (Repl.) 560, 5118.

G

(2) *Waudby v. Waudby and Bowland* (No. 2), [1902] P. 85; 71 L.J.P. 43; 86 L.T. 123; 66 J.P. 280; 50 W.R. 176; 18 T.L.R. 150; 46 Sol. Jo. 124; 27 Digest (Repl.) 574, 5300.

(3) *Kemp-Welch v. Kemp-Welch and Crymes*, [1910] P. 233; 79 L.J.P. 92; 102 L.T. 287; 26 T.L.R. 464, C.A.; 27 Digest (Repl.) 534, 4795.

(4) *Silver v. Silver and Grenfell*, [1924] P. 163; 93 L.J.P. 53; 130 L.T. 719, C.A.; 27 Digest (Repl.) 534, 4796.

(5) *Sanders v. Sanders*, [1911] P. 101; 80 L.J.P. 44; 104 L.T. 231; 55 Sol. Jo. 312, C.A.; 27 Digest (Repl.) 534, 4806.

H

(6) *Courage v. Courage* (1931), 47 T.L.R. 395, C.A.; 27 Digest (Repl.) 563, 5169.

(7) *Robertson v. Robertson and Favagrossa* (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880, C.A.; 27 Digest (Repl.) 570, 5258.

(8) *Hurley v. Hurley and Menzies*, [1891] P. 367; 61 L.J.P. 14; 65 L.T. 353; 8 T.L.R. 416; 27 Digest (Repl.) 566, 5198.

Appeal from a decision of BATESON, J.

I

The wife presented a petition for judicial separation on July 1, 1930, and on July 7, presented a petition for alimony pendente lite. On Oct. 22, 1930, an order was made for payment by the husband of £2 a week from the date of the petition, the wife already having the use of a house provided by her husband. On March 12, 1931, the wife applied for payment of her costs by the husband, and an order was made that the husband should pay the then taxed costs of the wife, namely, £37 6s. 11d., and also pay into court £45 as security for the costs of the trial. The husband complied with that order. The hearing of the petition for judicial separation took place on July 1 and 2, 1931, and the jury disagreed. On July 22 the wife took out a summons asking that her costs of the abortive trial should be paid by the

husband, and on July 27 BATESON, J., considering himself bound to follow *Waudby v. Waudby and Bowland* (1), decided that he would make no order "at present," and refused leave to appeal. On July 30 the Court of Appeal gave leave to appeal.

H. G. Garland for the wife.

Noel Middleton for the husband.

LORD HANWORTH, M.R.—This appeal has raised an important point, and we have had helpful arguments from Mr. Garland and Mr. Noel Middleton. It is important, in case this case should be reported, that we should give close attention to the facts. The parties in this appeal were married in 1898, and there were five children of the marriage, four of whom were daughters, the youngest of whom was eighteen years old. On July 1, 1930, the wife presented a petition for judicial separation on the ground of the husband's alleged adultery with a young woman. A few days later the young woman was examined by a doctor acting for the husband, and he gave a certificate that she was *virgo intacta*. That is not conclusive evidence that there had been no adultery. The result of that certificate was communicated to the wife. The husband, an accountant, was in receipt of an income of about £700 a year, the wife being without means; and on March 12, 1931, an order was made that the husband should give security for the wife's costs of the trial in the sum of £45. On July 7, 1930, the wife presented a petition for alimony *pendente lite*, and on October 22 an order was made allowing her £2 a week. She had the use of a house belonging to her husband. The trial took place on July 1 and 2, 1931, and it was then said that the young woman was still *virgo intacta*, but there was evidence that the husband had behaved indiscreetly with this young woman, and the jury disagreed. A deduction has been made from that that they were in favour of the petitioner (the wife), but for my part I think nothing can be inferred, it is enough to say that the jury disagreed.

No order has been made for the payment by the husband of the costs of that abortive trial. The only order was that for the payment into court by him of £45, and with that he has complied. On July 22 a summons was taken out by the wife asking that the costs of the trial which had taken place should be taxed and paid by the husband. That is to say, the wife wanted to safeguard her position in the event of a new trial. Upon that summons coming before BATESON, J., the only order he made was that he would make no order "at present," and he refused leave to appeal. On an application, however, being made to this court on July 30 we gave leave to appeal.

BATESON, J., in refusing to make an order "at present," had, as the foundation of his decision, *Waudby v. Waudby and Bowland* (1). In that case the husband charged the wife with adultery. No application in that case was made by the wife for taxation or security for costs against the husband. The jury were unable to agree, and the wife thereupon asked for an order for the husband to pay her costs in respect of the abortive trial. The President said that he thought that the wife's application must be refused. Following what was done in that case, BATESON, J., made no order "at present," and thereby, using his discretion, kept open his right to determine what ought to be done as to the costs, but at the moment he was not satisfied what the order ought to be. There is the £45 paid into court, so the wife is not altogether devoid of means to proceed. The judge exercised his undoubted discretion to adjourn the consideration of the matter to a later date. It has often been said that this court is always very reluctant to interfere with a matter which is pre-eminently within the judge's discretion, but that reluctance must be overcome if it is plain that the judge has acted on a principle inconsistent with a rule of law. It was contended that the judge followed *Waudby v. Waudby and Bowland* (1), misapprehending the true meaning of that case.

After the second trial in *Waudby's Case* (2), an order was made for the payment by the husband of the costs of both trials, but there had been no order as here for security for the costs to be given by the husband. On the second trial in that case, the jury found adultery and it was held that the wife was entitled to be paid the

A costs of both trials. GORELL BARNES, J., in giving judgment after the second trial, said:

"The wife succeeded in the present case in defeating the petition of her husband at the first trial, and if matters had rested where they were and the petitioner had not proceeded to a second trial she must have had her full costs of the first trial. I can see no good reason why she should not have them now; and I accordingly make the order that the petitioner pay those costs."

B In other words, he gave effect to the ordinary rule that a husband must provide costs incurred by a wife. He, in effect, said on completion of the second trial, that the rule ought to be enforced in her favour. But I cannot find that anything that happened on the second trial in *Waudby's Case* (2) in any way makes abortive the decision of the judge in the summons as to costs in the present case.

C It is quite true that later on Mrs. Waudby was granted her costs of the earlier trial, but that did not, directly or impliedly, negative the right of the judge, in his discretion, after the abortive trial, to make no order "at present." The contention has been put forward in the present case that the wife's right to receive the costs of an abortive trial is absolute, and that there is no jurisdiction to deny them to her even for a time; but *Courage v. Courage* (6) shows that it is not necessarily all the costs of a trial which a wife is entitled to charge against her husband. In that case the judge refused to allow certain costs, because they had been unjustifiably incurred without adequate consideration of the value of the evidence, and his decision was that the rule did not cover costs improperly incurred.

D In *Robertson v. Robertson* (7) (6 P.D. at p. 122), SIR GEORGE JESSEL said:

E "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence."

And he adds:

F "If he himself, [that is the solicitor for the wife] conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration of his labour because he is not successful."

G That case is interesting, and it shows the origin of the rule. The next case to turn to is *Hurley v. Hurley and Menzies* (8). In that case the jury disagreed on the trial of a husband's petition, and then on an application made by the wife the court made an order that her costs should be taxed and paid in full, and refused to limit such costs to the amount deposited in court. That only determined that the court still had the right to decide whether more or less than the amount deposited as security should be allowed. Then comes *Kemp-Welch v. Kemp-Welch and Crymes* (3); the jury disagreed at the first trial and the husband proposed to have the petition retried, although he had not paid the balance of taxed costs of the wife, which were not covered by a sum paid into court. Proceedings there were stayed until he had paid or secured that balance, and also given security for the wife's costs of the re-trial. From the judgment of COZENS-HARDY, M.R., it is plain that the principle is that the fair costs of the wife shall be provided for. BUCKLEY, L.J., stated, as must be noted, that on an order made on a husband's petition after an abortive trial that the husband should pay the wife her costs of the husband's petition, and after taxation an order that the husband should pay the amount so taxed, the wife was entitled to have the further trial of the husband's petition postponed until the taxed costs were paid or security given. That case in no way infringes the rule. In *Sanders v. Sanders* (5) it was held that the second petition should not be presented until the costs of the wife were first paid; that followed *Kemp-Welch v. Kemp-Welch and Crymes* (3). Lastly comes *Silver v. Silver and Grenfell* (4) ([1924] P. at pp. 172, 173), where this court stated plainly the rule of the court. WARRINGTON, L.J., said:

"*Robertson v. Robertson* (7) and *Kemp-Welch v. Kemp-Welch and Crymes* (3)

make it clear that it is at the option of the wife who is made a respondent by her husband to a petition for dissolution of the marriage to claim that proceedings in the suit shall be stayed until her costs have been provided for, and if there has been an abortive trial that the second trial shall not proceed until the costs of the first trial have been paid. That is the right of the wife." A

I do not wish to add to or detract from that proposition. Taking these rules at their full face value, there is nothing which says that at the time when the final issue has not yet been determined, it is obligatory on the court to say that the costs of the wife shall be taxed and paid forthwith; at a time when the court is not yet in a position to determine what are the fair and necessary costs of the wife. In this case the learned judge has not disobeyed the rule of the court. What he said in effect was: "Assuming the wife is entitled to her costs, I will not now make any order because there will be a better opportunity for me later on to determine what is the proper order to make," so he reserved his right to make an order at a time more convenient, when he would know more of the facts of the case and be in a better position to decide. Counsel for the wife has contended that that will be for his client a denial of justice, because she will not have the means to contest the proceedings any further. I am inclined to doubt that, but even if it be so, I think it would be wrong anyhow to overrule the very wide discretion given to the learned judge by s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, and to say he was wrong in postponing his decision until after the second trial, and that he was compelled to make an order after the first trial when he thought he could better make an order later on. The appeal must therefore be dismissed. B C D

LAWRENCE, L.J.—I agree. E

ROMER, L.J.—I agree.

Solicitors: *Alfred C. Warwick & Co.*; *Cunliffe, Blake, & Mossman*, for *Tolhursts & Cozens*, Southend-on-Sea.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.] F

ATTORNEY-GENERAL AND OTHERS v. MALLOCK G

[CHANCERY DIVISION (Luxmoore, J.), December 2, 1931]

[Reported 146 L.T. 344; 48 T.L.R. 107; 30 L.G.R. 141]

Easement—Right of way—Proof in absence of express grant—Consideration of all circumstances—Purpose and extent of user—Existence of other rights in users—No public right of access to terminus ad quem—Explanation of user—Reluctance of owner strictly to enforce his rights—Effect of notices. H

In the absence of the express grant of a right of way the fact of dedication can only be inferred from a consideration of all the circumstances of the case. The most important of these are the purpose and extent of the user of the way which has occurred, and the existence or non-existence of rights which might afford an explanation of the user. A single act of interruption by the owner of the way is of much more weight, on a question of intention to dedicate, than many acts of enjoyment. The fact that the public has no legal right of access to the place which is assigned as the terminus ad quem—e.g., a church which is vested in the incumbent and churchwardens, so that no person has a right to enter it when it is not open for divine service except with their permission—is a material point to consider in coming to a conclusion whether there was I

- A** dedication by an owner, for it would seem strange to confer a right of way on the public for a purpose which a third party could render useless by refusing admittance to the public. In considering evidence of user the court must always bear in mind that the user may be explained by the refusal of the owner of the land over which the right is claimed to act churlishly with regard to his property.
- B** Observations on the wording of notices held to be more consistent with permissive user than with dedication.
- Notes.** As to rights of way, see 12 HALSBURY'S LAWS (3rd Edn.) 569 et seq.; and as to churchways, see *ibid.*, Vol. 19, 15. For cases see 17 DIGEST (Repl.) 8, 15; 19 DIGEST 93 et seq., 307; 26 DIGEST 279.
- C** Cases referred to:
- (1) *Moser v. Ambleside U.D.C.* (1925), 89 J.P. 118; 23 L.G.R. 533, C.A.; 26 Digest 294, 256.
 - (2) *Thrower's Case* (1672), 1 Vent. 208; 86 E.R. 140; 17 Digest (Repl.) 15, 161.
 - (3) *Austin's Case* (1672), 1 Vent. 189; 86 E.R. 128; 26 Digest 260, 1.
 - (4) *Brocklebank v. Thompson*, [1903] 2 Ch. 344; 72 L.J.Ch. 626; 89 L.T. 209; 19 T.L.R. 285; 17 Digest (Repl.) 8, 50.
 - (5) *Farquhar v. Newbury R.D.C.*, [1909] 1 Ch. 12; 78 L.J.Ch. 170; 100 L.T. 17; 73 J.P. 1; 25 T.L.R. 39; 53 Sol. Jo. 46; 7 L.G.R. 364, C.A.; 26 Digest 289, 224.
 - (6) *Stoney v. Eastbourne R.D.C.*, [1927] 1 Ch. 367; 95 L.J.Ch. 312; 135 L.T. 281; 90 J.P. 173; 70 Sol. Jo. 690; 24 L.G.R. 333, C.A.; Digest Supp.
 - (7) *Blount v. Layard* (1888), [1891] 2 Ch. 681, n.; 4 T.L.R. 512, C.A.; 22 Digest (Repl.) 323, 3396.
 - (8) *A.-G. v. Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 J.P. 141; 21 T.L.R. 471; 49 Sol. Jo. 459; 3 L.G.R. 1071; 26 Digest 297, 285.
 - (9) *Behrens v. Richards*, [1905] 2 Ch. 614; 74 L.J.Ch. 615; 93 L.T. 623; 69 J.P. 381; 54 W.R. 141; 21 T.L.R. 705; 49 Sol. Jo. 685; 3 L.G.R. 1228; 26 Digest 299, 298.
 - (10) *Taylor v. Timson* (1888), 20 Q.B.D. 671; 57 L.J.Q.B. 216; 52 J.P. 135; 4 T.L.R. 208; 15 Digest (Repl.) 998, 9825.
 - (11) *Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L.T. 174; 26 Digest 261, 9.
 - (12) *Eyre v. New Forest Highway Board* (1892), 8 T.L.R. 648, C.A.; 26 Digest 260, 5.
 - (13) *Webb v. Baldwin* (1911), 75 J.P. 564; 26 Digest 284, 191.
 - (14) *Poole v. Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest 286, 193.
 - (15) *Jarratt v. Steele* (1820), 3 Phillim. 167; 161 E.R. 1290; 19 Digest 258, 401.
 - (16) *Griffin v. Dighton* (1864), 5 B. & S. 93; 3 New Rep. 523; 33 L.J.Q.B. 181; 9 L.T. 814; 28 J.P. 260; 12 W.R. 441; 122 E.R. 767, Ex. Ch.; 19 Digest 286, 758.
 - (17) *Simpson v. A.-G.*, [1904] A.C. 476; 74 L.J.Ch. 1; 91 L.T. 610; 69 J.P. 85; 20 T.L.R. 761; 3 L.G.R. 190, H.L.; 26 Digest 287, 196.

Witness Action.

- I** The plaintiffs, the Attorney-General, at the relation of Torquay Corporation, and the corporation, claimed against the defendant, Richard Herbert Mallock, of Cockington Court, a declaration that a way over the defendant's land was a public highway for vehicular traffic from a point in Cockington village on the Totnes-Torquay road to a turning-point for vehicles, and for foot traffic from that point to Cockington Church, and an injunction restraining the defendant, his servants, agents, and workmen from interfering with the public use of the alleged right-of-way.

The plaintiffs stated that the church was of great antiquity and possessed numerous features of architectural and historical interest, and had for many years

been an attraction to visitors from all parts of the country, and that the highway was dedicated by some owner of the land at a time unknown. They asked the court to presume dedication from uninterrupted use by the public throughout living memory and reputation. The defendant denied all these allegations.

Vaisey, K.C., and *Randolph Glen*, for the plaintiffs, referred to *Moser v. Ambleside U.D.C.* (1), *Thrower's Case* (2), *Austin's Case* (3), *Brocklebank v. Thompson* (4), *Farquhar v. Newbury R.D.C.* (5), *Stoney v. Eastbourne R.D.C.* (6), *Blount v. Layard* (7), *HAWKINS' PLEAS OF THE CROWN* (1739, c. 76, s. 1), and *LYNDEWODE'S PROVINCIALE* (1679, Book III, p. 184).

Jenkins, K.C., and *R. F. Roxburgh*, for the defendant, referred to *A.-G. v. Antrobus* (8), *Behrens v. Richards* (9), and *Taylor v. Timson* (10).

Vaisey, in reply, referred to *Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (11) (81 L.T. at p. 179); *Eyre v. New Forest Highway Board* (12); and *Webb v. Baldwin* (13).

LUXMOORE, J.—This case is one of considerable difficulty, but as I have come to a definite conclusion as to what my decision ought to be, I think that no useful purpose would be served if I reserved that decision.

The Attorney-General, on the relation of the corporation of Torquay, and the corporation, as co-plaintiffs, seek a declaration that there is a public right of way over land belonging to the defendant and running from a point in Cockington village on the high road from Totnes to Torquay to Cockington Church, and an injunction restraining interference with the public user of that way. The defendant is the owner in fee simple of an estate situate in the parish of Cockington, and known as Cockington Court. The mansion house is of some antiquity and has been in the defendant's family for many years. It is approached by, I think, three drives, two of which give access to the high road from Totnes to Torquay. Of these two drives one runs into the high road at Cockington village at a point some yards in a westerly direction from the other drive. There is a large gate across the entrance to the drive with a wicket gate on each side and a gate lodge on its left-hand side. This lodge is known as the Higher Lodge, and the drive is known as the Higher Lodge Drive. To the casual observer the gates and lodge appear to be the entrance of a private residence. A person proceeding down the drive in a direction away from the high road comes to a point where it is met on the left-hand side by another drive. This is known as the Lower Drive, and is the other drive giving access to and from the high road from Totnes to Torquay. At the junction of the two drives is a triangular piece of ground and the higher and lower drives pass round the triangle and continue as one drive for a short distance until the drive again forks, the upper part of the drive continues to Cockington Court, while the lower part continues for a short distance until it stops at two small iron gates which shut off the drive from a footpath leading to Cockington Church. At the point where the drive meets the two small iron gates, the drive widens out and forms what has been referred to during the hearing of the case as the turning place. The material part of the drive over which the public right of way is claimed is shown on plan No. 1, which was proved during the hearing, and is coloured red up to the two iron gates, while the footpath between those gates and the church is coloured green. The public right claimed is one for all purposes, including vehicular traffic over the part coloured red, and for foot passengers only over the part coloured green.

There is very little conflict of fact. Cockington Church is an edifice of considerable antiquity. The exact date of its erection has not been proved, but I think the original church is mentioned in Domesday Book and is said to have been built by one William de Fallaise somewhere between the years 1070 and 1080, and there is evidence from which it is, I think, reasonable to infer that it was dedicated before the year 1257. It stands close to Cockington Court, and is surrounded by the garden and park of Cockington Court. Apart from a private way to the church from the garden of Cockington Court, there is no other means of access to the

- A church except by the way claimed. It is admitted on behalf of the defendant that there is a church way for the parishioners of Cockington over the disputed way, but it is denied that there is any public right of way. The church is a beautiful building of great architectural and historical interest, and it is likely to be attractive not only to antiquarians and experts, but also to all those who appreciate works of art and beautiful things. I have no evidence by whom or in what circumstances the church was built. The freehold of the church is admitted to be in the incumbent. Apart from the ground on which the church is erected, the incumbent claims as his freehold nothing but a little piece of land lying at the west end of the church, and on the north side of the church path, cut off from the grounds of Cockington Court by a stone wall, and also a path on the south side of the church running, I think, to the Court. Before 1881 Cockington Church was legally a parochial chapel for the parochial chapelry of Cockington, which was co-extensive with the civil parish of Cockington, and formed part of the benefice of Tormoham with Cockington. By an Order in Council, dated Dec. 19, 1881, the parochial chapelry and civil parish of Cockington was constituted the district chapelry of Cockington and assigned to Cockington Church. The church is now, and always has been, held by a perpetual curate, and has, so far as the evidence goes, fulfilled all the functions of a parish church for the civil parish of Cockington, baptisms and marriages being solemnised there, and although there is no evidence with regard to the church having had a burial ground, there is no doubt that funeral services were conducted in the church.

- The title to Cockington Court Estate from April 12, 1774, is admitted, and from the epitome of title put in it appears that the estate was in settlement from December, 1778, to June, 1793; that it was held in absolute ownership from June, 1793, to May, 1846, and from May, 1846, to November, 1867, it was again in settlement; that from November, 1867, to November, 1917, it was held by an absolute owner; and that it was again settled from November, 1917, to November, 1928. Since the last-mentioned date the defendant has been the absolute owner. I mention those matters to show that the title is such that at any rate since 1774 there have been persons who have been in a position to dedicate ways to the public had they been so minded.

- Before I deal further with the evidence, it will, I think, be convenient if I state what I conceive to be the law with regard to the constitution of a public right of way. Such a right depends, not on user, but on dedication. There can be no public right of way unless there has been dedication of the way in question to the public by an owner able and intending to dedicate. The best evidence of dedication is, of course, an express grant. If there is no such grant, the fact of dedication can only be inferred from a consideration of all the circumstances of the case. The most important of these are the purpose and the extent of the user, and the existence or non-existence of rights which might afford an explanation of the user. I would refer to what was said by PARKE, B., in the well-known case of *Poole v. Huskinson* (14) (11 M. & W. at p. 830):

- "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

In the present case there is no express grant and, therefore, the solution of the question which I have to determine must depend upon a consideration of all the circumstances of the case. The first circumstance to be considered in the present case is, I think, the purpose of the user. It is to obtain access from an admitted highway to a church which is surrounded by land belonging to a private individual who has no ownership in the fabric or site of the church. The church itself is vested in the incumbent. He is in this case the owner of the freehold, but whether

he owns the freehold or not, the possession of the church is in him and the churchwardens. But, to use the language of SIR JOHN NICHOLL in *Jarratt v. Steele* (15), A

"no person has a right to enter the church when it is not open for divine service, except with [the permission of the vicar and the churchwardens] and under their authority."

That statement of the law was approved in and adopted by SIR WILLIAM ERLE in *Griffin v. Dighton* (16). The headnote of that case is this: B

"The freehold of a parish church is in the incumbent and churchwardens, and the right of access to every part of it. Where, therefore, there was a door leading from the churchyard into the chancel, upon which the lay rector had placed a lock which he kept locked except during divine service, HELD that the incumbent (vicar) had a right of access to the chancel through the door at all times." C

The passage in the judgment is where SIR WILLIAM ERLE says this:

"I do not mean to go into any question as to the rights of freehold or as to the rights of property in parish churches, which may vary in different parishes, but merely to express an opinion on the rights of the vicar, the minister who has duties to perform in the church; and I do not think I can express those rights in better language than that used by SIR JOHN NICHOLL in the following passage of his judgment in *Jarratt v. Steele* (15): D

'All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these courts; that the possession of the church is in the minister and churchwardens, and that no person has a right to enter it when it is not open for divine service, except with their permission and under their authority.' " E

It is to be observed that the terminus a quo in the present case is the public highway from Totnes to Torquay and the terminus ad quem, a parish church in which the public, as such, have no rights, for it seems that even the right to attend the church during the hours of divine service is limited to parishioners, at any rate, in the case where the only way to the church is a church way, for it is admitted that none but a parishioner can be legally entitled to use a church way. It has been argued that you cannot have a public right of way except from a place where the public has a right to be to enter a place where the public also has a right, and, to take the present case as an example, as there is no right for the public to enter the church or any part of the land held with it without the permission of the incumbent and the churchwardens, there can be no public right of way from the high road to the church. I am not, I think, concerned to decide whether there can be a public right to go from a public place to one which does not answer that description. In my judgment, the fact that the public has no legal right of access to the place which is assigned as the terminus ad quem, must be a material point to consider in coming to a conclusion whether there was in fact any dedication by an owner, for it would certainly seem strange to confer a right of way on the public for a purpose which some third party could render useless by refusing admittance to the public. F G

The next circumstance to be considered is the existence of other rights which might explain either wholly or in part the user proved, for dedication to the public is not presumed from user if there is an adequate explanation for the user apart from the dedication. In the present case it is admitted on behalf of the plaintiffs and the defendant that there is a church way. The extent of the church way has been the subject of an earlier action. That action was instituted on Dec. 21, 1928, by two parishioners on behalf of themselves and all other the parishioners of the ecclesiastical parish of Cockington, and was brought against the present defendant, Mr. Richard Mallock, and, I think, his stepfather, Colonel Bogle. The declaration asked in that case was a declaration that the plaintiff and all other parishioners of the said parish with their families, guests and servants were as of right entitled to H I

A a right of way in vehicles or on foot from the Higher Lodge entrance over and along the drive to the parish church or pathway leading thereto at all times for the purpose of attending divine service and for baptisms, marriages, funerals, private devotion, or otherwise in respect to the rights, liabilities, and privileges which parishioners have or are subject to in respect of their parish church. By the defence the church way was admitted, but its precise extent was put in issue. The
B action was not fought out, for before it came to trial a compromised order was made. I do not think that I am concerned with it beyond this—that, as a result, the parishioners have obtained an unquestioned right to use the disputed way as a church way during the hours of divine service, but, I think, only on foot.

Before considering the evidence of user, there is only one other matter to which I wish to refer. It is that in considering evidence of user the court must always
C bear in mind that the user may be explained by the refusal of the owner of the land over which the right is claimed to act churlishly with regard to his property. I cannot hope to put it in more suitable language than was used by FARWELL, L.J. (then FARWELL, J.), in *A.-G. v. Antrobus* (8), where the learned judge said ([1905] 2 Ch. at p. 199):

D “But the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years to visitors to Stonehenge from all parts of the world. It would indeed be unfortunate if the courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their
E gates in order to preserve their property. Considering the unique character and great archæological interest of Stonehenge and its position on downs where no harm is likely to be done to the land, it is most improbable that permission to visitors to inspect would have been ever refused, and as the right of walking around and inspecting the stones is not one which could be the subject-matter of a grant, the owner may well have dispensed with requests for permission, relying on the fact that no right could grow thereout. I adopt BOWEN, L.J.’s
F language in *Blount v. Layard* (7), which has been approved by LORD MACNAGHTEN in *Simpson v. A.-G.* (17):

“Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides
G the owners, under the fear that their good nature may be misunderstood.”

Having made these preliminary remarks let me consider the evidence as to user. A number of witnesses have been called before me, and some have been examined on commission. The conclusion I have come to on the evidence is that at the earliest times about which the witnesses are able to speak—that is somewhere
H about the year 1860—apart from the parishioners, comparatively few people visited the church, that those who did so mainly went on foot, and that it was rare for carriages to drive down the disputed way. This state of things existed, I think, at any rate, down to 1890 or thereabouts. But as time went on the user increased, and more carriages came down the disputed way to the church. The increase was gradual until 1900, and thereafter, though the increase was more marked, it was
I not until after the war of 1914–18 that really large numbers of people visited the church. I accept the evidence of Miss Mallock, who lived at Cockington Court until 1905, and put down the increase in or about 1900 to the provision by the railway companies of more excursion trains. It is, of course, a matter of common knowledge that since the advent of motor cars and the greater facilities for travelling from place to place, far larger numbers of visitors are found in holiday resorts. The user has, undoubtedly, been considerable. The evidence of the church visiting books show that the largest numbers of visitors came to the church in the months of August and September. In August, 1915, there were 1,258

visitors who signed their names in the visitors' book, and in September of the same year 715, while in the other months substantial numbers appear to have visited the church, the lowest figures for the year being for the months of January and December, for which months the respective figures were fifty-six and sixty-four. In 1916 there was again a substantial increase, the figures in August being 1,355, and in September 1,046, while in December, which shows the lowest number for the year, the figure is 100. In the year 1928 the visitors' book was filled during the period from July 7 to Aug. 24, and I am told that that book contains over 13,000 names. The evidence establishes quite clearly that these visitors came to the church down the disputed way either on foot, or in carriages, or motor cars, and that no one has ever been turned back. I do not think that the evidence of user in the earliest days would be sufficient to justify the inference that there had been an earlier dedication. I think the user in those days is sufficiently explained by the fact that there was a church way, and that the user by persons other than parishioners was of such a character as to cause no inconvenience to the then owner, and consequently to have been enjoyed by permission of the owner.

There is no doubt that as the user increased notice was taken of the fact, for the owner for the time being, or the trustees of the estate, put up notices. According to the evidence of Mr. Richards, who lived in the Higher Lodge from the time he was two years of age—he was born, I think, in the year 1877—until he was fourteen or fifteen years of age, there was a notice nailed to the chestnut tree opposite to the Higher Lodge to the effect that visitors must keep to the church path, with a request that they would not pick any flowers, and a notice that dogs were not to be allowed on the path. He stated that his mother used to take visitors up to the church, that his mother kept the key of the church and unlocked the door of the church for the visitors, that the church was usually kept locked, and if people came to the Higher Lodge gate too late they were refused admission to the drive, while people who brought dogs with them were told that they must leave their dogs behind them, and that some of the people went away because they refused to allow their dogs to be tied up. He also stated that Mr. Richard Mallock, the then owner, was very particular about the gate at Higher Lodge being kept shut, although it was not locked, I think, at all. In 1908 a notice was put on the rails to the right of the gate: "Visitors must keep to the church path only and not touch the flowers. No dogs allowed inside the gate. No access to the church after dusk." On the left-hand gate-post there was a notice: "Visitors to the church are requested to keep to the path and not to pick any flowers." On the rails on the right-hand side of the gate was another notice: "No thoroughfare except to the church. No dogs allowed inside the gate." In 1909 the notices were consolidated, so as to read: "Visitors must keep to the church path only and not touch the flowers. Church closed at dusk. No dogs allowed inside this gate." There was put on the right-hand gate-post a notice: "Carriages or motors must not pass this gate except during the hours of church service." These notices, apparently, remained up till the year 1923, when a strip of wood was painted and nailed across what I have called the consolidated notice: "Church closed at 8 p.m. weekdays," and on the left-hand gate-post was fixed a notice: "No admittance through this gate after 6 p.m." None of these notices suggests the existence of a public highway with the exception of the notice which read: "No thoroughfare except to the church." This notice cannot, I think, be treated as outweighing all the other evidence and as sufficient to establish dedication. In my judgment, these notices are, on the whole, more consistent with permissive user than with dedication. The word "visitors" itself suggests rather an invitation than an acknowledgment of a right.

[His Lordship reviewed the evidence and continued:] The only other fact to which I think it is material that I should refer is that on no occasion before 1928 was any objection made to any of the acts of interruption to which I have referred, except that on May 20, 1924, the hon. secretary and treasurer of the Cockington Church Council wrote to Mr. Kerslake with regard to the notice placed at the lodge gate saying: "Footpath only to church. No vehicles of any kind allowed," asking

A that it should be amended by some such addition as: "Except during the hours of divine service in wet weather." He went on to say:

B "It is obviously as unjust for the estate authorities to attempt to debar parishioners access to their parish church in a reasonable manner, as it is objectionable for elderly ladies attending an early morning service to have to alight at the lodge gate and continue their journey on foot in the streaming rain as happened on St. George's Day. My council are entirely in sympathy with the trustees' apparent desire to restrain the heavy motor traffic of visitors, but as there are practically no visitors to the parish church in wet weather we feel that by the suggested addition to the notice it would be possible to do this without offending our own people."

C The only other objection was on Jan. 13, 1928, when the clerk to the Cockington Parish Church Council wrote to the trustees of the estate, and to Mrs. Mallock-Bogle, the defendant's mother. In that letter there is a complaint about the gate having been locked during the time of service at the parish church, and it ends by this statement:

D "The council wish to remind you that so long as living persons can remember, the parishioners and the general public have exercised the right to go, pass and re-pass with or without vehicles along and over the roadway leading up to the parish church. Funerals, weddings, carriages, &c., have used this roadway for the purpose of obtaining access to the parish church from time immemorial, and the parish church council must see that the public rights relative to access to the parish church are not curtailed."

E That was the beginning of the dispute which culminated in the action which was instituted in December, 1928. But in that action itself no claim of any public right of way was made, the only claim being a claim to a church way. I do not, however, attach much importance to this, because it may well be that it was to the interests of the parishioners to limit the right of user to a church way rather than to support a claim on behalf of the public. A considerable portion of the evidence F was directed to the question whether the church was kept locked or not during the daytime. It is agreed that it was always locked at night, but I do not think that this point has any material bearing on the question which I have to determine, and I pay no attention to it.

After taking into consideration all the matters to which I have referred, the conclusion I have come to is that the actual user had can properly be explained as G having taken place by permission, and that there is no reason why the court should presume from the user any dedication to the public. I think the case is really singularly like the *Antrobus Case* (8), but, to my mind, there is less reason for finding dedication in the present case than in that case, and for this reason. Stonehenge occupied the same position with regard to the rights there claimed as Cockington Church does to the Higher Drive. Stonehenge and the land over which the road H was claimed were in the same ownership, while in the present case Cockington Church and the Higher Drive are in different ownership. Therefore it would seem to me less likely that the owner of the Higher Drive would think of dedicating the drive to the public use. It follows from what I have said that the claim of the plaintiffs in this action fails, and I, therefore, dismiss the action with costs.

I Solicitors: *Peacock, Fisher, Chavasse, & O'Meara*, for *H. A. Hield*, Torquay; *Bell, Brodrick, & Gray*, for *Bewes & Dickinson*, Plymouth.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

ENGLISH, SCOTTISH AND AUSTRALIAN BANK, LTD. v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), November 12, 13, December 15, 1931]

[Reported [1932] A.C. 238; 101 L.J.K.B. 193; 146 L.T. 330;
48 T.L.R. 170]

Stamp Duty—Exemption—Contract for sale of debt—"Property locally situated out of United Kingdom"—Situation of debt—Residence of debtor—Stamp Duty Act, 1891 (54 & 55 Vict., c. 39), s. 59 (1).

By s. 59 (1) of the Stamp Act, 1891, any contract or agreement for the sale of any interest in any property except lands, tenements, hereditaments, or heritages, or "property locally situate out of the United Kingdom," is to be charged with ad valorem duty. A simple contract debt is "property" within the exception in the subsection; it is capable of having a local situation; and that situation is where the debtor resides.

A company incorporated in this country entered into an agreement with a banking company incorporated in Australia for the purchase from the bank of all its assets, which included certain simple contract debts owing by debtors in Australia.

Held: the debts in question were situated in Australia, and, therefore, fell within the exception in s. 59 (1), and the agreement was exempt from stamp duty.

Velazquez, Ltd. v. I.R. Comrs. (1) ([1914] 3 K.B. 458), *Smelting Co. of Australia v. I.R. Comrs.* (2) ([1897] 1 Q.B. 175), and *Danubian Sugar Factories, Ltd. v. I.R. Comrs.* (3) ([1901] 1 K.B. 245) overruled.

Notes. Referred to: *Re Russian Bank for Foreign Trade*, [1933] All E.R. Rep. 754; *I.R. Comrs. v. Broome's Executors* (1935), 19 Tax. Cas. 667; *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202; *R. v. Williams*, [1942] 2 All E.R. 95; *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to the locality of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 478 and *ibid.*, Vol. 7, 44; and for cases see 8 DIGEST (Repl.) 545-547.

Cases referred to:

- (1) *Velazquez, Ltd. v. I.R. Comrs.*, [1914] 2 K.B. 404; 83 L.J.K.B. 1108; 111 L.T. 417; 30 T.L.R. 360; on appeal, [1914] 3 K.B. 458; 83 L.J.K.B. 1108; 111 L.T. 417; 30 T.L.R. 539; 58 Sol. Jo. 554, C.A.; 39 Digest 283, 661.
- (2) *Smelting Co. of Australia v. I.R. Comrs.*, [1897] 1 Q.B. 175; 66 L.J.Q.B. 137; 75 L.T. 534; 61 J.P. 116; 45 W.R. 203; 13 T.L.R. 84, C.A.; 36 Digest (Repl.) 824, 1804.
- (3) *Danubian Sugar Factories, Ltd. v. I.R. Comrs.*, [1901] 1 K.B. 245; 70 L.J.Q.B. 211; 84 L.T. 101; 65 J.P. 212, C.A.; 39 Digest 279, 640.
- (4) *Royal Trust Co. v. A.-G. for Alberta*, [1930] A.C. 144; 46 T.L.R. 25; Digest Supp.
- (5) *Guthrie v. Walrond* (1883), 22 Ch.D. 573; 52 L.J.Ch. 165; 47 L.T. 614; 31 W.R. 285; 23 Digest (Repl.) 416, 4868.
- (6) *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.*, [1900] 1 Q.B. 310; 69 L.J.Q.B. 21; 81 L.T. 667; 48 W.R. Digest 77; 16 T.L.R. 72; on appeal, [1901] A.C. 217; 70 L.J.K.B. 677; 84 L.T. 729; 49 W.R. 603; 17 T.L.R. 530, H.L.; 39 Digest 278, 627.
- (7) *Byron v. Byron* (1596), Cro. Eliz. 472.
- (8) *Stamps Comrs. v. Hope*, [1891] A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268, P.C.; 21 Digest 120, m.

- A (9) *Toronto General Trusts Corpn. v. R.*, [1919] A.C. 679; 88 L.J.P.C. 115; 121 L.T. 106; 35 T.L.R. 450, P.C.
- (10) *Re Commercial Bank Corpn. of India and the East, Fernandes' Executors' Case* (1870), 5 Ch. App. 314; 22 L.T. 219; 18 W.R. 411; sub nom. *Re Commercial Bank Corpn. of India and the East, Ex parte I.R. Comrs.*, 39 L.J.Ch. 497, L.J.; 10 Digest (Repl.) 1007, 6929.
- B (11) *R. v. Lovitt*, [1912] A.C. 212; 81 L.J.P.C. 140; 105 L.T. 650; 28 T.L.R. 41, P.C.; 8 Digest (Repl.) 546, 28.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.), affirming a decision of ROWLATT, J.

C By an agreement for sale executed in Australia the appellants, who were a company incorporated in England on April 1, 1927, under the Companies Acts, agreed to purchase, with some immaterial exceptions, the business goodwill and assets of the Royal Bank of Australia, Ltd., a company incorporated in Victoria, whose head office was in Melbourne. The assets agreed to be sold included simple contract debts owing to the Royal Bank by customers resident outside the United Kingdom in respect of overdrafts. Those debts fell into two categories, namely, advances made in London by the London office of the Royal Bank to residents outside the United Kingdom amounting to £13,482 7s. 7d. and advances made in Australia to residents outside the United Kingdom amounting to £3,262,347 18s. 7d. They were in all cases simple contract debts not secured by specialty. The question was whether these debts constituted "property locally situate out of the United Kingdom" within the meaning of s. 59 (1) of the Stamp Act, 1891. If they were, the agreement for sale was entitled to exemption, so far as regards the consideration for the sale of those particular assets, from the stamp duty imposed by that section on

"any contract or agreement . . . under seal or under hand only . . . for the sale of any estate or interest in any property except . . . property locally situate out of the United Kingdom."

F The Commissioners of Inland Revenue included in their assessment for stamp duty all the debts above mentioned. The Court of Appeal, affirming the decision of ROWLATT, J., upheld the assessment, regarding themselves as bound by the decision in the Court of Appeal of *Velazquez, Ltd. v. I.R. Comrs.* (1). The bank appealed.

Wilfrid Greene, K.C., and *H. G. Robertson* for the appellants.

G *The Attorney-General (Sir William Jowitt, K.C.)* and *J. H. Stamp* for the respondents.

The House took time for consideration.

Dec. 15. The following opinions were read.

H **LORD BUCKMASTER.**—The question on this appeal is whether an agreement made in this country for the purchase of debts owed by debtors who reside out of the United Kingdom is liable to an ad valorem stamp duty based on such debts.

I The history of the matter is quite simple. The appellants are a company incorporated in this country under the Companies Acts, and on April 1, 1927, they entered into an agreement with the Royal Bank of Australia, Ltd., a company incorporated in Victoria, Australia, for the purchase from the Australian bank of all the assets of that bank with certain inconsiderable exceptions. Part of such assets consisted of simple contract debts owing by customers of the Royal Bank resident outside the United Kingdom on overdrafts, a small portion of which had been granted by an office in London, but practically the whole had been granted in Australia. None of these debts was a specialty debt or secured by a bill of exchange, or other negotiable instrument. The Commissioners of Inland Revenue included in their assessment for stamp duty all the debts to which I have referred, and the question on this appeal is whether such assessment was correct. ROWLATT, J., and the Court of Appeal have upheld the assessment, rightly as I think, regarding

themselves bound by the decision in the Court of Appeal in *Velazquez, Ltd. v. I.R. Comrs.* (1), and the real point for consideration of this House is whether that decision should be overruled. A

The section of the Stamp Act, 1891, s. 59 (1), that is applicable is, as amended by the Revenue Act, 1909, s. 7, and omitting matters not relevant, in the following terms:

"59.—(1) Any contract or agreement for the sale of any estate or interest in any property whatsoever . . . except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." B

The question that arises upon this is whether debts are capable of a local situation, and if they are, whether that situation should be assumed to be out of the United Kingdom so that the property is within the exception mentioned in the section. That for purposes of probate and estate duty a simple contract debt is assumed to be situated where the debtor resides is established by a long series of authorities that stretch far back into the mists of antiquity. Instead of discussing the earlier cases, I think it better to take the latest of these authorities—*Royal Trust Co. v. A.-G. for Alberta* (4). In that case LORD MERRIVALE, delivering the opinion of the Board, used these words ([1930] A.C. at p. 150): C

"The local situation proper to be attributed to the various assets of a deceased person has long been governed under our law by rules, no doubt somewhat artificial in character, which were evolved when the lawful jurisdiction to direct the administration of such assets depended upon the locality in which the assets were found. Many of the courts concerned had authority within small provincial areas only. A simple contract debt due from a debtor outside the jurisdiction within which the testator resided was not assets within that jurisdiction." D

He might have added "but within the jurisdiction where the debtor resided." I have examined, but I do not think it necessary to discuss, the earlier authorities, for the statement I have already referred to is, in my judgment, an accurate statement of law. The cases where a similar question has arisen in consideration of wills are conveniently summarised in *Guthrie v. Walrond* (5), and in these cases gifts of property situate in a particular place have been held to include simple contract debts from debtors there resident. Cases of wills, however, are always open to the criticism that their construction depends upon ascertaining what the testator meant, and this is affected by many considerations not present in the consideration of an Act of Parliament. These authorities, therefore, may be passed by with the comment that they did at least recognise that a debt may be localised somewhere and that is one of the first matters for consideration in this case. Did the matter rest there, I should have thought that when the local situation of a debt had been recognised for two such important purposes as probate and gift by will, the local situation so attributed would be that referred to in the section of the statute. But authority has intervened, and has prevented this conclusion being reached until after a careful examination of the meaning and validity of such decisions. E

In *Smelting Co. of Australia v. I.R. Comrs.* (2) it was decided by the Court of Appeal that a licence to work a patent in Australia, and a share in a patent in New South Wales, were not locally situated outside the United Kingdom within the meaning of the statute. LORD ESHER, M.R., and LOPES, L.J., thought that the words "or property situate outside the United Kingdom" ought to be regarded as ejusdem generis with the property described in the preceding sentence, but this interpretation was disapproved in this House in *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6), and it needs no further comment beyond saying that it F

A appears to be based on the view that the word "or" in the section is equivalent to "and," a view with which I cannot agree. LORD ESHER, M.R., also thought that such rights as were there in question could have no locality. They were incorporeal, incapable of being handled or seen, and, therefore, in his view, could not be situate anywhere. RIGBY, L.J., based his decision on the ground that the property could be bought and sold here, a feature certainly not distinctive of the particular property there in dispute.

B In *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6), the question arose whether the goodwill of a German business was locally situate outside the United Kingdom, and this House thought that it was, though LORD HALSBURY held that it was not. In that case LORD MACNAGHTEN said ([1901] A.C. at p. 223): "It is not easy to form a conception of property having no local situation," and LORD DAVEY added C ([1901] A.C. at p. 227):

"Nor do I express any opinion on the abstract question whether an incorporeal right can have a local situation beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases,"

D while LORD LINDLEY said that he saw no difficulty in assuming that such property was capable of local situation, and that indeed for legal purposes such a local situation must be assumed. The actual question, therefore, was not decided, but valuable help had been afforded to those on whom the ultimate duty of decision should be cast.

E The exact question then arose in *Velazquez, Ltd. v. I.R. Comrs.* (1). This was first heard before SCRUTTON, J., and his judgment is reported [1914] 2 K.B. at p. 408. He regarded the decision in *Smelting Co. of Australia v. I.R. Comrs.* (2) as binding upon him, and not in terms overruled by *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6), which, in his view, was decided upon the ground that the goodwill was in some way attached to real estate. This opinion he expressed in the following words: "I am therefore bound to hold that a personal right to a debt F not attached in any way to land has no local situation." The Court of Appeal took the same view, and the case proceeded no further. It is, therefore, plain that in order to decide whether the *Velazquez Case* (1) was right or wrong, the *Smelting Co. of Australia v. I.R. Comrs.* (2) and *Muller's Case* (6) must be carefully examined.

G The first of these most clearly depends upon the assumption that incorporeal property can have no locality and it is true that it has not the attributes of place and substance like a chattel which you can handle and move from one place to another. But debts do, in one form or another, represent property of very considerable value in the modern world, and it appears to me it is desirable that they should possess a locality, even if they are invested with it by means of a legal fiction. Nor can I see why, when that locality has been attributed for several H centuries for purposes of jurisdiction in the administration of estates, it should be regarded as impossible when dealing with the Stamp Act. It is, in my opinion, a fair assumption that the statute was passed with knowledge of the well-established law relating to probate, and the phrases then used would be perfectly proper to cover debts where the debtors were out of the United Kingdom. I think, too, that the view of *Muller's Case* (6) is too narrow in basing the decision solely on the I ground of goodwill being attached to some form of hereditament. LORD LINDLEY certainly regarded a debt as capable of local situation, and there is nothing in any of the other Lords' opinions (apart from that of LORD HALSBURY) that differs from this view. Once it be assumed that a debt must have a local situation, as I think it must, it can only be where the debtor or the creditor resides, and the fact that it has for other and similar purposes been assumed to be determined by the residence of the debtor and not the creditor is a sufficient reason for holding that that is its situation for the purpose of the statute.

For this reason I think the *Australian Smelting Co.'s Case* (2) and the *Velazquez*

Case (1) were wrongly decided, and should be overruled. I have made no reference to the difference in the locality between simple contract debts and specialty debts, as the point is not relevant to this appeal, and I desire to avoid matter that is immaterial. In my opinion, therefore, the appeal should be allowed with costs, and I beg to move accordingly. A

LORD WARRINGTON (read by LORD THANKERTON).—By the joint effect of s. 59 (1) of the Stamp Act, 1891, and s. 7 of the Revenue Act, 1909, any contract or agreement for the sale of any interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom is to be charged with the same ad valorem duty as if it were an actual conveyance on sale of the interest or property contracted or agreed to be sold. The question in this appeal is whether for the purposes of the above-mentioned statute an agreement for the sale of (among other things) certain simple contract debts owing by debtors in Australia to an Australian bank is in respect of such debts liable to be charged with an ad valorem duty, the appellants contending that such debts are locally situate out of the United Kingdom, and are, therefore, within the exception specified in the statute. ROWLATT, J., and the Court of Appeal decided in favour of the Crown, conceiving themselves bound by the decision in *Velazquez, Ltd. v. I.R. Comrs.* (1). B C D

The agreement in question was dated April 1, 1927, and was made between the Royal Bank of Australia, Ltd., a company incorporated in Australia, and carrying on its main business in that country, of the one part, and the appellants, a company incorporated in this country under the Companies Acts, of the other part, for the sale and purchase of, with some immaterial exceptions, the whole of the business goodwill and assets of the Royal Bank as a going concern. It was found by the commissioners that of the total consideration for the sale the sum of £3,262,347 18s. 7d. was the consideration for the sale of advances made in Australia by the Royal Bank to residents outside the United Kingdom, and the sum of £13,482 7s. 7d. was the consideration for the sale of advances made by the London branch of the Royal Bank to residents outside the United Kingdom. The debts in respect of all these advances were simple contract debts. It is the local situation of these debts which is in question. E F

In this as in other cases depending on the construction of a statute it is necessary to look at the words themselves. The section imposes an ad valorem duty on agreements for the sale of, among other things, any interest in "any property except lands, tenements, hereditaments or heritages or property locally situate out of the United Kingdom." Two of the learned judges who decided the case of *Smelting Co. of Australia v. I.R. Comrs.* (2) expressed the view that by an application of the so-called ejusdem generis rule "property locally situate out of the United Kingdom" should be confined to property akin to lands, tenements, hereditaments or heritages. This view was not accepted by the third member of the court and has since been finally rejected by this House (*I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6)). Simple contract debts, therefore, are "property" within the exception. If this is so, then it is clear I think from the subsequent words that the legislature recognised the possibility of such debts having a local situation. I, therefore, on the statute itself without reference to authority, could not accept the view that intangible property such as a simple contract debt is incapable of having a local situation at all. Parliament cannot, in my opinion, be taken to have included debts in the exception and at the same time to have imposed a condition impossible of fulfilment. But indeed the task of discovering secundum fictionem legis a local situation for an intangible legal conception has long been a familiar one. One example is that of finding a residence for a company. A company exists in law apart from the human beings which compose it, the company itself cannot eat or sleep—common tests of residence in human beings—yet the courts have found no difficulty in attributing residence to it and ascertaining its locality. The position is really summed up by LORD LINDLEY in the *Muller's Margarine Case* H I

A (6) in this House, when he says ([1901] A.C. at p. 236) that the legal conception of property involves the legal conception of existence somewhere.

Once it is established that a debt may have a local situation, the rules of law by reference to which such situation is to be determined are settled beyond question. So far back as the reign of Elizabeth ANDERSON, J., is reported as saying [in *Byron v. Byron* (7)]:

B "The debt [in question in that case] is where the bond is, being upon a specialty, but debt upon a contract follows the person of the debtor; and this difference hath been oftentimes agreed."

The earlier cases, no doubt, are concerned with the locality of an item of property for the purpose of ascertaining whether it is covered by a probate granted by an Ordinary with a limited local jurisdiction, but the rule has been recognised and applied in a variety of circumstances. A very useful statement of it is contained in the judgment prepared by LORD FIELD, of the Judicial Committee in *Stamps Comrs. v. Hope* (8) ([1891] A.C. at p. 481), and in a more recent case it is stated by LORD CAVE, who says the general principle is well settled: *Toronto General Trusts Corpn. v. R.* (9) ([1919] A.C. at p. 683). In my opinion, in accordance with the rule above referred to, the debts in question, being all simple contract debts, are locally situate where the debtors reside, that is to say, in Australia and out of the United Kingdom.

It only remains to refer to certain authorities relied upon by the Crown. The one actually followed by ROWLATT, J., and the Court of Appeal was *Velazquez, Ltd. v. I.R. Comrs.* (1), but this decision merely followed the previous case of the *Danubian Sugar Factories, Ltd. v. I.R. Comrs.* (3), which itself followed *Smelting Co. of Australia v. I.R. Comrs.* (2). The subject-matter in this last case was certain patent rights in Australia and was based upon the view that the words "locally situate" cannot apply to something which has no locality. With the greatest respect to the learned judges who expressed that view, I prefer that of LORD LINDLEY above referred to. Indeed, in the *Smelting Co.'s Case* (2) one would have thought the Australian locality was unusually clear. The subject-matter was a licence to use an Australian patent, namely, a monopoly confined to Australia, and I think but for the erroneous view referred to above the decision must have been the other way. In my opinion, this case and the other cases dependent upon it must be taken to be overruled. For the above reasons I think the appeal should be allowed and the ad valorem duty reduced accordingly. The respondents must pay the costs here and below.

G LORD ATKIN.—I concur.

H LORD TOMLIN (read by LORD THANKERTON).—The question to be determined in this case is whether an agreement for the purchase of the assets of an Australian banking business, including book debts owing from debtors resident in Australia, is exempt from stamp duty in respect of such book debts on the ground that they are within the exception of s. 59 (1) of the Stamp Act, 1891, as being property locally situate out of the United Kingdom. The courts below, regarding themselves as bound by the decision of the Court of Appeal in *Velazquez, Ltd. v. I.R. Comrs.* (1), affirmed, without delivering reasoned judgments, the assessment of the Commissioners of Inland Revenue, whereby the agreement was assessed to duty in respect of the book debts in question. In *Velazquez, Ltd. v. I.R. Comrs.* (1) the Court of Appeal had held that book debts owing from persons resident in Argentina were not property locally situate out of the United Kingdom within the exception of s. 59 (1). In so holding the court had considered itself bound by the decision of the Court of Appeal in *Danubian Sugar Factories, Ltd. v. I.R. Comrs.* (3), where the benefit of a contract enforceable against a resident in Roumania for the transfer of a certain quantity of land in a certain locality in Roumania, the exact situation of the land to be selected by the transferee of the land, was held not to be property within the exception. The court responsible for the last-mentioned decision had

in its turn treated the case before them as falling within the principle of *Smelting Co. of Australia v. I.R. Comrs.* (2), where a share in a New South Wales patent and a sole licence to work the patent in a district of New South Wales were held by the Court of Appeal not to be covered by the exception, and not to be within the principle of *Muller & Co.'s Margarine, Ltd. v. I.R. Comrs.* (6), where the goodwill of a business carried on abroad was treated by the Court of Appeal as covered by the exception, a conclusion subsequently affirmed by your Lordships' House on different grounds. A B

It becomes necessary, therefore, to examine the validity of the decision in *Smelting Co. of Australia v. I.R. Comrs* (2), which is the basis of the line of cases culminating in the decision now under appeal. In *Smelting Co. of Australia v. I.R. Comrs.* (2), LORD ESHER, M.R., and LOPES, L.J., expressed the view that the words "property locally situate out of the United Kingdom" ought to be read as ejusdem generis with the words preceding them, thus excluding from its operation choses in action. The observations of LORD DAVEY and LORD LINDLEY in *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6) ([1901] A.C. at pp. 225 and 234) make it plain that that view was not well founded. Further, LORD ESHER and LOPES, L.J., held that, as the property could not be touched or seen or placed anywhere, it was incapable of being brought within the meaning of the words "locally situate," or of being said to exist in any locality. RIGBY, L.J., who differed from the other members of the court upon the question of ejusdem generis, concurred with them in the result, because he was of opinion that the persons claiming exemption were bound to show that the property was not capable of being dealt with in this country and because he was not satisfied that patent rights had any local situation anywhere within the meaning of the words "locally situate." C D E

So far as this decision rested upon the impossibility of there being a local situation for an intangible asset, or upon the asset being saleable in this country, it is, in my opinion, inconsistent with the opinions expressed in your Lordships' House in *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6), where the goodwill of a foreign business was held to have a local situation abroad and where LORD LINDLEY in terms disapproved the reasoning of LORD ESHER and LOPES, L.J., and also that of RIGBY, L.J., pointing out in regard to the latter that any property situate anywhere can be agreed to be sold in any other country: [1901] A.C. at pp. 237-238. I share the view expressed in the same case by LORD MACNAGHTEN ([1901] A.C. at p. 223), that it is not easy to form a conception of property having no local situation. In fact, for many purposes choses in action have in the past been held to have a local situation. The decisions under s. 59 (1), so far as they treat choses in action as having no local situation, constitute a singular exception to the general trend of decisions on other topics where the question of "local situation" in relation to a chose in action has come under consideration. To explain this singular exception it has been urged before your Lordships that in cases outside the Stamp Act, 1891, where local situation in relation to choses in action fell for consideration, it was essential to find that the asset had in fact some local situation, whereas under the Stamp Act, as every asset is charged, unless it is brought substantively within the exception, the necessity for showing an actual local situation does not arise. Having regard, however, to s. 14 (4) of the Stamp Act, 1891, whereby, by way of sanction to the charging provisions of the Act, an instrument relating to any property in any part of the United Kingdom is made inadmissible in evidence, and is not available for any purpose unless it is duly stamped, it is plain that the problem of local situation under the Act is one which does involve the fixing of the situation of an asset as being either within or without the United Kingdom. The distinction suggested between cases under the Act and other cases cannot, therefore, in my opinion, be supported, and I am unable to see why a principle should be applied to cases under the Act different from that applied in the other classes of case to which reference was made in argument before your Lordships. F G H I

In my opinion, under s. 59 (1), for the purpose of the exception under consideration, it is necessary to resolve whether the asset, be it a chose in action or not, is

A situate in or out of the United Kingdom, and the test of the situation of a simple contract debt is to be found in the place of residence of the debtor. I think that *Smelting Co. of Australia v. I.R. Comrs.* (2), *Danubian Sugar Factories, Ltd. v. I.R. Comrs.* (3), and *Velazquez, Ltd. v. I.R. Comrs.* (1) were all wrongly decided. In *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6), your Lordships' House affirmed the Court of Appeal, but, in my opinion, made it clear that the reasoning of the Court of Appeal in that case was erroneous so far as it was based on the view that a goodwill cannot have a local situation unless it is annexed to premises upon which the business is carried on. I think that this appeal should succeed, and I concur in the motion proposed.

C **LORD MACMILLAN.**—My Lords, by an agreement for sale executed in Australia the appellants, the English, Scottish, and Australian Bank, Ltd., of London and Melbourne, agreed to purchase the business and assets of the Royal Bank of Australia, Ltd., whose head office is in Melbourne. The assets agreed to be sold include certain debts owing to the Royal Bank by customers resident outside the United Kingdom in respect of overdrafts. These debts fall into two categories, namely, advances made in London by the London office of the Royal Bank to residents outside the United Kingdom amounting to £13,482 7s. 7d., and advances made in Australia to residents outside the United Kingdom amounting to £3,262,347 18s. 7d. They are in all cases simple contract debts not secured by specialty. The question is whether these debts constitute "property locally situate out of the United Kingdom" within the meaning of s. 59 (1) of the Stamp Act, 1891. If they are, the agreement for sale is entitled to exemption, so far as regards the consideration for the sale of these particular assets, from the stamp duty imposed by that section on

E "any contract or agreement . . . under seal or under hand only . . . for the sale of any estate or interest in any property."

It should be noted that since the passing of the Revenue Act 1909, s. 7, the duty is exigible in respect of any contract or agreement for the sale of property irrespective of the place of its execution, but with the same exceptions as before. The courts below, holding themselves bound, as the appellants conceded that they were, by the decision in *Velazquez, Ltd. v. I.R. Comrs.* (1), have held, without delivering judgments, that the items in question comprised in the agreement of sale are not "property locally situate out of the United Kingdom." The present appeal is, accordingly, in effect an appeal from that previous decision. In the case of *Velazquez, Ltd. v. I.R. Comrs.* (1), the Court of Appeal regarded themselves as bound by the decision in *Danubian Sugar Factories, Ltd. v. I.R. Comrs.* (3), and in the latter case in turn the Court of Appeal stated that they were bound by the decision in *Smelting Co. of Australia v. I.R. Comrs.* (2). The last-named case is, accordingly, the starting-point of the series of decisions which your Lordships are invited to reconsider.

H I propose, in the first place, to say a few words on the terms of the section of the Stamp Act itself. It is undisputed that the word "property" used in the description of the contracts or agreements subjected to duty extends to every kind of property, corporeal and incorporeal, and, therefore, embraces simple contract debts. When the section goes on to except property locally situate out of the United Kingdom I see no reason to assume that the term "property" is used any less extensively in the exception. I should, therefore, naturally read the section as excepting simple contract debts situate out of the United Kingdom, simple contract debts being one form of property. When the question of the local situation of a particular form of property is submitted for judgment I do not think it will do to say that it has in law no situation anywhere. The section, as I read it, contemplates that all property with which it deals must be situated either within or out of the United Kingdom. This may be reinforced by a reference to s. 14 (4), which forbids the production in evidence of any instrument relating to "any property situate . . . in any part of the United Kingdom" unless it is duly

stamped. If the true view be that simple contract debts have in law no situation, A then an unstamped instrument relating to simple contract debts would not come within the prohibition for it would not be an instrument relating to any property situate in any part of the United Kingdom; it would relate to property situated nowhere. The Act, in my view, does not permit the question of where any particular kind of property is situated to be evaded by holding that it is not situated anywhere, for every kind of property must be situated either within or outside the B United Kingdom.

I now turn to the *Smelling Co. of Australia Case* (2) as the fountain head of the subsequent course of decisions. The subject-matter of discussion there was an agreement for the sale inter alia of a share in a patent granted in New South Wales and a licence to use in a district of that colony the invention protected by the patent. These rights were held not to be "property situate out of the United C Kingdom." The Master of the Rolls (LORD ESHER) and LOPES, L.J., in so holding, proceeded on the grounds (i) that the word "property" in the exception must be construed as referring to real property because it followed on an enumeration of "lands, tenements, hereditaments or heritages"; and (ii) that the rights in question, not being visible or tangible, had in truth and in fact no locality, and, therefore, could not be said to be "situate out of the United Kingdom" because they were D not situated anywhere. The first of these grounds is clearly untenable. The structure of the section precludes the application of the ejusdem generis or noscitur sociis rule for the reasons assigned by RIGBY, L.J., with whose judgment on this point I agree. Having avoided this error, however, RIGBY, L.J., falls into a scarcely less serious one, for he appears to hold that any property which can be the subject of sale and purchase in the United Kingdom is in law situate in the E United Kingdom. This would render the exception as extensive as the rule for "any property situate anywhere can be agreed to be sold or purport to be sold in any other country": per LORD LINDLEY in *I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6) ([1901] A.C. at p. 238). Finally, however, the learned lord justice expresses his concurrence with the second of the reasons advanced by his colleagues and bases his judgment mainly or almost entirely "on the ground that he is not F satisfied that patent rights have any local situation anywhere." This, then, was the ground of judgment common to all the members of the court. In my opinion, it is quite unsound. As I have already said, it is not permissible under the statute to hold that any property has no situation. All property must be either within or out of the United Kingdom, and there is no intermediate limbo.

Having reached the conclusion that the statute requires a decision as to the local G situation of simple contract debts, I find ample guidance in authority for the solution of the problem. It is, of course, true that a debt cannot be touched or handled and cannot be physically situated anywhere. But the law has shown itself quite capable, where necessary, of determining the local situation of an incorporeal right. The question arose at a very early date in connection with probate jurisdiction, and later in connection with probate duty. Counsel for the appellants has H conducted your Lordships through a long and impressive series of decisions relating to these topics, beginning in the reign of Elizabeth, which emphatically establish that for these purposes a simple contract debt is situated within the area of the local jurisdiction within which the debtor for the time being resides. I may add to his list of citations *Re Commercial Bank Corpn. of India and the East; Fernandes' Executors Case* (10), where it was held that a simple contract debt due by an English company to a deceased resident in India was situated in England, the residence of the debtor. As an authoritative statement of the law I quote the words of LORD FIELD, delivering the judgment of the Privy Council in the well-known case of *Stamps Comrs. v. Hope* (8) ([1891] A.C. at pp. 481-2): I

"Now a debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the courts of this country, and is

A a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided."

B In *R. v. Lovitt* (11) the same principle was again affirmed by the Privy Council.

C It was suggested that the doctrine just enunciated was peculiar to probate cases. Apart from the illustrations of its application in other departments of the law which counsel for the appellants adduced, I venture to express my agreement with LORD LINDLEY who said ([1901] A.C. at p. 236):

"The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us."

D That was said in the only case, so far as I am aware, on s. 59 of the Stamp Act, 1891, which has reached your Lordships' House (*I.R. Comrs. v. Muller & Co.'s Margarine, Ltd.* (6) ([1901] A.C. at p. 236). The subject-matter of discussion there was an agreement for the sale of the goodwill of a business carried on in Germany, and the decision was that the goodwill was "property situate out of the United Kingdom." The Crown advanced the argument that goodwill was incorporeal and could not be situate anywhere. Dealing with this argument LORD MACNAGHTEN said ([1901] A.C. at p. 223):

"I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation."

F LORD DAVEY said ([1901] A.C. at p. 227) that he did not

"express any opinion on the abstract question whether an incorporeal right can have a local situation, beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases."

G LORD LINDLEY said ([1901] A.C. at p. 236):

"The legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are not dealing with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible."

H One would have thought that as the view that incorporeal rights had no local situation within the meaning of the Act was the only common ground of judgment in the case of the *Smelting Co. of Australia* (2) the authority of that decision was seriously impaired by the expressions of opinion in this House which I have just quoted. It was not, however, expressly overruled, and LORD LINDLEY, who alone I cites it, contented himself with saying that it did not deal, as did the case before him, with the goodwill of a foreign business. The *Danubian Sugar Factories Case* (3), though cited in the argument, was not referred to in any of the speeches in this House. When the *Velazquez Case* (1) came before the Court of Appeal the *Danubian Sugar Factories Case* (3), not having been expressly disapproved by this House, was regarded as a still binding authority, and the case of *Muller & Co.'s Margarine* (6) was distinguished on the ground that the goodwill with which it dealt was only held to be situate out of the United Kingdom, because it was attached to land situated abroad. SWINFEN EADY, L.J., differing from LORD

LINDLEY, expressed the view that the cases on probate duty were of no assistance. A
It is true that in the case of *Muller & Co.'s Margarine* (6) in this House emphasis
was laid on the association of the goodwill with business premises situated abroad,
but the decision was that a right of an incorporeal nature had a locality and that
that locality was out of the United Kingdom.

For myself I can see no reason why simple contract debts should have a local B
situation for the purpose of probate duty, but no local situation for the analogous
purpose of stamp duty. So far from regarding the probate cases as anomalous, I
regard the principle upon which they have been decided as the sound principle,
and the stamp duty cases in the Court of Appeal as an aberration which your
Lordships have now an opportunity of correcting.

Holding as I do that the simple contract debts here in question, being due by C
persons resident out of the United Kingdom, are situated where these persons are
resident and are therefore property situate out of the United Kingdom within the
meaning of s. 59 (1) of the Stamp Act, I concur in the motion that the appeal be
allowed.

Appeal allowed.

Solicitors: *Slaughter & May; Solicitor of Inland Revenue.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.] D

PARKER v. JUDKIN AND OTHERS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), F
February 13, 1931]

[Reported [1931] 1 Ch. 475; 100 L.J.Ch. 159; 144 L.T. 662]

Administration of Estates—Real estate—Sale—Land charged with annuity to widow—Notice to purchaser.

By his will made in 1913 P. appointed his two sons executors and devised G
and bequeathed to them the freeholds upon which his business was carried on
and the business subject to the payment of an annuity of £300 to his wife.
The testator died in 1914. In February, 1923, the two sons agreed to sell to a
trustee for an intended company the undertaking and assets of the business in
consideration of cash and shares in the company and an undertaking by the
company to pay all the liabilities of the vendors in relation to the business in- H
cluding the annuity and a charge to secure the bank overdraft of the vendors'
firm. That agreement was carried out by two deeds dated June 1, 1923, one
an assignment of the goodwill and the other a conveyance of the freehold
premises of the vendors in connection with the business, including freehold
premises at L.B. The conveyance recited the charge to the bank effected by I
deposit of the deeds, but made no reference to the annuity, and the will was
also shortly recited. The conveyance was made by the vendors as beneficial
owners and the habendum was expressed to be subject to a charge by way of
collateral security to the bank to secure £774 8s. 4d., the amount of the firm's
overdraft. On Nov. 19, 1929, the company sold the freehold premises at L.B.
to the defendant J. by a conveyance of the fee simple free from incumbrances
in the usual form. The company, having paid off the £774 8s. 4d., were able
to hand over the title deeds to J. The widow was paid her annuity until
December, 1929, when the company, owing to bad trade, were unable to
continue it. The widow then brought this action claiming that J. had taken

A the property with notice which ought to have put him on inquiry whether the premises were freed from the annuity.

Held: the following facts, whether taken alone or together, were not sufficient to put the defendant J. on inquiry whether the vendors under the conveyance of June 1, 1923, were conveying in their capacity as executors or in that of beneficiaries: (i) the fact that it appeared from the attestation clause to the conveyance that one of the vendors was a director of the company; (ii) the fact that the conveyance was by the vendors as beneficial owners, since executors, though not appearing on the face of the conveyance to be selling in that capacity, could convey property forming part of the testator's estate free from all charges created by the testator; (iii) the fact that the conveyance of June 1, 1923, included, not only property which formed part of the testator's estate, but also two leaseholds acquired after his death, which could only be assigned by the vendors in their individual capacity and not as executors; (iv) the fact that the title deeds of these two leaseholds had been deposited with the bank to secure the account of the vendors and not that of the estate.

Notes. As to the powers of personal representatives, see 16 HALSBURY'S LAWS (3rd Edn.) 357 et seq.; and for cases see 24 DIGEST (Repl.) 629 et seq.

Cases referred to:

- (1) *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 29 T.L.R. 79; 57 Sol. Jo. 76; 23 Digest (Repl.) 394, 4649.
- (2) *Re Venn and Furze's Contract*, [1894] 2 Ch. 101; 63 L.J.Ch. 303; 70 L.T. 312; 42 W.R. 440; 38 Sol. Jo. 273; 8 R. 220; 23 Digest (Repl.) 3803, 314.
- (3) *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356; 77 L.J.Ch. 598; 99 L.T. 336; 23 Digest (Repl.) 314, 3799.

Appeal by plaintiff from an order of MAUGHAM, J.

By his will, dated April 15, 1913, the testator, John Thomas Parker, after appointing Ernest William May, his son, George Dancer Thain Parker, and the defendant, Sydney John Parker, executors thereof and making certain specific and pecuniary bequests, disposed of the bulk of his property in the following terms:

"I bequeath the said George Dancer Thain Parker and Sydney John Parker absolutely the policy or policies of insurance upon my life and the full benefit thereof and also the share and interest in the residuary estate of my father to which I am entitled under the trusts of his will in the event of my sister's dying without leaving any child who shall become entitled as in the said will mentioned and also the goodwill of my businesses and the stock-in-trade, plant and effects employed therein and the benefit of all contracts subsisting in respect of the said businesses and all book debts and moneys due to me in respect thereof or standing to the credit of my business account at my bankers at the time of my decease and I devise and bequeath to them all the freehold and leasehold premises on which the said businesses may be carried on provided always and I declare that these bequests and devises are conditional on the said George Dancer Thain Parker and Sydney John Parker discharging and indemnifying my general estate from all debts and liabilities due or subsisting in respect of my businesses at the time of my decease including any mortgages or charges on the business premises and all moneys due to my bankers and on their paying the pecuniary legacies hereinbefore bequeathed and the duty thereon and also the estate duty payable in respect of the value of the said bequests and devises. And also on their paying to my wife during her widowhood the sum of £300 per annum by equal quarterly payments the first whereof shall become payable on such day as shall be three months after the date of my decease and also paying to my son John Frederick Parker on the decease of my wife (if he shall then be living) the sum of £300 and also paying to my son Herbert Parker on the second anniversary of the decease of my wife (if he shall

then be living) the sum of £200 and I declare that the said George Dancer Thain Parker and Sydney John Parker shall enter into such bond or covenant for the payment of the said debts liabilities and other moneys as the said Ernest William May shall require. I give and bequeath to my wife absolutely all the real and personal estate to which I may be beneficially entitled at the time of my decease or of which I may then have power to dispose beneficially by will for any purpose I may think fit and not hereby otherwise disposed of subject nevertheless to the payment of my debts (other than those charged on the bequests and devise to my sons hereinbefore contained) and my funeral and testamentary expenses except the portion of the estate duty charged on the bequest and devise to my said sons."

The testator died on Feb. 24, 1914, and his will and a codicil not material to the present case were proved on March 28, 1914, by George Dancer Thain Parker and the defendant Sydney John Parker. Ernest William May renounced probate. At the date of his death the testator was carrying on the business of a boot manufacturer at Long Buckby in the county of Warwick and at certain leasehold premises at Rood Lane and the Royal Exchange in London. The two sons, George Dancer Thain Parker and the defendant Sydney John Parker, entered into possession of the business and premises and paid off the debts and liabilities due or subsisting in respect of the business and the legacies immediately payable. They or the company which they formed in 1923 (*infra*) also paid the annuity of £300 to the plaintiff, the testator's widow, till the month of August, 1929. They did not enter into the covenant for the payment of the debts, liabilities and the annuity and the two postponed legacies which they were required to enter into by the terms of the will. No express assent to the devise and bequest to them appeared to have been given. On March 9, 1923, the defendant company was formed with the name of J. Parker, Ltd., that having been one of the names under which the testator's business had been carried on, for the purpose of acquiring the undertaking and assets of the business as a going concern. The capital of the company was £5,000, divided into shares of £1 each. The first directors of the company were the defendant, Sydney John Parker, and one Edward Casselston Elliott, who were to continue to hold office until retirement or disqualification without being subject to the provisions for retirement by rotation contained in the articles of association. These two gentlemen were also the two signatories of the memorandum and articles. The preliminary agreement was dated Feb. 16, 1923, and was made between George Dancer Thain Parker and the defendant, Sydney John Parker, as vendors, of the one part, and the trustee for the intended company, of the other part. There was a recital that the vendors had for some time past carried on business together in partnership as bootmakers under the style of J. Parker. Part of the consideration for the sale was the sum of £3,500 payable as to £1,750 in cash to George Dancer Thain Parker and as to £1,750 by the allotment to the defendant, Sydney John Parker, of 1,750 shares of £1 each credited as fully paid. The residue of the consideration was the undertaking by the company to pay or satisfy all the debts, liabilities and engagements of the vendors in relation to the business, including the annuity of £300 per annum to be paid to the widow of the late John Thomas Parker during her widowhood and also of the two legacies of £300 and £200 payable to John Frederick Parker and Herbert Parker after the death of the widow. Clause 5 of the agreement began in the following terms:

"The premises are sold free from all incumbrances except the mortgages or charges specified in the third schedule hereto. . . ."

The third schedule included the annuity of £300 per annum and the two legacies of £300 and £200, and also included a charge in favour of the Northamptonshire Union Bank, Ltd., to secure the bank overdraft of the vendors' firm. The adoption agreement entered into by the company (if any) was not produced at the hearing before MAUGHAM, J., but it seemed to have been carried out by two assignments,

A both dated June 1, 1923, the one being an assignment to the company of the good-will and book debts, and the other being a conveyance and assignment of the freehold and leasehold premises of the vendors in connection with the business. By cl. 3 of the first of these two deeds the company covenanted to pay, discharge and fulfil all the debts, liabilities and engagements of the vendors in relation to the business. The second deed contained a recital of the charge to the bank effected by deposit of the deeds, but contained no reference whatever to the annuity of £300 per annum or the two legacies above referred to. The will of the testator was shortly recited and probate thereof to the vendors as executors. The conveyance of the land was effected by the vendors—who were described as seised as joint tenants of the hereditaments and premises agreed to be sold and assigned—as beneficial owners and the habendum was subject to a charge by way of collateral security to the bank to secure the sum of £774 8s. 4d.

B The company entered into possession and carried on business at first with success. In the year 1924 the company sold certain Cornhill leaseholds which it had acquired to a purchaser for the sum of £6,100. On Nov. 19, 1925, the company sold the freehold premises at Long Buckby to the defendant, Ralph Judkin. The conveyance is in the ordinary form. It recites that the company was seised in fee simple in possession free from incumbrances of the hereditaments and had agreed to sell the same to the purchaser for a like estate at the sum of £690. In other respects the conveyance was simply in the form of a conveyance in fee simple free from incumbrances to the purchaser. The proceeds of sale of the Cornhill leaseholds were utilised in paying off the charge to the bank so that the company was in a position to hand over, and did hand over, the deeds. The plaintiff, however, claimed that the defendant, Judkin, had notice of the charge upon the Buckby freeholds created, as she contends, by the terms of the will and that he took those freeholds subject to such charge. In July, 1927, the defendant company issued to the defendants, Sydney John Parker, Roland William Mussett, and Clement Lewis Sealey, certain debentures containing a floating charge in the ordinary form upon the undertaking and property and assets of the company, both present and future. E Such a charge being merely an equitable charge, the position of the debenture holders, as between themselves and the plaintiff, was no better than the position of the company. On Dec. 20, 1929, the company intimated that as the result of the trading position it was unable to pay any further annuity to the plaintiff. On Feb. 20, 1930, she issued the writ in the present action, the defendants being Ralph Judkin, the company, Sydney John Parker, Roland William Mussett, and Clement Lewis Sealey. G She claimed that the company were liable to pay the annuity, and also that the defendant Judkin had taken the property subject to the charge in her favour.

H MAUGHAM, J., held that the claim against the defendant Judkin failed and must be dismissed with costs, but that against the other defendants the action succeeded and they must pay the plaintiff's costs of the action as against them. The plaintiff appealed from so much of the decision as related to the defendant Judkin.

W. P. Spens, K.C., and E. Riviere for the plaintiff.

F. K. Archer, K.C., and G. G. Tomlin for the defendant, Judkin.

1 LORD HANWORTH, M.R.—This is an appeal from a decision of MAUGHAM, J., who had to decide a somewhat interesting conveyancing point. The question is whether or not the defendant, Mr. Judkin, was put upon inquiry and ought to have ascertained whether or not the premises which were conveyed to him by the deed of Nov. 19, 1925, were subject to a charge of £300 a year in favour of the plaintiff. The plaintiff is the widow of the testator, who died as long ago as 1914. By his will he devised the premises, which were ultimately conveyed to Mr. Judkin, to his two sons, subject to a charge thereon in favour of his widow, the plaintiff, for a payment of £300 per annum by equal quarterly payments. In the will Mr. Ernest William May was also made an executor with the testator's two sons, but

he renounced. Perhaps it is worth noticing that the testator says in the terms of the will:

"I declare that [the two sons] shall enter into such bond or covenant for payment of the said debts liabilities and other moneys as the said Ernest William May shall require."

In fact, Mr. May did not require any such bond to be entered into. The sons took possession, and they carried on the business. Ultimately, on Feb. 16, 1923, an agreement was made between them and a Mr. Smith, who was acting as trustee for a company which was intended to be formed, for the sale of these premises at Long Buckby. In that agreement there is a reference to the charge which was imposed upon the premises by the terms of the will. On March 9, 1923, the company was incorporated and pursuant to the agreement, but without definite reference to it, on June 1 there was a conveyance to the company of these freehold premises. The company got into difficulties, and there was a conveyance by the company on Nov. 19, 1925, to Mr. Judkin. The plaintiff endeavours to assert that Mr. Judkin has taken these premises subject to the charge created by the testator's will in her favour. If the sale to the company was a sale by the executors, the two sons of the testator, then the sale by the company would be a sale which would be freed and discharged from the charge created by the will.

It is said on behalf of the plaintiff that Mr. Judkin took with such notice as ought to have put him upon inquiry whether or not the freehold premises, which were being conveyed, in fact were freed. The conveyance to the company was made by the two sons as beneficial owners. It is said that there are sufficient indicia in the conveyance to show that the two Mr. Parkers, the two sons, were conveying, not as executors, but as trustees. When one comes to look at it this transaction took place inside the period of twenty years to which the learned judge refers, and in respect of which he takes note that there is no necessary deduction drawn against the sale by the executors by reason of the lapse of time, and when one looks into the detailed points which are said to have put Mr. Judkin upon his inquiry, they seem to fail. I will take the one point to which Mr. Riviere referred. In the recitals contained in the conveyance of June 1 there is a recital:

"And whereas lease No. 1 was deposited by the said John Thomas Parker during his lifetime with the bank by way of further security for the repayment of moneys due by him to the bank and the said lease No. 1 now remains and lease No. 2 has since been deposited with the bank for the purpose of creating a charge thereon to secure the repayment to the bank of moneys overdrawn by the vendors on their account with the bank . . ."

It would seem that the history of the debt due to the bank had been traced, that it originated with the testator and was a debt of his and did not necessarily originate with the vendors. When one comes to the habendum, it is:

"To hold the same unto the use of the purchasers in fee simple subject to the charge thereon and to the said sum of £774 8s. 4d. thereby secured."

That sum of £774 8s. 4d. was a debt due to the bank; in other words, it shows that there was then an unpaid debt due to the bank which was payable by these two sons as executors of their father and payable out of the estate of the father. That seems to prevent any deduction of inference being necessarily drawn that they had ceased to act as executors and that their duty as executors was closed. I need not refer to more, but the question then arises whether or not the principle laid down by LORD HALDANE in *Attenborough v. Solomon* (1) ([1913] A.C. at p. 83) as to what is sufficient to constitute an assent by executors to the dispositions in a will becoming operative has been complied with. Within that principle has there been an assent by the two sons and ought there to be an inference from their conduct that they had ceased to act as executors having assented to the terms of the will. In the circumstances I have mentioned and for the reasons I have given it appears to me that the decision of MAUGHAM, J., with whose judgment I desire to express my complete concurrence, must be affirmed, and the appeal must be dismissed.

- A LAWRENCE, L.J.**—I agree. It has been contended that Mr. Judkin was put on inquiry whether the vendors to his vendor were conveying in their capacity as executors or in their capacity of beneficiaries by reason of the form and contents of the conveyance to his vendor. In support of this contention they relied upon three matters appearing on the face of that conveyance. In the first place, there was the fact that it appeared from the attestation clause to the conveyance that
- B** one of the vendors was a director of the company and, therefore, if he were conveying as an executor the conveyance would be voidable. In my opinion, the fact that one of the vendors attested the execution by the company of the conveyance was not sufficient to put Mr. Judkin on inquiry whether the vendors were conveying the property to the company as executors or as beneficiaries. As a matter of fact the vendors were shown on the face of the conveyance to the company to
- C** be the sole beneficiaries under their father's will as well as executors, and, therefore, the persons who would have been entitled to have it set aside if there had been anything wrong in the transaction. I think that Mr. Judkin was justified in ignoring such a contingency which seems to me to be far too remote to have put him upon such an inquiry as is suggested. Counsel admitted that, if this point were the only one, he would not be able to succeed upon it.
- D** The second matter relied upon was that the conveyance was expressed to be made by the vendors as beneficial owners. That fact, however, is also admitted not to be enough by itself to put Mr. Judkin on inquiry. As already stated it appeared on the face of the conveyance that the vendors were in fact beneficial owners of the property, but this fact did not, of course, relieve them from their obligation as executors to discharge the debts of the testator, one of which was
- E** shown by the conveyance to be still unpaid. I agree with MAUGHAM, J., that the fact that the conveyance was made by the vendors as beneficial owners in such circumstances did not put Mr. Judkin upon inquiry. It is well settled that executors, although not appearing upon the face of the conveyance to be selling in that capacity, can convey property forming part of their testator's estate free from all charges created by the testator.
- F** The third matter relied upon was the recital in the conveyance from which it appeared that the title deeds of the two leasehold properties had been deposited with the bank to secure the account of the vendors and not the account of the testator. As against that fact, however, there is the recital that there was a debt still outstanding due to the bank which had been created by the testator, and there is nothing to show that the account might not have been an executorship account.
- G** It is quite true that the will of the testator placed the vendors under an obligation to discharge the outstanding debt out of their own moneys; but that obligation did not relieve them from their duty to the estate as a whole, or prevent them from exercising their power of sale as executors for the purpose of discharging that debt and all other outstanding debts, if any. In my judgment, therefore, the third matter relied upon is not sufficient to put Mr. Judkin upon inquiry.
- H** Counsel, however, contended that, although none of the three matters to which I have referred when taken singly might be sufficient to put Mr. Judkin on inquiry, yet when they are combined they were sufficient for that purpose. I do not think that this contention is well founded. If each matter be insufficient of itself to create suspicion in the mind of an ordinary purchaser, it ought not to be held that he was put on inquiry, because there were three such matters. After having
- I** examined each matter separately and having come to the conclusion that it is not sufficient to put the purchaser on inquiry, the case against him is in no way strengthened by putting the three matters together. For these reasons I agree that the decision of MAUGHAM, J., is right and ought to be affirmed.

ROMER, L.J.—I agree. The only question arising on this appeal is whether there is sufficient in the deed of June, 1923, to give Mr. Judkin notice in the conveyance of 1925 that the vendors in the deed of 1923 were conveying, not as executors, but in their beneficial capacity, or, it comes to the same thing, whether

there is sufficient in that deed to have put Mr. Judkin upon inquiry which should have led to the discovery of the fact that they were conveying, not as executors, but in their individual capacities. A

There are four matters relied on as matters which raised enough suspicion to put Mr. Judkin on inquiry. The first is that the vendors in the deed of 1923 were expressed to convey as beneficial owners. That point has long been settled. In *Re Venn and Furze's Contract* (2), one of the cases to which MAUGHAM, J., referred in his judgment, the facts were that the vendor of leaseholds derived his title through a conveyance made by one T. T. was in fact an executor, but had not purported to assign the leaseholds as executor; he had, indeed, assigned them as beneficial owner. STIRLING, J., held that the abstract showed a good title, and the purchaser could not insist upon a requisition asking the vendor to show that the executor was discharging his duties when he was selling—in other words, that he was selling as executor. He was entitled to assume that he was selling as executor although he had sold as beneficial owner. That case was followed by *Re Henson, Chester v. Henson* (3), a decision of SWINFEN EADY, J. B

The second point upon which reliance is placed is the fact that the assignment of June 1, 1923, includes, not only freehold and leasehold property which formed part of the testator's estate, but also two leaseholds, Nos. 2 and 3, which had been acquired after the death of the testator. It is said, therefore, that Mr. Judkin had notice that there was contained in the assignment property which could be only assigned by the vendors in their individual capacity and not as executors. I pointed out in argument, and I will point it out again, that if one looks at the form of conveyance of June 1, 1923, it seems rather to suggest that the vendors are to retain the freehold and leasehold No. 1 as executors and assigned Nos. 2 and 3 in their individual capacity, because both in the recital in the agreement for sale and in the operative part of the deed a distinction is drawn between the several properties, and the purchase-money for the properties belonging to the testator is distinct from the consideration—I do not know whether there was any purchase-money—for the assignment of the leaseholds Nos. 2 and 3. C

The third point was that it appears from one of the recitals in the deed that leasehold No. 1 had been deposited by the executors with the bank for the purpose of creating a charge to secure the repayment to the bank of moneys overdrawn by the vendors on their account with the bank. All I can say is that there is nothing whatever in that recital to suggest that the account which was to be secured by the deposit of the leasehold No. 2 was not an account of the vendors as executors, but an account in their individual capacity. D

The fourth and last point was this: If one looks at the 1923 deed it will be found that the seal of the purchasers, the company, was affixed in the presence of two directors, and one was Mr. S. J. Parker, who was one of the executors. I entirely agree with what has been said by my Lord and by MAUGHAM, J. MAUGHAM, J., said this: E

“An independent purchaser from executors would not be at all likely to insist on one of the vendors, even though an executor, becoming a director of the new company for a time.” F

I entirely agree that there is nothing in that circumstance, I think, to put Mr. Judkin upon inquiry in regard to the abstract of title. All those four points seem to me individually quite insufficient to put the purchaser upon inquiry. I entirely agree with what has fallen from LAWRENCE, L.J., that if these four points, each one standing by itself, is insufficient to put the purchaser upon inquiry, he is not put upon inquiry by the fact that they all occur together in the same document. G

Appeal dismissed.

Solicitors: Mills, Lockyer & Co.; Hamlins, Grammer, & Hamlin, for Williams & Kingston, Northampton. H

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.] I

COUSINS AND ANOTHER v. INTERNATIONAL BRICK CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January 12, 1931]

[Reported [1931] 2 Ch. 90; 100 L.J.Ch. 404; 145 L.T. 471;
47 T.L.R. 217]

Company—Proxy—No revocation—Right of shareholder personally to vote.

In the absence of express provision in a company's articles taking away a shareholder's personal right to vote after he has appointed a proxy, that personal right remains and the shareholder can attend and effectively give his vote according to his own volition even though that vote is cast contrary to the way in which the proxy vote was to be cast and the proxy has not been revoked in the manner prescribed by the articles. Every proxy is subject to an implied condition that it should only be used if the shareholder is unable, or finds it inconvenient, to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and the shareholder is not entitled to vote contrary to the instructions of the shareholder.

Notes. The Companies Act, 1929, s. 20 (referred to in the judgment of the Master of the Rolls), has been replaced by s. 20 of the Companies Act, 1948.

As to voting by proxy, see 6 HALSBURY'S LAWS (3rd Edn.) 342-344; and for cases see 9 DIGEST (Repl.) 608 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Spiller v. Mayo (Rhodesia) Development Co. (1908), Ltd.*, [1926] W.N. 78; Digest Supp.

Appeal from an order of LUXMOORE, J.

The respondent company was incorporated in February, 1928, with a nominal capital of £200,000 divided into 150,000 cumulative preferred ordinary shares of £1 each and 1,000,000 deferred shares of 1s. each. By art. 71 of the articles of association:

"Every member shall, upon a show of hands, have one vote and upon a poll one vote in respect of each preferred ordinary share and one vote in respect of each five deferred shares held by him."

By art. 74: "Votes may be given personally or by proxy . . ." By art. 75:

"The instrument appointing a proxy, together with the power of attorney (if any) under which it is signed, shall be deposited at the office [of the company] not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote."

By art. 76:

"A vote given in accordance with the terms of an instrument of proxy will be valid notwithstanding the previous . . . revocation of the proxy . . . provided no intimation in writing of the . . . revocation . . . shall have been received at the office before the meeting."

On Oct. 20, 1930, a general meeting of the defendant company was held at which one Pantlin, the chairman of the company, who was due to retire, offered himself for re-election. The first plaintiff, Cousins, had secured proxies representing 102,108 votes, in favour of the election as director of the second plaintiff, Carr. Those proxies were properly lodged in accordance with the company's articles of association. At the meeting Pantlin was elected by a show of hands. A poll was demanded and the meeting was adjourned until Nov. 3 for it to be taken. At the adjourned meeting shareholders who had given proxies to Cousins for the election of Carr attended and personally cast their votes, numbering 11,396, for Pantlin.

None of the proxies given by these shareholders had been revoked in writing as provided by the articles of the company. As a result of the 11,396 votes being cast in favour of Pantlin he was re-elected a director. A

The plaintiffs sought a declaration that upon the poll of the shareholders in the defendant company held upon Nov. 3, 1930, with reference to the election of the plaintiff Carr as a director of the defendant company in place of the defendant Pantlin and to the re-election of the defendant Pantlin, the defendants or one of them wrongfully rejected or disallowed votes tendered by the plaintiff Cousins as proxy for other shareholders and wrongfully received and counted votes in favour of the defendant Pantlin; that the defendant Pantlin was not validly re-elected to be a director of the defendant company; and that the plaintiff Carr was elected as a director in place of the defendant Pantlin. By notice of motion in the action they asked for an order that the defendant Pantlin be restrained from acting as a director of the defendant company and restrained from preventing or interfering with the plaintiff Carr acting or attending as a director of the defendant company. C

LUXMOORE, J., held that the shareholders were entitled to vote as they did in person, and the plaintiffs appealed.

R. J. Sutcliffe for the plaintiffs.

H. S. G. Buckmaster for the company. D

LORD HANWORTH, M.R.—In this case the question we have to determine is whether at the adjourned meeting of the defendant company on Nov. 3, 1930, the chairman was right in counting 11,396 votes as cast against an amendment then put to the meeting or whether they should be counted on the other side in favour of the amendment in view of the proxies for those votes which had been given for the original meeting. The controversy was whether a director retiring at the end of his year of election should be re-elected or a new director put in his place. The original general meeting was held on Oct. 20, 1930. At that meeting it was proposed that the retiring director, Mr. Pantlin, should be re-elected, and the first plaintiff, Mr. Cousins, proposed by way of amendment that the second plaintiff, Mr. Carr, should be elected in his place. When the result of a vote by a show of hands was declared and it was said that Mr. Pantlin had been re-elected, a poll was demanded and the meeting was adjourned till Nov. 3. Arrangements were made in the meantime whereby the amendment was to be considered at the adjourned meeting. At the meeting of Nov. 3 the amendment was put that in the place of Mr. Pantlin Mr. Carr should be elected. The voting having taken place, it was declared by the chairman that the amendment was lost and thereupon the resolution proposing the re-election of Mr. Pantlin was put and carried by a show of hands. What is said is that 11,396 votes ought not to have been counted against the amendment, although these votes were tendered by the shareholders in person, because, it is said, they had lost the right to vote in person after having given proxies which under the articles of association relating to proxies held good at the adjourned meeting. Counsel for the plaintiffs has referred to cases which, he says, decide that the meeting on Nov. 3 was the same meeting as that which began on Oct. 20—that it was a continuance of that meeting and not a separate meeting. E

The articles of the company with regard to the system of proxies indicate that, if a proxy is once given, for the purpose of putting an end to its validity a notice must be given to be received by the company before the meeting, and I will take it as established that for the present purposes the meeting so referred to is the meeting which commenced on Oct. 20. Some considerations had been indicated during the arguments by LAWRENCE, L.J., that might make it desirable to hold that there had been such a distinction between the meeting on Oct. 20 and the adjourned meeting on Nov. 3 as to divide them into two separate meetings, but it is unnecessary to determine this, and I am prepared to accept the view that the whole proceedings were all part of the meeting adjourned on Oct. 20. Attention has been called to the decision of RUSSELL, J., in *Spiller v. Mayo (Rhodesia) Development Co. (1908), Ltd.* (1). In that case he held that when there is a F G H I

A continuation of a meeting at a subsequent date for the purpose of taking a poll, it is all one meeting, and the date of the commencement of the meeting is the date before which a notice must be given revoking a proxy so as to comply with an article of association similar to art. 76 in the present case. I am accepting all that, and I am prepared to deal with the case on the footing that, as matters stand, the proxies given to Mr. Cousins were valid and had not been withdrawn on Nov. 3 or brought to an end by any of the contingencies mentioned in art. 76.

B But the question to be determined is whether a shareholder who has given a proxy is bound by it, when it has not been determined by the course indicated in the articles, so as to prevent him giving a valid vote at the meeting when he attends personally and by his action in voting in person brings the system of voting by proxy to an end. Can he vote personally when, by proceedings taken some time before, he has instituted a system under which his vote can be given by proxy? The answer must depend on the construction of the articles. The combined effect of the articles, and s. 20 of the Companies Act, 1929, is to make the provisions as to voting contained in the articles a matter of contract between the shareholders and the company, and, it may be, as between the shareholders inter se, though it is not necessary finally to determine that. At any rate, as between the shareholders and the company, arts. 74, 75, and 76 have, in this case, introduced by way of contract certain arrangements as to voting.

D That fact, however, does not exclude the ground on which LUXMOORE, J., decided this case. Article 74 of the company's articles provides that "votes may be given personally or by proxy." That being so, it became necessary for the articles to lay down how votes by proxy were to be given, as there is not a common law right to vote by proxy, but it is a question for stipulation between the company and the shareholder. Article 74, however, clearly indicates two alternative modes of voting—in person or by proxy. The subsequent two articles indicate the path to be followed if a shareholder decides to place his right of voting in the hands of a proxy. What, then, do I mean by a proxy? I mean a person representative of the shareholder who may be described as his agent to carry out a course which the shareholder himself has decided upon. It is clear that in the present case due steps were taken to give valid proxies to be effective at the meeting of Oct. 20 or any adjournment thereof, and in respect of these proxies there was no effective effort to countervail them by notice in accordance with art. 76. Therefore, at the date of the adjourned meeting there was in the hands of the proxy the 11,396 votes in question which, in the ordinary course, would have been valid and counted in accordance with their tender. But the persons who had given the proxies for that number of votes were present, and, instead of allowing their representative (the proxy) to hand in the votes, they determined to exercise their alternative right and to vote personally, and the votes they gave personally were in opposition to the votes which would have been given by them through their proxy if the proxies had been accepted.

H It is said that by giving proxies they were prevented from attending personally and voting, and that, having set in motion the machinery for proxy voting, they had disabled themselves from voting personally. The articles might have been so drawn as to produce that result, but when I examine these three articles—74, 75, and 76—I find no such exclusion of the personal right of the shareholder to vote. Article 74 states plainly that there are the alternative rights of voting in person or by proxy. The subsequent articles which define the channel along which the proxy system is to flow, do not negative the continuance of the alternative right of voting personally. It follows that the personal right to vote is not taken away, and, indeed, it would be strange if a person in the position of an agent could say to his principal: "You have entrusted to me a power which I will not allow to pass back to you although you demand the right to exercise it." In the absence of express provision taking away the shareholder's personal right to vote after he has put in force the proxy system, that personal right remains and the shareholder is able to attend and give his own vote according to his own volition, and the proxy has no

right to prevent him doing so. For these reasons which are in addition to those given in the clear judgment of LUXMOORE, J., with which I agree, the appeal must be dismissed.

LAWRENCE, L.J.—I agree. The question is whether a shareholder, by having appointed a proxy to vote for him at a particular meeting, has precluded himself from voting personally at that meeting, and whether, if he does vote personally, the chairman of the meeting is justified in rejecting his vote and accepting that of his proxy. Article 74 gives the shareholders in the respondent company the alternative right to vote either in person or by proxy. Is there anything in that article to preclude a shareholder from exercising his right to vote personally because before the meeting he has appointed a proxy? It is not suggested that the shareholder is not entitled to attend the meeting, but it is said that he cannot vote personally at it after he has given a proxy unless that proxy has been duly revoked before the meeting in accordance with art. 76, which is as follows:

"A vote given in accordance with the terms of an instrument of proxy will be valid notwithstanding the previous death of the principal or revocation of the proxy or transfer of the shares in respect of which the vote is given, provided no intimation in writing of the death, revocation or transfer shall have been received at the office before the meeting."

In my judgment, that article does not in any way prevent the shareholder from exercising his right to vote in person. Every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and his principal is not entitled to vote contrary to the instructions of the latter. As between these persons and the company, the shareholder is under art. 74 entitled to exercise his option to vote in person or by proxy at the time when the occasion for its exercise arises—that is to say, when the vote is taken—and if the proxy insists on voting notwithstanding that the shareholder himself attends and votes and thus a double vote is given at the meeting in respect of the same shares, it is the duty of the chairman of the meeting to reject the vote of the proxy as the personal vote is an unequivocal exercise on the part of the shareholder of his option to vote in person. Article 76 is merely directed to safeguarding the company and the chairman of a meeting when acting on votes given by proxy. It is reasonable if a shareholder does not attend and vote himself that if he wishes to revoke a proxy he should do so by a proper notice given to the company before the meeting. It is also reasonable that the validity of a vote given by proxy should not depend on whether the shareholder giving the proxy has died before the meeting is a fact which might be difficult to ascertain, unless a proper notice of the death be given; and the same considerations apply to a transfer of shares made by a shareholder after having given a proxy. LUXMOORE, J., was, I think, clearly right in holding that none of these considerations applies when a shareholder, after having given a proxy, comes to a meeting himself and exercises his right to vote in person. In such a case the proxy cannot be used, and there is no necessity to inquire whether it was validly given in the first instance or whether it has since been revoked. In my opinion, therefore, art. 76 has no application to the case where a shareholder attends the meeting and votes in person. For these reasons and for those given by the Master of the Rolls I agree that the appeal should be dismissed.

ROMER, L.J.—I am of the same opinion. The decision of LUXMOORE, J., seems to me to be summed up in these four lines of his judgment:

"There is, in my judgment, no contract binding the shareholder vis-à-vis the company to exercise the option to vote either in person or by proxy at any time before the actual moment the vote is to be given."

A With that sentence I find myself in complete accord. By art. 74 votes may be given by shareholders in person or by proxy; and in art. 76, upon which reliance has been placed by Mr. Sutcliffe, we find certain provisions relating to the event of a shareholder having elected that his vote shall be given not in person but by proxy. That article throws no light, in my opinion, on the question up to what time the shareholder can exercise the option given to him by art. 74 of voting in person or by proxy. It was, no doubt, contemplated by art. 76 that the proxy was to be revoked by notice in writing, but when a shareholder, having given a proxy, appears at the meeting and says he prefers to vote in person, he is not revoking the proxy previously given, but doing an act which obviates the necessity of the proxy ever being used at all. The giving of a proxy is subject to an understanding that the shareholder giving it does not elect to give his vote in person, and when he in fact gives a vote in person, though he is not revoking the proxy, he is taking a step which obviates any necessity for the proxy to be used at all. For these reasons I agree that the appeal must be dismissed. I ought to add that we have not been asked to consider whether the 36,991 votes in respect of which proxies had been given, but purported to be withdrawn before Nov. 3 and in respect of which shareholders had not voted in person, were properly disallowed. Speaking for myself, I think that they ought not to have been disallowed. But it by no means follows that, as between the proxy and the shareholder, the proxy in voting in accordance with the power given to him after he had received notice by the shareholder that the proxy was withdrawn was not committing a breach of duty to his principal in voting. The question has not been argued before us, and I only wish to reserve any opinion on it and mention the point to show that it has not been overlooked.

Appeal dismissed.

Solicitors: *Bateman & Co.; Clifford-Turner, Hopton, & Lawrence.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

DE TCHIHATCHEF AND OTHERS v. SALERNI COUPLING, LTD.

[CHANCERY DIVISION (Luxmoore, J.), June 9, 23, 25, 26, 1931]

[Reported [1932] 1 Ch. 330; 101 L.J.Ch. 209; 146 L.T. 505]

Estoppel—Estoppel in pais—Representation—Statement in company prospectus as to contract with named purchaser of company's products—Acquiescence by purchaser—Purchaser estopped from denying legal effect of contract to be as stated.

The rule that if a person authorises or permits another to make a representation for the purpose of being acted on, which is acted on, he cannot afterwards be heard to say that it was not true, applies when the representation is as to the legal effect of a document, if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relations of the parties.

By a contract in writing, dated Feb. 26, 1929, and made between the defendant company and one F., it was provided, by cl. 2, that F. should take at a specified price 50,000 articles manufactured by the defendant company during the first year, and 100,000 during each of the subsequent fourteen years, of the agreement. By cl. 12, F. had the right to assign the benefit of the agreement to a company which he proposed to form (the S.C. company),

"and in such event the name of such company shall be deemed to be substituted for that of [F.] in this agreement." On March 16, 1929, the defendant company issued a prospectus which, to F.'s knowledge, contained a statement of the effect of cl. 2 of the contract of Feb. 26, 1929, and commented on the beneficial result to the defendant company of that provision. By a deed made on Nov. 12, 1929, F. assigned to the S.C. company the agreement of Feb. 26, 1929, and all benefits under it.

Held: (i) the representation made by the prospectus as to the effect of the agreement, having been acquiesced in by F., created an estoppel which precluded the plaintiffs, F.'s personal representatives, from setting up that, by the assignment of Nov. 12, 1929, all his liability to the defendant company had ceased so that his estate was discharged therefrom:

(ii) in any case, on construction, while the effect of cl. 12 was to give F. power to assign the benefit of the contract of Feb. 26, 1929, he remained liable under the agreement.

Notes. Applied: *Aigan v. Middlesex County Council*, [1945] 2 All E.R. 243. Referred to: *Farrow v. Orntowell*, [1933] All E.R.Rep. 182; *Slingsby Belson Investment Trusts v. F. Karmos & Co. (London), Ltd.*, [1956] 1 All E.R. 536.

As to estoppel by representation, see 15 HALSBURY'S LAWS (3rd Edn.) 223 et seq.; and for cases see 21 DIGEST 290 et seq.

Cases referred to:

- (1) *Re a Bankruptcy Notice*, [1924] 2 Ch. 76; 98 L.J.Ch. 497; 131 L.T. 367, 68 Sol. Jo. 458; [1924] B. & C.R. 188, C.A.; 21 Digest 292, 1040.
- (2) *Beattie v. Lord Elbury* (1872), L.R. 7 Ch. 777; 41 L.J.Ch. 804; 27 L.T. 398; 20 W.R. 994; affirmed (1874), L.R. 7 H.L. 102; 44 L.J.Ch. 20; 80 L.T. 581; 38 J.P. 564; 22 W.R. 897, H.L.; 1 Digest 660, 2766.
- (3) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 394; 65 L.T. 333; 40 W.R. 50; 7 T.L.R. 582, C.A.; 21 Digest 136, 5.
- (4) *Carr v. London and North-Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest 258, 1000.
- (5) *George Whitechurch, Ltd. v. Cavanagh*, [1902] A.C. 117; 71 L.J.K.B. 400; 85 L.T. 349; 50 W.R. 218; 17 T.L.R. 746; 9 Mans. 351, H.L.; 21 Digest 295, 1057.
- (6) *Jordan v. Money* (1854), 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 21 Digest 292, 1041.
- (7) *Calgary Milling Co., Ltd. v. American Sugar Co. of New York*, [1919] 3 W.W.R. 98; 48 D.L.R. 295; 7 Digest 374, r.
- (8) *Gregg v. Wells* (1839), 10 Ad. & El. 90; 2 For. & Dav. 266; 8 L.J.Q.B. 196; 3 Jur. 555; 113 E.R. 35; 21 Digest 372, 1473.
- (9) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 684; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (10) *Fenner v. White*, [1900] 1 Q.B. 426; 69 L.J.Q.B. 267; 82 L.T. 149; 45 W.R. 392, D.C.; 31 Digest (Repl.) 574, 6947.
- (11) *Holt v. Markham*, [1923] 1 K.B. 604; 92 L.J.K.B. 406; 128 L.T. 719, 67 Sol. Jo. 314, C.A.; 21 Digest 305, 1111.
- (12) *Cane v. Mells*, 1892, 7 H. & N. 413; 31 L.J.Ex. 265; 6 L.T. 680; 8 L.J.W.S. 363; 10 W.R. 471; 158 E.R. 740; 21 Digest 183, 28.
- (13) *Re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.*, [1929] 1 K.B. 297; 122 L.T. 178; sub nom. *Hooley Hill Rubber and Chemical Co., Ltd. v. Royal Insurance Co., Ltd.*, 88 L.J.K.B. 1120; 121 L.T. 279; 65 T.L.R. 483; 21 Digest 295, 1054.
- (14) *Freeman v. Cooke* (1845), 2 Exch. 564; 6 Dow. & L. 187; 15 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest 287, 1019.

Action for declaration.

The defendant company, *Salwood Gnylling, Ltd.*, was incorporated on Feb. 26, 1929, under the Companies Acts, 1908 and 1917, to acquire certain patent rights

A relating to the Salerni coupling, used in connection with gear changing in motors. By an agreement of that date made between the company (therein referred to as "the manufacturer"), of the one part, and Edward Arthur FitzGerald (therein referred to as "the purchaser"), of the other part, it was recited that the manufacturer was about to acquire an invention of one P. M. Salerni, which it was proposed should be known as the Salerni coupling, and that the purchaser had requested the manufacturer to grant to him

"the sole right of purchase of Salerni couplings for sale for all the countries of the continent of Europe and their colonies and dominions, with the exception of Italy and her colonies and dominions (hereinafter referred to as the 'said territories')."

(C By cl. 1 it was provided that the agreement "shall remain in force subject as hereinafter provided for a period of fifteen years." By cl. 2:

"The manufacturer agrees to sell and to grant to the purchaser the sole and exclusive right to purchase for sale in the said territory and the purchaser agrees to purchase [subject to a proviso immaterial] a minimum of 50,000 Salerni couplings during the first year of this agreement commencing on Sept. 1, 1929, and a minimum of 100,000 of the said couplings during the second and subsequent years of this agreement."

It was also provided that, although Italy was not intended to be included, it was understood and agreed that any couplings sold in Italy, her colonies and dominions were to be deducted from the minimum number, and there was an option to the purchaser for sixty days to have his rights extended to Italy. Clause 4 provided for the price payable for the couplings, with a provision as to the amount payable in respect of the minimum number of couplings to be taken in the first and subsequent years. Clause 12 was as follows:

F "The purchaser shall have the right to assign the benefit of this agreement to a company which he proposes to form with a capital of 7,000,000 French francs of which not less than 6,200,000 francs shall have been subscribed for cash prior to such assignment and in such event the name of such company shall be deemed to be substituted for that of the said Edward Arthur FitzGerald in this agreement."

Clause 41 provided that the agreement

G "is to be construed and take effect as a contract made in England and in accordance with the law of England, and the purchaser hereby submits to the jurisdiction of the High Court of Justice in England . . ."

A prospectus was issued on March 16, 1929, offering for public subscription at par 1,500,000 shares at 2s. each. It contained a paragraph headed "Sales Contract for Europe," and was as follows:

H "The . . . company has entered into a contract with Major Edward Arthur FitzGerald, of 38, Green Street, Park Lane, London, W.1, who is associated for the purposes of this contract with Messrs. Raymond Saulnier (of Messrs. Morane Saulnier), Clement Bayard, and other leading French motor manufacturers, granting the sole and exclusive selling rights for fifteen years, for all foreign countries of the continent of Europe, their colonies and dominions (but only upon special terms as to Italy, her colonies and dominions). Under this contract the purchaser binds himself to take a minimum of 50,000 Salerni couplings during the first year ending Aug. 31, 1930, and a minimum of 100,000 during each subsequent year of the contract at a price, based upon cost to the company, including the vendor's royalty, which should produce a minimum profit of 10 per cent. in the first year, and 20 per cent. in each subsequent year upon the capital issued and under option. A deposit of £12,500 has been paid in respect of the minimum number of couplings to be taken during the first year."

Major FitzGerald, either in his own name or in that of the plaintiff, a naturalised Englishman, subscribed for a large number of shares. A

On April 3, 1929, a French company was incorporated under the laws of France, the Société Anonyme Salerni Coupling, with a capital of 7,000,000 francs, divided into 70,000 shares of 100 francs each. The objects, as set out in the "statuts," was to deal in the countries of the continent of Europe, except Italy, and in their colonies and all protected countries, with certain patented apparatus and accessories relating to the motor trade, and, in particular, with the apparatus called the Salerni coupling. By art. 7 the capital was to be as above mentioned, all of which was to be subscribed for and paid in cash. By art. 9 a proportion of the nominal value of the shares was to be paid equal to at least one-fourth on subscription, with power to pay the total amount by way of anticipation, or the balance at the dates and in the proportions fixed by the board. According to French law, the whole of the share capital had to be subscribed before the company could come into existence, the subscription being for cash or other consideration. By deed made on Nov. 12 in the same year, and expressed to be made between Edward Arthur FitzGerald (hereinafter called "the assignor"), of the one part, and Société Anonyme Salerni Coupling (hereinafter called "the assignees"), of the other part, the agreement of Feb. 26, 1929, was recited under which the assignor was given the sole and exclusive right to purchase for sale in the territory therein mentioned a certain number of Salerni couplings upon the terms therein set out, and it referred expressly to cl. 12, which conferred on the assignor the right to assign the benefit of the agreement to a company which he was then about to form in France with a capital of 7,000,000 francs. It also recited the formation of the company and an agreement that B C D E

"the assignor has agreed with the assignees to assign the said agreement together with all right and benefit therein to the assignees in consideration of the covenant on the part of the assignees hereinafter contained."

By cl. 1:

"In consideration of the covenant on the part of the assignees contained in para. 2 hereof the assignor doth hereby assign unto the assignees the said agreement dated February 26, 1929, and all moneys to become or grow due by or upon any agreement therein contained and all right of action benefit advantage claim and demand whatsoever relating thereto to which thereby the assignor is in any manner entitled to hold the same said agreement and all other the premises hereinbefore assigned unto the assignees absolutely." F G

By cl. 2:

"The assignees hereby covenant with the assignor that they the assignees will perform and observe all the conditions on the part of the assignor contained in and provided by the said agreement and will indemnify and keep indemnified the assignor against all actions claims and demands arising thereunder." H

The French company by Alfredo Salerni, their managing director, wrote to the secretary of the defendant company on Nov. 22, 1929:

"We hereby give you notice that on the 12th inst., by an assignment under the hand and seal of Major Edward Arthur FitzGerald, all the rights and benefits of the agreement between your company and himself were assigned to us, and the liabilities under such agreement have now been taken over by this company." I

A similar letter of even date was written by FitzGerald to the defendant company. On Nov. 30 the defendant company wrote to the French company, acknowledging receipt of their letter, and added:

"The arrangements between your company and Major Edward FitzGerald in respect of his liabilities under the agreement do not concern this company, the responsibility to this company for the liabilities under the agreement of Feb.

A 26, 1929, remaining vested in Major FitzGerald. That agreement conferred upon him only the right to assign the benefit of the agreement to a company of a defined capitalisation."

A similar letter was written to FitzGerald on even date by the defendant company, in which they said:

B "We are, of course, unaware of the precise nature of the form of assignment, but the agreement of Feb. 26 confers upon you no right to assign the agreement but only the right to assign the benefit of it to company of a defined capitalisation."

C Major E. A. FitzGerald was, therefore, then claiming to be free from all liability under the agreement of Feb. 26, 1929, and the defendant company was refusing to accept this claim. In consequence, an agreement dated March 4, 1930, without prejudice to the rights of the parties, was entered into to regulate the relationship of the parties until the issue between them could be decided. Proceedings were begun later in another division of the High Court, but on Jan. 2, 1931, Major FitzGerald died. The plaintiffs were his executors. The writ was issued on April 1, 1931, by which they claimed a declaration that they were not liable to the defendant company in respect of the deceased's obligations under the agreement of Feb. 26, 1929, and that by the assignment of Nov. 12, 1929, all his liability to the defendant company had ceased, and his estate was freed and discharged therefrom.

Topham, K.C., and Wilfrid H. P. Lewis, for the plaintiffs, referred to *Re a Bankruptcy Notice* (1); *Beattie v. Lord Ebury* (2); *Low v. Bouverie* (3).

E *Sir Patrick Hastings, K.C., H. Fletcher Moulton, and Sylvia Fletcher Moulton*, for the defendants, referred to *Carr v. London and North-Western Rail. Co.* (4); *George Whitechurch, Ltd. v. Cavanagh* (5); *Jorden v. Money* (6); *Calgary Milling Co. v. American Surety Co. of New York* (7); *Gregg v. Wells* (8); *The Moorcock* (9); *Fenner v. Blake* (10); *Holt v. Markham* (11); and *Cave v. Mills* (12).

F *Topham, K.C.*, in reply, referred to *Re Hooley Hill Rubber and Chemical Co.* and *Royal Insurance Co.* (13) and *Freeman v. Cooke* (14).

LUXMOORE, J., stated the facts, and continued: The questions which fall to be determined are these: First, what is the true construction of the agreement? Was it open to Major FitzGerald to free himself from all future liability under it by assigning the benefit of it to the French company, assuming that the French company fulfilled the requirements of cl. 12 of the agreement; or was Major FitzGerald's only right to assign the benefit, he remaining liable to the defendant company for the fulfilment of the liability imposed upon him by it? Secondly, assuming that on the true construction of the agreement Major FitzGerald can free himself from liability, has he in fact done so by the assignment that he has made, (a) having regard to the nature of the French company, and (b) having regard to the terms of the assignment to them? Thirdly, assuming all these questions are answered in favour of the plaintiffs, are they precluded from relying on the construction of the agreement, having regard to the statement made in the prospectus? In other words, are the plaintiffs estopped by reason of the representations made in the prospectus as to the liability of Major FitzGerald under it, and the conduct of Major FitzGerald and/or the plaintiff, Captain de Tchihatchef, with regard to these representations?

I The material facts with regard to the representations are these. Major FitzGerald was interested in the incorporation of the defendant company and in the public issue of a million and a half of its shares which were subsequently offered to the public. His interests arose in two different ways. He was a subscriber for a large number of shares, and he was to become an underwriter of a large number of those shares which were to be offered for public subscription. He subscribed for shares and became an underwriter in his own name and in the name of the plaintiff, Captain de Tchihatchef, who was at all material times his secretary and business representative. The offer of the shares to the public was made

through a company called the Scottish Finance Co., of which a Major Beckwith was a director, and who was also a director of the defendant company and had in hand the work of preparing the prospectus. On Feb. 15, 1929, a Mr. Kennedy, managing clerk to the firm of solicitors, Messrs. Ernest Salaman, Wade, & Co., who were acting for the company in the preparation of the prospectus, prepared a statement as to the contract of Feb. 26, 1929, for insertion in the prospectus. That statement was that the company had entered into a contract with Major FitzGerald, representing important French motor manufacturing interests,

"granting the sole and exclusive selling rights for fifteen years, for all foreign countries of the continent of Europe, their colonies and dominions (but only upon special terms as to Italy, her colonies and dominions). Under this contract the purchaser binds himself to take a minimum of 50,000 Salerni couplings during the first year ending Aug. 31, 1930, and a minimum of 100,000 during each subsequent year of the contract, at a price based upon cost to the company, including the vendor's royalty, which should produce a minimum profit of 10 per cent. in the first year, and 20 per cent. in each subsequent year upon the capital issued and under option. A deposit of £12,500 has been paid in respect of the minimum number of couplings to be taken during the first year."

That statement was inserted in the proof prospectus of Feb. 16, 1929, and, I think, in some of the subsequent proofs. On Feb. 21 a proof of the prospectus was submitted to counsel (the late Mr. B. A. Hall) for settlement, and the paragraph which I have just read stands in the draft as I have read it, Mr. Hall's note against it being: "I assume the company to be in a position to carry out this contract." On Feb. 25, 1929, the draft was again submitted to Mr. Hall, and on that draft he made certain alterations. He altered the paragraph so that it read:

"The company has entered into a contract with Major FitzGerald, who is associated with important French motor manufacturing interests granting the sole and exclusive selling rights for fifteen years, for all foreign countries of the continent of Europe, their colonies and dominions (but only upon special terms as to Italy, her colonies and dominions). Under this contract the purchaser"—he struck out the words "selling organisation" and put "the purchaser"—"binds himself to take a minimum number of . . . couplings"

and so on. I need not refer to the rest of the paragraph because no material alteration is made. From time to time there were further alterations made and further proofs obtained, but there was no material alteration in the clause which is headed "Sales Contract for Europe," and the shares were offered for public subscription according to it. The evidence establishes to my satisfaction that the alterations made in the particular clause were brought to the notice of Captain de Tchihatchef and Major FitzGerald. The clause was a most important and a most attractive one from the public point of view, because it showed that there was, apparently, a responsible person in touch with certain well-known French motor traders bound for a period of fifteen years to take such a number of the defendants' couplings as would ensure a dividend on the capital of the company issued and under option of 10 per cent. for the first year and 20 per cent. for each of the subsequent fourteen years. Captain de Tchihatchef, one of the plaintiffs, was called as a witness by counsel for the plaintiffs, and I think that his evidence is corroborated by what another witness, Major Beckwith, said in the witness-box. He said that the proofs as they came in from time to time were sent to all those who were interested in the underwriting, that he had discussed them with Captain de Tchihatchef, and some of the drafts were probably sent direct to Major FitzGerald. From the evidence I am satisfied that both Captain de Tchihatchef and Major FitzGerald were fully aware of the statement contained in the paragraph, "Sales Contract for Europe," as finally agreed and drafted, and that no objection was ever taken by them or either of them to it.

A A question arises as to the legal effect of their acquiescence in this paragraph. The paragraph appears to me to contain a statement of fact that under the agreement therein referred to Major FitzGerald is bound to take so many couplings for a fixed period of fifteen years, and, consequently, there will be a certain dividend of 10 per cent. in the first year and 20 per cent. in each subsequent year. There is no suggestion that Major FitzGerald can terminate his liability at any time by transferring the right to take the couplings to a third party who might or might not be bound to the company. The statement is a definite statement as to the position resulting from the contract. It was made to the knowledge of Captain de Tchihatchef and Major FitzGerald for the purpose of obtaining public subscription and with the knowledge that the company intended to make the offer on the faith of that statement. If the representation was not in fact true, the company would or might be liable to those who subscribed and underwrote the shares.

C Counsel for the plaintiffs has sought to lay down a number of precise rules as to what constitutes an estoppel. I doubt whether it is possible to achieve what he has attempted. As LORD MACNAGHTEN said in *Whitechurch, Ltd. v. Cavanagh* (5):

D "The doctrine of estoppel by representation is a very old head of equity. It has been discussed not infrequently in this House, notably in the case of *Jorden v. Money* (6), to which LORD SELBORNE was constantly in the habit of referring. It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in *Carr v. London and North-Western Rail. Co.* (4)."

E Bearing in mind that injunction, and without attempting to formulate any precise rules, it seems to me that it is sufficient, so far as this case is concerned, to say that if a person authorises or permits another to make a representation for the purpose of being acted upon, which is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relationship of the parties.

F My attention has been called to a number of cases. It is not from any disrespect to those cases or to counsel's argument that I do not refer to them expressly. I think I have stated, so far as is sufficient for this case, the general result of those cases in what I have already said. There is, however, one case which is for practical purposes almost the same as the present case. It was before the Privy Council in 1919, *Calgary Milling Co. v. American Surety Co. of New York* (7), and is reported in the WESTERN WEEKLY REPORTS, which contain "All judgments of value delivered by and originating in the Courts of Alberta, British Columbia, Manitoba and Saskatchewan." The facts in that case are as follows. There was a building contract for a lump sum, and it provided that the contractor should be paid by the building owner in instalments for labour and materials upon production of certified accounts. The agreement provided that the total amount so paid during the progress of the work should not exceed a sum equal to 80 per cent. of the work done and materials furnished on the premises at the contract price. The owner was authorised to retain out of the moneys payable to the contractors the sum of 20 per cent. of the amount of the contract work, and to retain such 20 per cent. until thirty-one days after the completion of the work. That contract was open to two constructions: First, must the owner pay the full amount certified until the total amounts paid by him reached 80 per cent. of the total sum, or must he deduct 20 per cent. from each instalment certified? The Judicial Committee held that the former was the true construction. The contractor's performance of the contract was guaranteed by a surety; the suretyship bond provided that the owner's right of recovery under the bond was conditioned on the owner faithfully performing the contract and retaining all he might retain under it, and the owner,

having in fact deducted 20 per cent. from each of the certified amounts, had throughout paid the contractor less than he ought to have received on what the Judicial Committee held to be the true construction of the contract. The surety in the action sought to rely on that fact as relieving him from his liability under the bond. It was proved that before the deductions were made, the owner had written to the surety asking his view as to the meaning of the particular provision. The material letter is set out at p. 102 of the WESTERN WEEKLY REPORT. So far as material, it is this:

"Referring to your 30,000 dollar surety bond, Tromanhauser and Mooers [building contractors], Principals, and ourselves, Obligee, dated August 10, 1910, and our agreement with these contractors in connection with the same dated July 18, 1910—a copy of which we presume you have retained—would say that the contractors claim that s. 3 of cl. 14 of this agreement binds us to pay them after our acceptance of the bond, 100 per cent. or in full for all paid vouchers produced for work done and material supplied on the building; up to a point where we have paid them 80 per cent. of the contract price of 52,000 dollars; after which all payments cease until thirty-one days after the completion of the contract to our satisfaction, when final payment will be due then. Now, it appears to us that the wording of this section of cl. 14 is rather ambiguous, and you may have interpreted it as binding us to pay them not more than 80 per cent. of the amount of such paid vouchers; up to a point where we will have paid them 52,000 dollars, or 80 per cent. of the contract price, after which all payments cease until they are entitled to their final payment. It is agreeable to us to make these payments in accordance with the interpretation of the contractors, providing we will not thereby be invalidating your bond. Kindly let us know how you have interpreted this clause, and what, in your opinion, is our obligation to you in respect to same."

In answer to that the sureties wrote acknowledging the letter and saying that they desired to state that, after carefully reading over the contract, their company was of opinion that payments to be made to the contractors should be on an 80 per cent. basis, that is, 20 per cent. of every payment should be retained until the final completion and acceptance of the work. So that the surety took the view on the construction of the contract which was not held to be the true construction of the contract taken by the court, and it was held that in those circumstances the contractors could not rely on any breach of the original contract by the building owner in so far as he had not paid the contractors in full. LORD DUNEDIN, in delivering the judgment of the Board, said:

"Their Lordships are of opinion that this argument is not open to the appellants in respect that they are estopped by their letter of Sept. 13, 1910. On what their Lordships have held to be the true construction of the contract, the contractors might, it is true, have insisted on the full certified payments up to the total limit, but inasmuch as the respondents put the matter fairly to the appellants, and in acceptance of their view only paid the 80 per cent., it is impossible for the appellants to found on that as a breach of contract on the respondents' part."

In my view, the representation made by the prospectus as to the effect of the agreement of Feb. 26, acquiesced in, as I hold it was, by Captain de Tchihatchef as agent for Major FitzGerald, and by Major FitzGerald himself, creates an estoppel that precludes the plaintiffs, as Major FitzGerald's legal personal representatives, from setting up any other construction of the agreement in question.

That would be sufficient to dispose of the case, but, as the matter has been fully argued, I think it is right that I should deal with the other points which have been raised. The first is, I think, as to the construction of the agreement itself. It is said that, on this agreement, if the benefit were to be assigned by Major FitzGerald to a company which fulfils the conditions and restrictions set out in cl. 12, then

A and in this event Major FitzGerald was freed from all liability under the agreement. The question whether that is the right construction depends on the actual provisions of the agreement. The agreement itself is an agreement under which Major FitzGerald is liable for fifteen years to take a specified number of couplings at a specified price. He is to be the sole selling agent in the particular territories named for that period, and he is to have the sole right to sell them. Clause 12 of the agreement is the material clause, and it provides that the purchaser shall have the right to assign the benefit of this agreement to a company which Major FitzGerald should form, with a capital of 7,000,000 French francs, of which not less than 6,200,000 francs shall have been subscribed for in cash before the assignment. Those are the words on which plaintiffs' counsel relies as showing that, in the event of this assignment, Major FitzGerald was to be absolutely freed from any liability. The agreement then goes on:

"and in such event the name of such company shall be deemed to be substituted for that of the said Edward Arthur FitzGerald in this agreement."

D It is to be noted that it does not say that it is to be substituted for him so as to free him from any liability, or anything of that sort. If it means that by the assignment of the benefit of the agreement to the French company, Major FitzGerald is under no liability—and, of course, the French company not being in any sense in contractual relationship with the company who entered into the agreement—it would result in no one remaining bound to the company at all. All it would mean would be that the French company would have the benefit of the agreement. They could, if they wished, purchase the particular couplings, and so on, and act as sole agents for the company, but if they did not take any of the couplings, the defendant company would have no power on that basis to enforce anything against them. It would be a very extraordinary result. I think that when you read this agreement and consider the whole position between the parties, the true construction is that the purchaser is to have the right to assign the benefit of the agreement to the French company, and that, so far as the benefit is assigned, then and in that event and for the purpose of giving Major FitzGerald the benefit of the assignment which he has made, the name of the company is to be substituted for that of Major Edward Arthur FitzGerald and for no other purpose. There is nothing to suggest that the liability of Major Edward Arthur FitzGerald is to be determined on the assignment in any way. On the whole I think the true construction is that the power is to assign the benefit and, on the assignment of the benefit, Major Edward Arthur FitzGerald still remains liable under the agreement.

G Then it is said that the company which has been formed is not a company which fulfils the conditions of this agreement. The company which has been formed has a capital of 7,000,000 French francs. The whole of that capital has been subscribed, and subscribed for in such a way that the whole amount of it is payable in cash, none of it being payable for a consideration other than cash. It is said by **H** defendants' counsel that the company does not fulfil the conditions because, on the true meaning of this contract, "subscribed for cash prior to such assignment" must mean that the company has in fact received the whole 6,200,000 francs in cash before the date of the assignment. I do not think that that is the true meaning of the contract. The phrase "subscribed for in cash" is a phrase which is well recognised in business transactions with regard to limited companies, only it is **I** used in contradistinction to a subscription for consideration other than cash. So long as the subscription is for cash, I do not think it is material to consider whether the payment has to be made in fact in full before the date of the subscription; the amount could be called up at any time. The other point which defendants' counsel made was that the assignment itself did not operate as an assignment within the meaning of this agreement. So far as I read the assignment, it is an assignment of every benefit which is to accrue to Major FitzGerald under the agreement, and in my view the assignment itself, apart from any other question, is an assignment within the meaning of cl. 12,

The result of my decision is that the plaintiffs' claim for a declaration that the estate is not under any liability fails, and with the usual consequences.

Solicitors: *Gordon, Dadds & Co.; Ernest Salaman, Wade & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

B

SEDGWICK (CAMBERWELL REVENUE OFFICER) *v.* CAMBERWELL ASSESSMENT COMMITTEE AND WATNEY, COMBE, REID & CO.

C

GROVE (DUDLEY REVENUE OFFICER) *v.* LLOYD'S BRITISH TESTING CO.

TURPIN *v.* MIDDLESBROUGH ASSESSMENT COMMITTEE.

D

KAYE (BARNSELY REVENUE OFFICER) *v.* EYRE BROS.

KAYE (DEWSBURY REVENUE OFFICER) *v.* DEWSBURY ASSESSMENT COMMITTEE AND BURROWS.

HINES (IPSWICH REVENUE OFFICER) *v.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION.

E

FINN (WIMBLEDON REVENUE OFFICER) *v.* KERSLAKE.

BANCROFT (MANCHESTER REVENUE OFFICER) *v.* MANCHESTER ASSESSMENT COMMITTEE AND UNION COLD STORAGE CO.

F

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Tomlin, Lord Thankerton and Lord Russell), February 3, 5, 6, 9, 10, 12, 13, March 6, 1931]

[Reported [1931] A.C. 446; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926-31] 2 B.R.A. 886]

G

Rating—De-rating—Industrial hereditament—Beer bottling store—Chain cable testing establishment—Garage—Rag sorting—Seed cleaning—Bakery and baker's shop—Cold store—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1) (c) (iii)—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), s. 3 (1) (2) (4).

H

1. The respondents occupied a hereditament as a bottling store. Beer was brought to the premises and pumped into tanks where carbon dioxide was forced into it. Before this had happened the beer was regarded as unsaleable, but afterwards no further alteration was made in the beer which was then corked and sold as bottled beer.

Held: the treatment which the beer underwent on the premises was not a mere prelude to distribution, but it changed the quality of the beer from an unfinished, unpotable, and unmarketable article into a finished, potable and marketable one, and, therefore, the hereditament should be placed in the special list.

I

2. A hereditament was used for the purposes of testing chain cables and anchors in accordance with the provisions of the Anchors and Chain Cables Act, 1899. In addition to the actual testing new links were forged on the

A premises to replace links removed from chains while under test and after testing the chains were coated with anti-corrosive material.

Held: (i) "adapting for sale" pointed to something being done to the article in question which made it in itself different from what it had been; testing did not in any way alter an article, but merely proclaimed its character; and, therefore, the premises were not a "factory" within s. 149 (1) (c) (iii) of the
B Factory and Workshop Act, 1901.

(ii) the forging of links and the other operations which were not actually testing were merely incidental to the process of testing, and, therefore, the premises, though a "metal works" within para. 13 of Sched. 6 to the Act of 1901, were within the exception in s. 3 (1) (f) of the Rating and Valuation (Apportionment) Act, 1928.

C 3. A hereditament consisted of a building which was primarily used for the repair of motor cars and the storage of motor cars awaiting or undergoing repairs. No accessories or petrol were sold except to persons bringing cars for repair and as incidental to the work of repair.

Held: the building was one to which the public could resort for the purpose of having particular wants supplied and services rendered therein without the intervention of a middleman; by s. 3 (4) of the Act of 1928 a place where repair work was carried on was included in the term "retail shop"; and, therefore, the hereditament was primarily occupied and used for the purposes of a retail shop, and was not an industrial hereditament within s. 3 (1) of the Act of 1928.

E 4. A hereditament was occupied for the purpose of sorting rags for sale to manufacturers. No machinery was used, but the method adopted was extremely complicated. The sorted results were sold where the original bulk could not be sold, and highly skilled labour was required. Another hereditament consisted of a seed warehouse specially constructed for seed cleaning. The seeds came to the warehouse in an unclean and impure state, and were unsaleable in that condition. By a series of elaborate mechanical operations
F the seeds were sorted and rendered fit for sale.

Held: in both cases the finished article was different from the article in bulk which entered the hereditament; that was an adaptation for sale within s. 149 (1) (c) (iii) of the Act of 1901; "storage" in the exception in s. 3 (1) (d) of the Act of 1928 meant storage as an end in itself and not storage which was merely a necessary and transitory incident of a manufacturing process conducted on the premises; and, therefore, the hereditaments were entitled to be
G de-rated.

5. A hereditament consisted of a baker's and confectioner's shop, with living rooms above, and a bakehouse in the rear. The bakehouse was a factory within para. 23 of Sched. 6 to the Factory and Workshop Act, 1901. Of the gross revenue of £15,300 received from the sale of the articles made, £1,860
H was received in respect of sales over the counter, £9,940 in respect of sales by roundsmen at customers' houses, and £3,500 in respect of sales to restaurants and for re-sale. The shop was used for the retail sale of bread and confectionery.

Held: the hereditament was all occupied and used for one trade or business, namely, a retail trade or business in bread and confectionery, the bakehouse being purely ancillary to the retail trade, and, therefore, it was not an industrial hereditament.

I 6. A hereditament was used for the refrigeration and cold storage of produce, there being used a quantity of complicated machinery for refrigeration. About 25 per cent. of the produce received was fresh and had to be refrigerated, and about 75 per cent. had already been refrigerated when received, and was kept in that state.

Held: although the process applied to the goods might alter them by affecting their quality, and though, without its application, the goods might not

be available for sale in the markets in which they were in fact ultimately sold, yet the refrigeration of the goods was incidental to storage and done to render storage possible; it did not constitute "adapting for sale" within s. 149 (1) (c) (iii) of the Act of 1901, but the hereditament was used for the purpose of storage within s. 3 (1) (d) of the Act of 1928; and, therefore, it was not an industrial hereditament. A

Notes. The Factory and Workshops Act, 1901, was repealed by the Factories Act, 1937, but the definitions of "factory" and "workshop" contained therein were retained for the purposes of the Rating and Valuation (Apportionment) Act, 1928; see 20 HALSBURY'S STATUTES (2nd Edn.) 180. B

SEDGWICK v. CAMBERWELL ASSESSMENT COMMITTEE.—Followed: *Toogood & Sons, Ltd. v. Green*, [1932] All E.R.Rep. 309. Applied: *Wiltshire County Valuation Committee v. London Co-operative Society, Ltd.*, [1950] 1 All E.R. 937. Referred to: *James A. Jobling & Co. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 207; *Dolton Bounes and Dolton Ltd. v. Osmond*, [1955] 2 All E.R. 258. C

GROVE (DUDLEY REVENUE OFFICER) v. LLOYD'S BRITISH TESTING Co.—Considered: *Richardson & Son v. Middlesbrough Assessment Committee*, [1947] 1 All E.R. 884. Distinguished: *Acton Corpn. v. West Middlesex Assessment Committee*, [1949] 1 All E.R. 409. Referred to: *Hendon Corpn. v. Stanger*, [1948] 1 All E.R. 377. D

TURPIN v. MIDDLESBROUGH ASSESSMENT COMMITTEE.—Followed: *Wilkinson v. Sibley*, ante, p. 187. Distinguished: *Toogood & Sons, Ltd. v. Green*, [1932] All E.R.Rep. 309. Considered: *McGowan v. Osgoldcross Assessment Committee*, *West Riding of Yorkshire*, [1936] 2 All E.R. 170; *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; *Dolton Bounes and Dolton Ltd. v. Osmond*, [1955] 2 All E.R. 258. Referred to: *Simmonds Aero-accessories (Western), Ltd. v. Pontypridd Aero Assessment Committee*, [1944] 1 All E.R. 264; *M. & F. Frawley, Ltd. v. Ve-ri-best Manufacturing Co.*, [1953] 1 All E.R. 50. E

KAYE (BARNSELEY REVENUE OFFICER) v. EYRE BROS.—Distinguished: *Toogood & Sons, Ltd. v. Green*, [1932] 1 All E.R.Rep. 309. Considered: *Dolton Bounes and Dolton Ltd. v. Osmond*, [1955] 2 All E.R. 258. F

KAYE (DEWSBURY REVENUE OFFICER) v. DEWSBURY ASSESSMENT COMMITTEE.—Followed: *Richardson & Son v. Middlesbrough Assessment Committee*, [1947] 1 All E.R. 884. Referred to: *James A. Jobling & Co. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 500; *Davis Cohen & Sons, Ltd. v. Hall*, [1952] 1 All E.R. 157. G

HINES (IPSWICH REVENUE OFFICER) v. EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION.—Considered: *Toogood & Sons, Ltd. v. Green*, [1932] All E.R.Rep. 309. Followed: *Richardson & Son v. Middlesbrough Assessment Committee*, [1947] 1 All E.R. 884. Referred to: *Davis Cohen & Sons, Ltd. v. Hall*, [1952] 1 All E.R. 157.

FINN (WIMBLEDON REVENUE OFFICER) v. KERSLAKE.—Distinguished: *Toogood & Sons, Ltd. v. Green*, [1932] All E.R.Rep. 309. Followed: *Wilkinson v. Sibley*, ante, p. 187. Considered: *McGowan v. Osgoldcross Assessment Committee*, [1936] 2 All E.R. 170; *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; *Dolton Bounes and Dolton Ltd. v. Osmond*, [1955] 2 All E.R. 258. H

BANCROFT (MANCHESTER REVENUE OFFICER) v. MANCHESTER ASSESSMENT COMMITTEE AND UNION COLD STORAGE Co.—Distinguished: *Carmarthen Revenue Officer v. United Dairies (Wholesale), Ltd.* (1931), 95 J.P. 88. Referred to: *Union Cold Storage Co. v. Moon*, [1932] 2 K.B. 648; *Ellerker v. Union Cold Storage Co.*, [1939] 1 All E.R. 23. I

As to de-rating of factories and workshops, see 27 HALSBURY'S LAWS (2nd Edn.) 439 et seq., and for cases see DIGEST SUPPS., tit. Rates and Rating, case no. 226a et seq. For Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 173.

A Cases referred to:

(1) *Moon (Lambeth Revenue Officer) v. London County Council, Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; (1926-31), 2 B.R.A. 573, H.L.; Digest Supp.

B

(2) *Law v. Graham*, [1901] 2 K.B. 327; 70 L.J.K.B. 608; 84 L.T. 599; 65 J.P. 501; 49 W.R. 622; 17 T.L.R. 474; 45 Sol. Jo. 485; 3 W.C.C. 131; 19 Cox, C.C. 709, D.C.; 24 Digest (Repl.) 1021, 4.

(3) *Inland Revenue v. William Younger & Co.*, 1930 S.C. 548; Digest Supp.

(4) *Inland Revenue v. John Walker & Sons, Ltd.*, 1930 S.C. 372; 1930 S.L.T. 237; Digest Supp.

C

(5) *White Horse Distillers v. Inland Revenue*, 1930 S.C. 426; Digest Supp.

(6) *Inland Revenue v. MacLachlans, Ltd.*, 1930 S.C. 449; Digest Supp.

(7) *Inland Revenue v. Whitbread & Co.*, 1930 S.C. 516; Digest Supp.

(8) *Inland Revenue v. Moffat*, 1930 S.C. 412; Digest Supp.

(9) *Inland Revenue v. W. & T. Avery*, 1930 S.C. 490; Digest Supp.

(10) *St. Cuthbert's Co-operative Association v. Edinburgh Assessor*, 1931 S.C. 386; 1931 S.L.T. 144; Digest Supp.

D

(11) *Inland Revenue v. Easson Bros.*, 1930 S.C. 480; Digest Supp.

(12) *Paterson v. Hunt* (1909), 101 L.T. 571; 73 J.P. 496, D.C.; 24 Digest (Repl.) 1025, 24.

(13) *Inland Revenue v. Donaldson & Co.*, 1930 S.C. 348; Digest Supp.

(14) *MacLeod & Sons v. Inland Revenue*, 1930 S.C. 434; Digest Supp.

E

(15) *Henderson v. Glasgow Corpn.*, 1900, 2 F. (Ct. of Sess.) 1127; 24 Digest (Repl.) 1030, *20.

(16) *Inland Revenue v. Gunn, Collie and Topping*, 1930 S.C. 389; Digest Supp.

Appeals from orders of the Court of Appeal in eight cases dealing with the de-rating of different types of hereditaments which were heard together.

The Rating and Valuation (Apportionment) Act, 1928, provides:

F

"Section 3 (1): In this Act the expression 'industrial hereditament' means a hereditament (not being a freight transport hereditament) occupied and used as a mine or mineral railway, or, subject as hereinafter provided, as a factory or workshop. Provided that the expression 'industrial hereditament' does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes whether or not similar to any of the foregoing which are not those of a factory or workshop."

G

"Section 3 (2): . . . The expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

H

"Section 3 (4): In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say: . . . 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

The Attorney-General (Sir William Jowitt, K.C.), Wilfrid Lewis and Colin H.

I

Pearson appeared for the revenue officer in each case.

SEDGWICK (CAMBERWELL REVENUE OFFICER) v. CAMBERWELL ASSESSMENT COMMITTEE AND WATNEY, COMBE, REID & Co.

The respondents occupied a hereditament as a bottling store. The Attorney-General admitted that the hereditament was a factory and that a process of adapting for sale went on within it, but he contended that the primary purposes for which it was used and occupied were those of a "distributive wholesale business" within the meaning of s. 3 (1) (c) of the Act of 1928. Seventy-five per cent. of the

beer was brought to the premises in tank wagons, whence it was pumped into tanks, where carbon dioxide was forced into it. Before this had happened the beer was regarded as unsaleable; after it, no further alteration was made in the beer, which was then bottled and corked. The bottles were then labelled and sent out to the trade. The whole of the processes from beginning to end might have been carried out at the respondents' brewery except for want of space, but, this being lacking there, the respondents, in choosing the premises in question, were moved by the consideration that these premises were in such a position as to facilitate as much as possible the distribution of their beer to the trade. They were "in the line of delivery." The assessment committee had included the hereditament in the special list as an industrial hereditament. The Court of Appeal held, reversing the decision of the Divisional Court, that the hereditament was not primarily used for non-factory purposes and should, therefore, be placed in the special list. The revenue officer appealed.

Wilfrid Greene, K.C., and Maurice Healy for the respondents.

GROVE (DUDLEY REVENUE OFFICER) *v.* LLOYD'S BRITISH TESTING CO.

The respondent company were the owners and occupiers of a hereditament which they used for the purposes of testing, proving and finishing chain cables and anchors, in accordance with the provisions of the Anchors and Chain Cables Act, 1899, and for other purposes. The testing in the case of the cables consisted in subjecting them to strains according to a table contained in the Act of 1899. In order to apply these strains the cables had to be divided by cutting out links, which links were replaced after the test by the company, who also submitted the chains, after the strain had been applied, to a link-by-link scrutiny to discover whether any link had suffered under the strains. For this purpose it was necessary to remove all scale from the links. If any link was found to have suffered, it was cut out and replaced by a link forged on the premises. The chains were sent to the company uncoated because the application of paint or other coating would render it impossible to scrutinise the chains effectively. When the scrutiny had been completed, the company applied an anti-corrosive coating to the chains, and then delivered them to the consignees. In addition to this work, the company tested samples of metal cable, wire, rope, and other metal substances by testing to destruction—that is to say, by breaking the article and thus discovering the tensile strain which it would bear. By far the greater portion of the work done by the company consisted of work done in pursuance of the provisions of the Act of 1899. The recorder had held that the hereditament was not an industrial hereditament within the meaning of s. 3 of the Act of 1928. The company appealed on the grounds that (i) the operation of testing was in itself a factory or workshop purpose, in that it was the adapting for sale of the cables, because the cable could not be sold without infringing the Act of 1899 unless previously tested; and (ii) that at all events the replacement of links and the scaling and coating of the cables constituted the making of part of the cable and the repairing, finishing and adapting for sale thereof. The Court of Appeal (SCRUTTON, L.J., dissenting) held, reversing the decision of the Divisional Court, that the operations necessary before the chains, cables and anchors could be sold in the market in which the makers wanted to sell them were part of the processes carried out in the production of a saleable commodity, and not part of the processes of wholesale distribution by a merchant, and, therefore, the premises should be placed in the special list. The revenue officer appealed.

Comyns Carr, K.C., and John Wylie for the respondents.

TURPIN *v.* MIDDLESBROUGH ASSESSMENT COMMITTEE.

KAYE (BARNSELY REVENUE OFFICER) *v.* EYRE BROS.

In the first of these two cases the hereditament consisted of a large shed used for the repair of motor cars and the storage of motor cars awaiting or undergoing repairs, with certain accommodation for storage of spare parts and accessories, a mess room, and two spirit pumps. Six adult workmen and two boys were con-

- A tinuously employed on repair work on the premises, which were separated from other premises of the respondents by the width of a private road. The other premises were occupied by the respondents as central offices and motor sales room, and persons in their employment constantly passed from one set of premises to the other. No accessories or petrol were sold except to persons bringing vehicles for repairs, and as incidental to the work of repair. Quarter sessions held that the
- B hereditament was not an industrial hereditament in that it was primarily occupied and used as a retail shop. In the second case, the premises and the facts relating to them were similar, except that there was an occasional sale of a second-hand motor car on commission for a customer, and that there were windows in which small accessories were displayed for sale, and that there were sales of accessories and petrol from three pumps outside the premises; but in this case also by far the
- C greater part of the work done on the premises was repair work. The recorder held that it was an industrial hereditament and was not primarily occupied and used as a retail shop. The majority of the Divisional Court held that the premises in each case should be de-rated as not being a "retail shop," and that the primary purpose for which they were occupied and used was repair work. The Court of Appeal held that it was impossible to lay down any rule which would apply to all garages,
- D as one of the points to be decided depended on the facts of each particular case. The definition of a "retail shop" in the Rating and Valuation (Apportionment) Act, 1928, s. 3 (4), did not mean that any place where repair work was done for an individual was a retail shop. They held that the hereditaments should be placed on the special list and the revenue officer appealed.

- E *Walter Hedley, K.C., and C. Paley Scott* for the respondents in the first case.
Willoughby Jardine, K.C., and W. P. Donald for the respondents in the second case.

KAYE (DEWSBURY REVENUE OFFICER) v. DEWSBURY ASSESSMENT COMMITTEE
 AND BURROWS

- F The respondent Burrows occupied a hereditament in which was sorted a bulk of old clothes and rags and fresh tailors' cuttings to produce various selections of rags, &c., for sale to manufacturers of shoddy and mungo cloth. No machinery was used. Some alteration of the original bulk was produced, as old garments and rags were torn to pieces or disintegrated into their separate materials, and cotton strips were cut out of woollen materials and darns out of socks. But the bulk of the process was very complicated sorting. Nearly 300 different kinds of fibrous
- G material were sorted to be sold separately, and, in cases where coloured fabric was required, were blended or mixed to produce the necessary effect. The sorted results were sold where the original bulk could not have been sold. Fifty-six women sorters were employed, who were required to be highly skilled. The assessment committee de-rated the premises. Quarter sessions, by a majority, reversed the decision of the assessment committee, holding that the business in the hereditament was
- H primarily a distributive wholesale business. The Court of Appeal held, reversing the decision of the Divisional Court, that there was very little evidence as to what amount of actual selling, as distinguished from adapting for sale, was done in the hereditament. Quarter sessions had erroneously directed their attention to what was going to take place after the rags were sorted and left the factory, instead of what was being done on the hereditament itself—the purpose for which the hereditament was being used. There was no evidence on which the tribunal could find
- I that the primary purpose and use of the hereditament was non-factory. The hereditament must be de-rated. The revenue officer appealed.

Comyns Carr, K.C., and W. Stewart for the respondent.

HINES (IPSWICH REVENUE OFFICER) v. EASTERN COUNTIES FARMERS' CO-OPERATIVE
 ASSOCIATION

The premises in question consisted of a single hereditament at Hadleigh Road, Ipswich, which was described in the valuation list as a seed warehouse, kiln, office,

wool shed, land and siding, and was occupied by the appellants, the Eastern Counties Farmers' Co-operative Association, Ltd., who carried on the business of seed merchants. The premises, which were a factory and workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920, were used and occupied by the respondents for the purposes of their trade in seeds. The seed warehouse was a six-floor building specially constructed for seed cleaning, and was of large dimensions. Except for a small office, the building was used exclusively for the purposes of treating and preparing seeds for sale. The office occupied a floor space of 84 sq. ft., and was used only by the foreman to record the quantity of seed received and dispatched. The respondents occupied other premises about three-quarters of a mile away, consisting of offices, warehouse and stores. The wholesale and retail business of the respondents as seedsmen, corn merchants and implement agents, as well as other seed cleaning work, was carried on at this property, and it had been held by the assessment committee that the user and occupation of it by the respondents was primarily non-industrial. Approximately 2,000 tons of seeds were dealt with in the course of a year at the Hadleigh Road hereditament, and with the exception of a very few tons the seed was as it came from the threshing machine, in a rough, unclean, and impure state. It underwent on the premises treatment and preparation for sale. The methods of treatment and preparation varied according to the nature of the seed. No seed was warehoused as an end in itself on the premises. About 95 per cent. of the seed that came to the premises was within the Seeds Act, 1920, and the Seeds Regulations, 1922, which contained elaborate provisions to secure purity of seeds sold. The rough bulk as it came to the seed merchant could not legally be sold to farmers because of the impurities which it contained, and commercially certain changes were necessary. A series of elaborate mechanical operations were, therefore, performed to sort the seeds to be sold and render them fit for sale. Some of the operations altered the substance; for example, oats were clipped of their sharp points; some seeds must be decorticated or the husks removed; and some hard seeds must be broken so that they might germinate. This was done by mechanical operations of the most complicated character. No change in the nature of the individual seeds themselves took place as a result of the treatments above referred to, except as stated. The Court of Appeal held that the operations conducted on the hereditament were factory processes. There was both alteration of substance and adapting for sale in sorting, which made a substantially different article in bulk from that which existed before the processes were applied. The process had altered the bulk and made it legally and commercially saleable. The process being, therefore, a factory process, its purpose could not be displaced by saying that the process was carried out for the ultimate or ulterior purpose of wholesale distribution. The appeal must be allowed and the hereditament must be restored to the special list. The revenue officer appealed.

Singleton, K.C., and Charles H. Henderson for the respondents.

FINN (WIMBLEDON REVENUE OFFICER) *v.* KERSLAKE

The assessment committee decided that the hereditament, being a baker's and confectioner's shop with living rooms over and bakehouse in the rear, of which the respondent was the occupier, should be entered in the special list as an "industrial hereditament," and they apportioned the user thereof, under s. 4 of the Rating and Valuation (Apportionment) Act, 1928, as to £27 industrial and £111 non-industrial. The hereditament consisted of (i) a well-fitted shop with offices, &c., and dwelling rooms on the first floor, occupied by the manager. The shop was occupied and used for the retail sale of bread and confectionery. (ii) A yard at the rear in which were stores, bakehouses, &c., and a stable. The part of the hereditament which comprised the bakehouses and ovens was physically capable of a separate occupation subject to access being given from the roadway. The goods manufactured consisted of bread, small bread, cakes and chocolates. Eight persons were regularly employed in the bakehouses. The gross revenue derived

A from the sales of goods manufactured in the hereditament was £15,300 a year. Of this, £1,860 was taken over the counter; £9,940 was in respect of sales of goods delivered direct to premises of private customers in fulfilment of orders given to roundsmen; £3,500 was in respect of sales of goods to restaurants and for re-sale. The hereditament was registered as a factory under the Factory and Workshop Acts. The Court of Appeal held, reversing the decision of the Divisional Court, B that the assessment committee having found that the hereditament was an industrial hereditament, and there being no finding of fact in the case with regard to the primary purpose of the hereditament, there was no ground in law on which it could be said that the sale was more important than the manufacture, and, therefore, the hereditament must be restored to the special list. The revenue officer appealed.

C *Konstam, K.C., and Michael E. Rowe* for the respondent.

BANCROFT (MANCHESTER REVENUE OFFICER) v. MANCHESTER ASSESSMENT COMMITTEE AND UNION COLD STORAGE CO.

The appellants occupied and used a hereditament for the refrigeration and cold storage of produce. There was upon it a quantity of complicated machinery for refrigeration, and an electrical bandsaw, used for trimming and cutting carcasses for sale. About 25 to 30 per cent. of the produce received was fresh and had to be refrigerated by the occupiers; about 75 per cent. had already been refrigerated when received and was kept in that state. It was not contended that the presence of the bandsaw was of any importance in the case, but it was urged that the process of refrigerating and keeping refrigerated produce which could not survive to be marketed without refrigeration, was an adapting of it for sale, and was, therefore, a factory or workshop process. It was argued that "storage" in s. 3 (1) (d) of the Act of 1928 meant only storage which was not a factory or workshop process, and that the storage on this hereditament, though spoken of as "cold storage" was not "storage" within the meaning of that paragraph. The assessment committee had included the hereditament in the special list as an "industrial hereditament." E The Court of Appeal held, affirming the decision of the Divisional Court, that it was impossible to believe that Parliament used the word "storage" without intending to cover in it the well-known class of cold stores. The company appealed.

Wilfrid Greene, K.C., and G. Granville Sharp for the appellants.

The House took time for consideration.

G March 6. **LORD DUNEDIN** read the following opinion of the House.—We are now to dispose of a batch of cases depending on the construction of the various clauses of the Rating and Valuation (Apportionment) Act, 1928, which have come up to your Lordships' House. It is unnecessary to repeat the observations made in the opinions pronounced in *Moon v. L.C.C* (1) as to the general scheme of the Act.

H SEDGWICK (CAMBERWELL REVENUE OFFICER) v. CAMBERWELL ASSESSMENT COMMITTEE AND WATNEY, COMBE, REID & Co.

The respondents are brewers. As brewers, they make what is commonly known as bottled beer, and the hereditament which is the subject of controversy in the present case is used in connection with the manufacture of bottled beer. Bottled beer is manufactured in the following way. The beer is first brewed. This is not I done on these premises. It is brought to the premises in tank wagons and pumped into large tanks. This is necessary in order to effect carbonation, which is done by putting carbonic acid gas into it. This done, it is filtered, and then, by means of a filling machine, put into bottles which are corked and labelled. The bottles are then packed and removed for delivery to the trade. The carbonation is necessary in order to get the sparkle which is the marked attribute of bottled beer. The beer as it comes in the tank wagon is not in a drinkable condition. It could not be sold as draught beer, but it is beer which is destined to be bottled beer. It may here be as well to set forth once for all the actual words of the material section,

for all the cases turn on the interpretation of various portions of it. Section 3 (1) A of the Act is as follows :

"In this act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. (2) (b) of the same section it is provided that for the purposes of the Act the expressions "factory" and "workshop" have respectively (with certain immaterial exceptions) the same meanings as in the Factory and Workshops Acts, 1901 to 1920.

The question in the case is whether the hereditament on which all this is done is entitled to be put on the special list as an industrial hereditament. It is admittedly a factory, as it falls within one of the definitions of a factory in s. 149 of the Factory and Workshop Act, 1901. But the question on which the case turns is whether, though a factory, it is not an industrial hereditament because it is, in terms of s. 3 (1) (c) of the Act, primarily occupied and used for the purposes of distributive wholesale business. The course of decision in the case has been that the rating authority put the premises on the special list and their decision was upheld by the assessment committee. Appeal being taken to quarter sessions, a Special Case was, by agreement, stated in terms of s. 40 of the Metropolis Valuation Act, 1869. On the Special Case being heard by the King's Bench Division, the decision of the court below was reversed. From that judgment, appeal was taken to the Court of Appeal, who reversed the judgment of the King's Bench Division and restored the judgment of the assessment committee. In earlier stages it was asserted that the premises were also disqualified under sub-ss. (d) and (f)

"for purposes of storage and any purposes, whether or not similar to the foregoing, which were not those of a factory or workshop."

But the Attorney-General did not advance any argument in support of these reasons and rested his objection solely on (c) "the purposes of distributive wholesale business."

The first remark, which is, indeed, obvious, is that the words point at some kind of special use of the premises. In one sense any wholesale business is distributive because no goods remain for ever in a factory. They leave the factory in order to be distributed. But without attempting any definition, which would be useless as one cannot have in one's mind all the instances which may arise, it is easy to conceive premises used primarily for arranging for the process of distribution. Nor do I doubt that, in the case of premises where nothing was done except the mere bottling of a liquid, such premises might be said to be of that character. An illustration of a case which looks like that may be found in *Law v. Graham* (2), although the actual question for decision was whether the premises were a factory. But the point is whether the treatment that the beer undergoes in these premises is a mere prelude to distribution. I am clearly of opinion that it is not. The finished article that is being prepared for distribution is bottled beer. The beer does not enter the premises as bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unpotable and unmarketable article into a potable and marketable one. It is true that the treatment requires the use of a bottle, and that, when the treatment is finished, the bottle and its contents are ready for distribution. But what is really done on the premises is the turning of what I may call an unfinished liquid into a finished one.

A The view which prevailed in the Divisional Court was enunciated by the Lord Chief Justice when he said :

B “The manufacture and adaptation for sale of the beer is finished as soon as the beer has been carbonated. The process of carbonisation is but a very small element in the processes carried on upon the premises, and we think that the assessment committee could not have arrived at the conclusion to which they came unless they had misdirected themselves upon the point as to where distribution begins.”

C This view is, I think, unsound. The article, as already said, which the brewers set out to produce is bottled beer, a liquid which is of a character different from that of draught beer, and which must be placed in bottles if its distinctive character is to be retained. Distribution of the article can only begin when the article is ready for delivery, a point of time which arrives not when the carbonated beer is in the vat, but only when it is in a bottle corked and labelled, because it is only then that it is a finished article. It is only then that the article known as bottled beer so to speak springs into existence. The distribution which then follows is no more than the ordinary distribution which follows on any goods being delivered D forth from a factory. This is the view which commended itself to the Court of Appeal, and, in my opinion, the judgment of that court was right. The making of bottled beer which has been described accounts for 75 per cent. of the material cases dealt with in the factory, and, if the conclusion come to as to that is right, it is enough for the decision of the case that the primary occupation and use of the premises is not for the purposes of wholesale distributive business. But lest E it should be thought that something has been overlooked, it may be mentioned that there is other beer treated for bottling which is not carbonated. It is called self-matured beer, and in this case the finishing is effected by leaving in the beer certain matters which will induce a secondary fermentation. This takes place on the premises, and the beer has to be watched and the precise moment selected for its being put into bottles. Then again, these bottles have to be watched before F the beer is considered to be finally ready, when the bottle is corked and labelled. The same considerations really apply to this as to the first case, but, as already said, the matter is determined by the premises being primarily used for the manufacture of bottled beer as described.

Several cases decided in the Scottish Valuation Court were cited to us. The case most actually in point is that of *Inland Revenue v. William Younger & Co.* (3).

G In that case there was a finding of the committee that

“the committee were of opinion that in these premises the beer was altered, finished, or adapted for sale, evidence having been given that the beer in the state in which it came into the premises could not be sold as bottled beer without undergoing the processes referred to.”

H They, accordingly, put the premises on the special list. This decision was reversed by the court, and it is evident that that decision was, in the view expressed in this judgment, erroneous. LORD SANDS seems to have had difficulty, but in view of former cases thought that it was well to lay down a general rule applicable to each class of industry. This remark is a little dangerous. Certain decisions will, it is hoped, prove of very general application, and so be of service to the local rating I authority. But after all, the question is an individual one as to each particular hereditament. It is for this reason that I do not refer specially to *Inland Revenue v. John Walker & Sons* (4) and *White Horse Distillers v. Inland Revenue* (5). These were cases as to whisky, and without the full facts before us it would, I think, be quite inadvisable to decide whether what is done in the blending of whisky puts the case in the same lines as the present. Nor is it necessary to comment on the other cases where the treatment of beer was the subject of discussion, namely, *Inland Revenue v. Maclachlans, Ltd.* (6) and *Inland Revenue v. Whitbread & Co.* (7), because there were questions as to how great a part of the

premises was occupied for other purposes. The result of the view taken in this case is that the appeal will be dismissed with costs. A

GROVE (DUDLEY REVENUE OFFICER) v. LLOYD'S BRITISH TESTING CO.

The question in this case is whether the premises, in which is carried on the testing of cables and anchors by the respondent company, are in an industrial hereditament. The Divisional Court, by a majority, held that they were not. B The Court of Appeal, by a majority, held that they were. There is, therefore, an equal balance of judicial opinion.

The respondents are not makers of cables or anchors, only testers. By the Anchor and Cables Act, 1899, penalties are enacted against all who sell, buy, or use untested cables, and certain establishments, of which the respondents' is one, are authorised to give testing certificates. The conditions of test are set forth. C According to these conditions, what is done with a cable which is received for testing is as follows. Three links are sawed out of the cable. These links are subjected to a specific breaking strain. If they come away, three more links are cut out from the same length of cable. If these also come away, the cable is rejected and no certificate granted. If either of the sets of three links resist, the cable is joined together again by means of a new link forged on the premises and subjected to a tensile strain. If the cable fails it is rejected, but if it passes the test a certificate is granted. In the courts below, the whole controversy was whether these works were or were not a factory, because it was assumed that, if they were a factory, that would be an industrial hereditament, as they would not fall within any classes of the exceptions set forth above. D

There are three ways in which premises may become a factory. First, they may so become because they are mentioned by specific description in Part I of Sched. 6 to the Factory and Workshop Act, 1901. E Secondly, they may so become by being a place mentioned in Part II of the said schedule, and within which mechanical power is used in aid of the manufacturing process carried on there. Thirdly, they may so become, by s. 149 (1) (c) of the Act, because they are premises where manual labour is exercised for the purpose of (i) the making of any article or part of any article; or (ii) the altering, repairing, ornamenting, or finishing of any article; or (iii) the adapting for sale of any article . . . and wherein mechanical power is used in aid of the manufacturing process carried on there. F It was as to the third method that the difference of judicial opinion manifested itself. The opposing views may be well expressed in a very few sentences used by the learned judges who held opposing opinions. GREER, L.J., said: G

"The making of the goods fit to be legally sold is the primary purpose for which the hereditament is used."

SLESSER, L.J., said:

"The testing of the cables was a part of the process of making them fit for sale. I, therefore, conclude that the phrase 'adapting for sale' includes adaptation for selling." H

On the other hand, the Lord Chief Justice said:

"Their task (i.e., the testers' task) is not to adapt the cables for sale, but to see that they have been so adapted."

SCRUTTON, L.J., said:

"The cables are not adapted for sale, but tested to see if they are fit for sale." I

In such an evenly balanced expression of judicial opinion, it would be indecent to say that the question was perfectly plain, but I should not be dealing frankly with your Lordships if I allowed you to suppose that, so far as my personal opinion is concerned, I have been harassed by any doubt. Personally, I have no hesitation whatever in preferring the opinions of the Lord Chief Justice and SCRUTTON, L.J. I think "adapting for sale" points clearly to something being done to the article

A in question which, in some way, makes it in itself a little different from what it was before. Now, testing does not in any way make the article different as an article from what it was before. It only proclaims its character. The insertion of the one link which is necessary to re-join the cable after the links have been cut out is, as the Lord Chief Justice puts it, obviously only incidental to the operation of testing. The same must be said as to the removing of scale. And
 B this view will be reinforced by contrast when the cases as to seed and rags are discussed. No doubt, the giving of the certificate makes the article, in a sense, more saleable than before. Without a certificate it would only be saleable in a foreign market, and even that sale would bring with it a penalty on the seller, but I cannot look on the granting of the certificate as an adaptation. If a horse is
 C passed sound by a veterinary surgeon it becomes saleable in a way it was not before it was so passed, but no one would dream of saying that the veterinary surgeon by his certificate adapted the horse for sale. All this may be no more than matter of impression. All I can say is that, so far as I am concerned, my impression is clear and I have the satisfaction of knowing that all your Lordships agree with me.

But, while this would settle the case as it left the courts below, because the judgment held that the hereditament was not a factory, before the case arrived at
 D your Lordships' House the parties became agreed that the premises were a factory, if not under the third method, at least under the first. For para. 13 of Part I of Sched. 6 to the Act of 1901 is as follows:

"Metal and india-rubber works, that is to say, any premises in which steam, water or other mechanical power is used for moving machinery employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or gutta-percha or of articles made wholly or partially of india-rubber or gutta-percha."

Undoubtedly, there is in these works the forging of links to join up the chains which have been severed, and that forging gives to the premises the character of a factory. The Attorney-General admits this in his Case, but then he says:
 F "True, it becomes a factory, but it is not an industrial hereditament because it is struck at by s. 3 (1) (f) of the Act of 1928, namely, being primarily occupied and used for other purposes which are not those of a factory or workshop." The question, put in this way, was, as I have said, not dealt with in the courts below. In answer to the argument of the Attorney-General, counsel for the respondents presented an argument to this effect: "This is," said he, "admittedly a
 G factory, but this factory has only one purpose, to wit, testing. Therefore, it cannot be said that it is mainly used for a purpose which is not a factory purpose." This argument is very ingenious and seems, at first sight, difficult to answer, but, on consideration, I am satisfied that it is unsound. One must begin by remembering that, in considering this argument, testing alone is, *ex hypothesi*, not a factory purpose. The purpose of a particular factory must be gathered from that which
 H makes it a factory. If it was made a factory because it fell within an actual description in Part I of the schedule, you must gather the purpose from that description. Here the hereditament is made a factory because of the manufacture of articles of metal. Therefore, so far as this hereditament is a factory, its purpose is the manufacture of metal. But the hereditament is, without doubt, primarily occupied and used for the purposes of testing operations, and such operations are,
 I *ex hypothesi*, not factory purposes, and, consequently, the case falls within the words of the exception. and the hereditament, although a factory, is not an industrial hereditament. The appeal will, therefore, be allowed and the judgment of the Divisional Court restored.

TURPIN v. MIDDLESBROUGH ASSESSMENT COMMITTEE

The question which arises on this appeal is whether or not a hereditament in Middlesbrough, consisting of a garage and motor repair depot, is an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The assessment committee thought that it was, and included

the hereditament in the special list. An appeal to the court of quarter sessions was dismissed. A Divisional Court (AVORY, J., dissenting) affirmed the decision of the court of quarter sessions. The Court of Appeal unanimously affirmed the order of the Divisional Court.

The case which now comes for consideration before your Lordships' House is one the decision of which must necessarily affect the position under the Act of 1928 of those establishments which are common objects of the roadside, and in which repairs to cars can be effected and petrol obtained. The building in question is built of brick and has a concrete floor. The floor space is (with a negligible exception) occupied by (a) an office and place for washing cars; (b) a workshop with plant machinery and power suitable for repair work; (c) two inspection pits; (d) space for cars while standing for repairs; and (e) space for garaging cars. No cars are stocked for sale, though occasionally the occupier sells a car, obtaining it from another dealer, and sharing with him the commission. He may sometimes have a second-hand car there for sale, either on commission or on his own behalf. He garages the cars of private owners; these cars average five at a time. He has also on the premises a motor cab for hire. At the front of the premises are windows exposing small accessories for sale, and outside the premises are three pumps for the supply of petrol to the public. Sales of accessories and petrol take place daily. Much the larger part of the premises and practically the whole of the working time of the occupier and of his employees are devoted to repair work. The repair work, which is principally concerned with motor cars, but extends to some extent to other matters, yields the larger part of the income of the business carried on. No one is employed on the premises specifically for selling purposes.

The hereditament is registered as and is clearly a factory within the Factory and Workshop Acts, 1901 to 1920. It is, accordingly, an "industrial hereditament" within s. 3 (1) of the Act of 1928 unless it is primarily occupied and used for any of the purposes enumerated in the proviso to that subsection or for any combination of such purposes. The appellant, the revenue officer, contends that it is not an industrial hereditament within the section, because it is primarily occupied and used for the purposes of a retail shop. Whether a hereditament which (as here) is primarily occupied and used for the purpose of effecting repairs to cars and other objects to the direct orders of their owners is a retail shop within the meaning of the Act of 1928 is the sole question to be decided; and the decision will depend upon the view adopted as to the meaning and effect of the language used in sub-s. (4) of s. 3 relating to the words: "Retail shop." Subsection (4), so far as relevant, runs thus:

"In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say: . . . 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

So far as appears from the Special Case, there is no indication that the learned recorder took into consideration the words of sub-s. (4) and the specific allusion to repair work which it contains. He would seem to have contrasted the occupation and user of the hereditament for the purposes of buying and selling articles, storage of goods and garaging of cars, on the one hand, with its user and occupation for the purpose of executing repairs, on the other hand, and to have held that the hereditament was not primarily occupied and used for any of the purposes enumerated in the proviso or for any combination of such purposes, because the primary occupation and user of the hereditament taken as a whole was for the purpose of repairing. In the Divisional Court the definition of "retail shop" was carefully considered. FINLAY, J., thought that retail trade meant, speaking generally, buying and selling in small quantities; that a retail shop was a shop where such trade was carried on; and that a shop had certain physical characteristics of which such matters as the window and the counter were examples. He thought that the words "premises of a similar character" meant premises resembling a

A shop in physical attributes, and that the words "including repair work" only referred to such repairs "as reasonably fall to be included in retail trade and as are likely to be performed in a retail shop." TALBOT, J., contrasted the definition of retail shop contained in the Act of 1928 with the definition of shop contained in the Shops Act, 1912. He thought that the words "of a similar character" should be construed liberally and in a popular and reasonable way. They included, in his opinion, the physical aspect and arrangement of the place, and he agreed with the judgment of FINLAY, J. AVORY, J., on the other hand, was of opinion that, in order to satisfy the words of the definition, it was not essential that the premises should resemble a shop in physical characteristics or that ordinary retail buying and selling should take place there. He thought that there was a retail business of repair work carried on upon the premises, and that the recorder, having found that the hereditament was primarily occupied and used for the purposes of repairing, could not hold in law that the hereditament was an industrial hereditament within the meaning of the Act of 1928. The Court of Appeal agreed with the view that, since the primary occupation and use of the hereditament had been found to be for the purpose of repairing, the hereditament could not be said to be primarily occupied and used for the purpose of a retail shop. It is not easy to see the exact basis of the decision in the Court of Appeal. It is stated that they agree with the view of the majority of the Divisional Court as to "retail shop," but in addition there is a suggestion that something may turn upon the largeness or smallness of the value of the objects which are repaired, and of the cost of the repairs which are executed. This suggestion, I confess, does not recommend itself to me.

The matter seems to me simply a question of attributing an everyday meaning to the words used in the definition. Upon the facts found this hereditament is primarily occupied and used for the purposes of repair work, done to cars and other objects brought or sent there by the owners without the intervention of any middleman. I do not pause to inquire whether a person who does such repair work could not properly be said to be carrying on a retail trade or business. It may be that in strictness the words "retail trade or business" are only applied with complete accuracy to cases of selling goods; or it may be that they may properly be applied to all trades and business which deal directly with the "consuming" customer. In the present case all doubt is removed by the express inclusion of "repair work" in the term "retail trade or business." I am unable to accept the view which was urged before your Lordships and which found favour in the courts below, that the only repair work which is covered by the definition is repair work incidental to retail selling. I can see no justification for thus limiting the language of the definition.

Nor do I agree with the view that has prevailed as to the effect of the words "of a similar character." For myself I am unable to state what are the physical features, the existence of which are essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even found in retail shops, such as counters and shop windows, but I am equally familiar with retail shops where no such features exist. In my opinion, it is not possible to say that the words "of a similar character," even if they include, are limited to, physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now, if we compare the hereditament here in question with a retail shop, do we find any common characteristics? I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein. Moreover, once you include repair work in the words "retail trade or business," it can be truthfully said there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop. These common characteristics are, in my opinion, sufficient to satisfy the requirement that the premises should be of a character similar to the character of a retail shop. It was said that this view would deprive the words of all effect. I think not. They would operate to exclude from the

definition the extreme case put in argument and referred to in the judgments of the shipbuilding yard, which no one would dream of calling a retail shop. **A**

It remains for me to say a few words about the relevant authorities which were cited in argument. The opinion which I have formed in the present case appears to me to accord with the decisions in regard to the premises of William Barr and Ethel Smith in *Inland Revenue v. Moffat* (8), and with the decision of the majority in *Inland Revenue v. W. & T. Avery* (9), although I cannot assent to the view of LORD SANDS in the last-mentioned case, that works for the repair of lorries or reaping machines could not fall within the description of premises similar to a retail shop. The present case is very different from the recent decision in the Valuation Appeal Court pronounced on Jan. 14, 1931, on the appeal of *St. Cuthbert's Co-operative Association, Ltd. v. Assessor for Edinburgh* (10). The hereditament there in question was used for the purpose of repairing boots and shoes. The public did not resort to the hereditament, but the articles repaired were collected at the appellants' branch shops throughout Edinburgh (to which the public resorted) and brought to the hereditament in question. It was held that the hereditament was neither a retail shop nor premises of a similar character. The essential fact in that case which prevented the hereditament from being "of a similar character" was that the public did not resort thereto. For the reasons which I have indicated I am of opinion that the hereditament here in question is primarily occupied and used for the purposes of a retail shop, and that, therefore, it is not an industrial hereditament within the meaning of the Act of 1928. This appeal, accordingly, succeeds, and the hereditament should be removed from the special list. **B**
C
D

KAYE (BARNSELY REVENUE OFFICER) v. EYRE BROS., LTD. **E**

This appeal, which relates to a hereditament at Market Hill, Barnsley, raises for decision the same point as the appeal in the case of the Middlesbrough Garage, but the facts in the two cases are somewhat different. In this case the assessment committee included the hereditament in the special list as an industrial hereditament. On appeal to the court of quarter sessions it was excluded from the special list. The Divisional Court (AVORY, J., dissenting) restored it to the special list, a decision which the Court of Appeal affirmed. **F**

The relevant facts are as follows. The respondents occupy various motor premises in Barnsley. They sell new cars, larger motor accessories and petrol to the public in Peel Street. They have a garage for private cars and their own hire-vehicles in Western Street. They store and sell second-hand cars in Regent Street South. They have a shop and a showroom and their registered offices in Eldon Street. In addition they occupy the hereditament in Market Hill. These last-mentioned premises have a floor space of 590 sq. yds., of which about 520 sq. yds. are used for repairing cars and storing cars which are there for the purpose of repairs. The rest of the space is utilised for storage of accessories and other articles needed for the repairs, for a mess-room for workmen, and for the accommodation of two motor spirit pumps. Six men and two boys are continuously employed there in motor repair work. The repair work is done to privately owned motor vehicles, and varies in character from simple to important jobs. It is stated in the Case that orders for a small proportion of the repair jobs done on the Market Hill premises were given at the Eldon Street premises. I think that inferentially this means that the other orders are given at Market Hill. Any sales of accessories or petrol which take place at Market Hill are made only to the owners whose cars are being repaired there. Finally, it is to be observed that the Market Hill premises (which are only separated from the Eldon Street premises by a narrow way) do not open directly on to a public thoroughfare. In order to reach them, an owner would have to drive his car along a roadway which leads out of Market Hill and is some 80 ft. in length. The hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920. **G**
H
I

These facts establish beyond doubt that the hereditament is primarily occupied and used for the purposes of what may be conveniently termed retail repair work,

A i.e., repair work done to the order of the owner of the object which is repaired, without the intervention of any middleman. I think it is plain that unless there is some difference between the facts of this case and the facts of the Middlesbrough case sufficient to warrant you in saying that the Market Hill premises are not premises of a character similar to the character of a retail shop, this case falls to be decided in the same way as the last-mentioned case. For myself I can detect
 B no sufficient difference and I am accordingly of opinion that this appeal succeeds with costs here and below.

KAYE (DEWSBURY REVENUE OFFICER) v. DEWSBURY ASSESSMENT COMMITTEE
 AND BURROWS.

C HINES (IPSWICH REVENUE OFFICER) v. EASTERN COUNTIES FARMERS' CO-OPERATIVE
 ASSOCIATION

It will be convenient to discuss these two cases together because the learned judges in the courts below so constantly refer from one to the other. In Burrows' case the Special Case sets forth:

The total floor area of the hereditament is 5,774 sq. yds., of which 1,991 sq. yds. are used for the preparation, ripping, clipping, grading, classification, blending, and sorting of rags which consist of old garments on the one hand, and tailors' new clippings on the other, and of which 3,753 sq. yds. are used: (a) for the storage of rags awaiting such processes; (b) for the storage of rags partially prepared, graded, blended, and/or sorted; and (c) for the storage of such rags after they have been so dealt with and before despatch to the respondent's customers. The said hereditament contains three electric cranes, one electric rag press for the purpose of
 E packing and baling, and one hand rag press and numerous riddles upon which the rags are prepared, ripped, clipped, graded and sorted. The said hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920. The said rags, after being ripped, clipped, graded, classified, blended and sorted, are sold wholesale to heavy woollen cloth manufacturers for use in the heavy woollen cloth industry. The business of the respondent carried on in the said hereditament
 F is the first process in the production of heavy woollen cloth and is a branch of the heavy woollen cloth manufacturing industry centred in Dewsbury and other neighbouring towns. The further processes in the production of heavy woollen cloth which are carried on elsewhere consist of pulling and spinning into yarn, and such yarn is used either alone or in conjunction with yarn spun from new wool in the manufacture of woven cloths. In the heavy woollen manufacturing trade large
 G quantities of woven patterned and coloured cloths are made from "pulled" rags without the addition of any new wool and without re-dyeing. The rag trade is an integral and necessary section of the heavy woollen trade. The respondent purchases bales of miscellaneous rags, mixed and unsorted, from various parts of the world and also in the British Isles, and the rags so bought consist, as to part, of old garments, and as to part of tailors' new clippings. The respondent sells assortments of rags adapted to particular trade descriptions or to the special needs of
 H particular customers. The rags so bought include in the way of fibrous materials, wool, cotton, silk, artificial silk, jute, hemp, imitation silk, and imitation wool, and individual rags contain combinations of the above materials. The rags so bought are of no use for the purposes of the woollen cloth manufacturers until they have been ripped, clipped, sorted, graded or blended and/or prepared as above
 I described. The respondent produced to the court a collection of 296 different sorts of fibrous materials as showing the effect upon the rags bought by him of the ripping, clipping, sorting, grading, blending, and preparation above described carried out on the said hereditament, such materials being commercially known and recognised commodities in the rag trade and to shoddy and cloth manufacturers. The following processes are carried on by the respondent in the said premises in order to produce the said 296 sorts: (a) The sorting, ripping, clipping, grading and classification of all kinds of rags into their respective fibrous groups. (b) The removal of dirt and foreign matter from the said rags. (c) The division or

separation of rags into their component parts of different fibrous origin by clipping, A
ripping, or otherwise dividing or disintegrating old garments by removing cotton
strips and/or selvages from woollen tailors' clippings and unwanted colour strips
and/or selvages whether of wool or cotton from such clippings, and by cutting out
darns, clocks, seams and unwanted coloured parts from knitted garments. The
respondent deals with 95 per cent. of the total quantity of rags received by him
according to the processes detailed in cl. 17 of this Case. The respondent blends B
from 25 per cent. to 50 per cent. of the rags dealt with by him. By reason of the
processes carried on by the respondent, rags purchased as mixed rags in bulk as
aforesaid are separated into sorts, also in bulk of widely different values, quality,
shade and character.

The assessment committee put the hereditament on the special list. Quarter
sessions held by a majority that the business carried on in the hereditament was C
primarily distributive wholesale business and removed it from the special list. The
Divisional Court affirmed this judgment. The Court of Appeal reversed and
restored the judgment of the assessment committee.

In the Co-operative Association case, the Special Case sets forth :

The respondents carry on the business of seed merchants at the said premises
comprising the aforesaid hereditament and the said premises are a factory and D
workshop within the meaning of the provisions of the Factory and Workshop Acts,
1901 to 1920. The rateable value is £788. The hereditament is used and occupied
by the respondents for the purposes of their trade in seeds. The seed warehouse
is a six-floor building specially constructed for seed cleaning and is of large dimen-
sions. Save as to a very small office, it is used exclusively for the purposes of
treating and preparing seeds for sale. Approximately 2,000 tons of seeds are dealt E
with in the course of a year at the Hadleigh Road hereditament. With the excep-
tion of a very few tons the seed is as it comes from the threshing machine and in
a rough, unclean and impure state. It undergoes upon the said premises treatment
and preparation for sale. The methods of treatment and preparation vary accord-
ing to the nature of the seed. No seed is warehoused as an end in itself upon the
said premises. About 95 per cent. of the seed that comes to the premises is within F
the provisions of the Seeds Act, 1920, and the Statutory Rules and Orders made
thereunder.

Then follows a detailed account of the way in which various seeds are treated.
The treatment is done entirely by machinery, and has for its object the separation
of weed, seeds, and dirt of various sorts from the good seeds. In many cases the
seed being treated is decorticated. In many cases, to obtain purity, the seeds G
have to be put through special machines in succession. There is no chemical
change effected in the seed itself. The assessment committee put the hereditament
on the special list. The Divisional Court reversed that judgment and took it off
the list. The Court of Appeal reversed the judgment of the Divisional Court and
restored that of the assessment committee.

Before the Divisional Court pronounced their judgment there had been decided H
in the Scottish courts several cases under the present Act which were cited. The
first to be mentioned is *Inland Revenue v. Easson Bros.* (11). That was a case
where rags were dealt with for paper manufacturing purposes. Besides rags proper,
there was waste paper, rope, canvas, twine, and all kinds of cotton, linen, and silk
cuttings. This mass of material was cleaned, sorted out, and classified into more
than eighty different categories, packed into bales by hydraulic presses, and the I
bales then sold to paper-makers. The valuation committee put the hereditament
on the special list. The valuation court, by a majority, reversed that decision and
founded their judgment mainly on *Paterson v. Hunt* (12), but LORD SANDS dis-
sented, and, as his judgment was specially approved by the Court of Appeal, it will
be convenient to quote the passage quoted by GREER, L.J., in *Burrows'* case :

"On the counter emptied out of collecting carts there is a huge amorphous
mass of wastepaper, rags, &c., mixed with dirt and rubbish, which no paper

A manufacturer would look at. The workers produce a number of orderly bales in eighty different classes which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The paper-maker is not buying one rag or one piece of wastepaper; he is buying a bale. If what had happened was that the paper-maker had come into the premises saying I want a blue cotton rag or a piece of brown paper, I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a paper-maker comes in and asks for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale or made saleable by laborious assortment."

D There was also *Inland Revenue v. Donaldson & Co.* (13), which was a case of seed-cleaning on all fours with the present. The case was decided on two grounds, distributive business and storage. The majority, the same who decided *Easson's Case* (11), decided on both grounds, LORD SANDS only on the ground of storage.

Whether the hereditament is primarily used for purposes of storage is obviously a question depending on the facts of the particular case.

E Coming now to the present cases, in the seed case before the Divisional Court the learned judges say that, so far as the premises are used for the sorting and cleaning of seeds, the case is governed by the decision in *Paterson v. Hunt* (12). They also approve of the Scottish decision in *Inland Revenue v. Donaldson & Co.* (13). They point out that there is no change effected in the seed itself, and so

F they came to the conclusion that the primary purpose for which the hereditament was used was a distributive wholesale business. They, curiously enough, overlooked the fact that over 85 per cent. of the output of the factory was sold retail to farmers, but that may, for the moment, be put aside because the crucial question, treating this as a leading case, is whether there is here primarily a distributive business or an adapting for sale. In the rag case they felt more difficulty, and TALBOT, J., in particular would, if he had thought he was free to judge on the facts, have come to a different conclusion. But, on the whole, looking at what they had done in the seed case, at *Paterson v. Hunt* (12), and at the Scottish case of *McLeod & Sons v. Inland Revenue* (14), a wool sorting case, they thought they ought not to interfere with the judgment at quarter sessions.

In the Court of Appeal in the seed case, SCRUTTON, L.J., said this :

H "In my view there was both alteration of substance and adapting for sale in sorting and making a substantially different article in bulk from that which existed before the processes were applied. In my opinion, you cannot deal with the case by saying there was a seed before the process and the same seed after the process. The process has altered the bulk and made it legally and commercially saleable. The process, being therefore a factory process for reasons already given, I do not think its purpose can be displaced by saying the process is carried out for the ultimate or ulterior purpose of wholesale distribution. This, as already said, would destroy all de-rating."

I GREER, L.J., quotes and approves of LORD SANDS' dissenting judgment in *Easson's Case* (11), which has been quoted above and says that the same considerations are conclusive in the decisions in the seed cases, the wool-sorting cases, and scrap iron cases. In the rag case, SCRUTTON, L.J., says that it follows the seed case and describes the result of the processes carried out by saying: "The sorted results are sold when the original bulk could not be sold." He again expresses his agreement

with LORD SANDS in *Easson's Case* (11). GREER, L.J., had already expressed his opinion as above. A

In both of these cases I agree with the Court of Appeal and approve the view of LORD SANDS in the passage quoted. The test is just as it was in the bottled beer case. You must look at what is the finished article to be turned out. If that finished article is only put into the condition of a finished article by the processes to which it has been subjected in the hereditament, then the processes will fall within the expression "altering or adaptation for sale." There is an older Scottish case which does not appear to have been cited in the courts below: *Henderson v. Glasgow Corpn.* (15). In that case the Glasgow Corporation accumulated the street sweepings, and, mixing them with ashes by a mechanical process, produced out of the mass a produce saleable as manure. It was held that this was an adaptation for sale and made the premises a factory. In both the cases of the rags and the seeds the finished article is different from the article in bulk which enters the hereditament, and that is, in my opinion, an adaptation for sale. It is here that one gets the contrast with the cable testing case, for there is no difference, in that case, between the article, as an article, which enters and that which leaves the hereditament. B C

A word must now be said as to *Paterson v. Hunt* (12), which really formed the foundation of the majority judgment in the Scottish court in *Easson's Case* (11) and in the first case in the English court. In that case it was held by LORD ALVERSTONE, C.J., and DARLING, J., that sorting rags was not an adaptation for sale, and that, consequently, premises where rag sorting was carried on were not a factory. It is left doubtful by the report whether what was done there was at all the same complicated process as was done in the rag case here. If the operation was not the same then the case does not apply. If it was practically the same, then it is not binding on your Lordships, and I may say that it was wrongly decided. As regards storage I am of opinion that storage in s. 3 (1) (d) means storage as a purpose and end in itself, and that such storage as is merely a necessary and transitory incident of the manufacturing process which is being carried on does not fall within the definition. Accordingly, in *Burrows'* case I think the premises are not "primarily occupied and used for purposes of storage." D E F

The result is that, in both cases, the judgment of the Court of Appeal is affirmed and the appeals are dismissed with costs.

FINN (WIMBLEDON REVENUE OFFICER) v. KERSLAKE

The hereditament here in question comprises a baker's shop with living rooms over and a bakehouse in the rear, and the respondent is occupier of the whole. The bakehouse is a factory under head (23) of Part II of Sched. 6 to the Factory and Workshop Act, 1901, and, therefore, the whole hereditament is an "industrial hereditament" under s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, unless it is excluded therefrom by reason of the proviso in that subsection. The assessment committee entered the hereditament on the special list, and, on appeal by Special Case under the Quarter Sessions Act, 1849, a Divisional Court of the King's Bench reversed that decision. On appeal from the latter decision the Court of Appeal restored the decision of the assessment committee. In the present appeal the Crown challenges the judgment of the Court of Appeal and maintains that the hereditament is excluded by the proviso to s. 3 (1) of the Act of 1928 on the ground that it is primarily occupied and used either (a) for the purposes of a retail shop, or (b) for purposes which are not those of a factory or workshop, its use for the purposes of a dwelling-house falling to be taken in combination with either (a) or (b). Under s. 3 (4): G H I

"Retail shop includes any premises of a similar character where retail trade or business (including repair work) is carried on."

It may be noted that, in order to qualify the whole hereditament—always subject to exclusion by reason of the proviso—as an industrial hereditament under s. 3 (1) it is not necessary that the area affected by the Factory and Workshop Acts should

A be co-extensive with the hereditament, and this is illustrated by the present case. For the purpose of this first stage under the section the other uses of the hereditament are ignored. But when the proviso falls to be considered the occupation and use of the hereditament as a whole must be looked at; it may then be found that the occupation and use is only for one primary purpose, possibly with minor uses which are merely ancillary to the primary purpose and serving its ends alone, or

B it may be found that there are really two distinct purposes of the occupation and use, in which case it will be necessary to decide, on a comparison of them, which is the primary use. Further, the particular use of the hereditament which brings the hereditament or part of it within the Factory and Workshop Acts may be merely a minor and ancillary use which is an integral part of the primary use and is not to be separately regarded in considering the application of the proviso to the

C hereditament in question. The definition of retail shop, which includes a repair business carried on in premises similar to a retail shop, and the public supply undertakings excluded under head (e) of the proviso show that, with the exception of head (f), the purposes excluded are not confined to purely non-factory purposes.

In the present case, the hereditament is all occupied and used for the one trade or business, namely, a retail trade or business in bread and confectionery, for it

D cannot be doubted that the sale to hotels, clubs, restaurants, &c., is typical retail trade, and these sales, as also the orders given to roundsmen, are just part of the ordinary business of a retail shop. Similarly, the bakehouse at the back of the shop, which makes the goods for the retail business, is an ordinary part of a retail baker's shop, and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt, on the facts of this business, that the

E whole hereditament is used and occupied for the purposes of a retail baker's shop, and that there is no need to pray in aid any extended meaning given to "retail shop" by the special definition in s. 3 (4). It follows that the hereditament is not an industrial hereditament and should not be entered on the special list.

The decision of the Court of Appeal, in agreement with the reasoning in some Scottish cases, to which we were also referred, was based on a separation of the

F bakehouse from the shop, and the inability to determine that the shop was the primary purpose. As already stated, I am of opinion that the dissection of a unified business such as is in fact carried on here is not justified. I prefer the reasoning of LORD HUNTER in his dissent in *Inland Revenue v. Gunn, Collie and Topping* (16), where he says (1930 S.C. at p. 401):

G "It may be contended with force that, if a large part of the premises is devoted to the purposes of manufacture or adaptation of goods for sale, all that you can affirm is that the premises are partly used for the purposes of retail business. On the other hand, it may be said that, as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the

H primary purpose for which the building as a whole is used is the carrying on of a retail business. My own view is in favour of the latter construction. The manufacture or adaptation for sale of the cloth by making it into suits appears to me to be ancillary to the retail business of selling suits of clothing. I think the subjects ought to be treated as a retail shop, and ought not to appear in the valuation roll as industrial subjects."

I Accordingly, the appeal should be allowed and the judgment of the King's Bench Division restored. The appellant to have the costs of this appeal and the costs in the Court of Appeal.

BANCROFT (MANCHESTER REVENUE OFFICER) v. MANCHESTER ASSESSMENT COMMITTEE AND UNION COLD STORAGE CO.

The appellants are the occupiers of a hereditament in Manchester known as No. 60, Miller Street. The assessment committee placed the hereditament upon the special list as an industrial hereditament. The matter came before the Divisional Court by way of appeal upon a Special Case. The Divisional Court

reversed the decision of the assessment committee and ordered the hereditament to be deleted from the special list. An appeal from the Divisional Court to the Court of Appeal was dismissed. The ground of decision both in the Divisional Court and in the Court of Appeal was that the hereditament was primarily occupied and used for purposes of storage within the meaning of the proviso to s. 3 (1) (d) of the Rating and Valuation (Apportionment) Act, 1928.

The appellants' name indicates the general character of the activities in which they are engaged. The nature of the premises in question and the manner in which they are occupied and used appear from the following passages taken from the Special Case :

10. The said hereditament comprises premises built by the Union Cold Storage Co., Ltd., and opened for business in May, 1903. The building is of substantial and special construction, brick built and fireproof; it contains sub-basement, basement, ground floor and eight upper floors with condensing chamber with coils on the roof. . . . The various floors are utilised as follows :

(i) *Sub-Basement*: Boiler and engine room containing two boilers, two engines and two auxiliary engines, two compressors, two dynamos, two circulating pumps, &c.; also refrigerating chamber No. 1 used for the refrigeration and/or refrigerated storage of bacon and fresh-killed meat. . . .

(ii) *Basement*: Upper floor of boiler and engine room and refrigerating chamber No. 2 used for the refrigeration and/or refrigerated storage of game and fish. . . .

(iii) *Ground Floor*: Private and general offices, lavatory, loadingway and refrigerating chamber No. 3 used for refrigeration and/or refrigerated storage of meat.

(iv) *First Floor*: Refrigerating chamber No. 4 used for refrigeration and/or refrigerated storage of various meat carcasses and offal.

The registration notices as a "non-textile factory" are on this floor.

(v) *Second Floor*: Refrigerating chamber No. 5 used for general refrigeration and/or refrigerated storage; offal, tripe, liver, &c.

(vi) *Third Floor*: Refrigerating chamber No. 6 used for refrigeration and/or refrigerated storage of mutton, lamb, beef, butter, &c.

On the landing outside this chamber there is an electrical band-saw for cutting up meat and carcasses . . . used for the purpose of trimming and cutting carcasses for sale.

(vii) *Fourth Floor*: Refrigerating chamber No. 7 used for refrigeration and/or refrigerated storage of butter, liquid eggs and general merchandise.

(viii) *Fifth Floor*: Refrigerating chamber No. 8, the larger part of which is used for refrigeration and/or refrigerated storage of butter and a small part, recently partitioned off, for refrigeration and/or refrigerated storage of beef.

(ix) *Sixth Floor*: Refrigerating chamber No. 9 used for refrigeration and/or refrigerated storage of bacon, fish, &c.

(x) *Seventh Floor*: Refrigerating chamber No. 10 used for preserving eggs. . . .

(xi) *Eighth Floor*: Refrigerating chamber No. 11 used for preserving eggs, and a special chamber and electric fan on this floor is set aside for de-frosting eggs. Eggs are chilled under close supervision after careful stacking. Constant surveillance and instrument readings are essential and de-frosting is carried out under like careful supervision, each egg being candled and examined before re-packing for dispatch.

11. The walls of all the refrigerating chambers are insulated by means of charcoal filled in between an outside and inside layer of timber. Such insulation consists of a wall 13 in. thick, comprising 9 in. charcoal impressed between thicknesses of tongued and grooved boards which are in turn insulated with waterproof paper. The process of refrigeration is carried out by means of the compression of ammonia and the circulation of expended ammonia in a complicated system of expansion pipes which are distributed throughout the premises. The system is known as a system of direct "expansion." Ammonia is compressed in the engines to a pressure of 150 lb. to the square inch and forced into condensers which are erected on the summit of the building. . . . In these condensers the ammonia

A liquefies and thereafter expands in the pipes causing a loss of heat in the process of expansion, the temperature in each chamber being subject to control. The building contains two hydraulic lifts and is lighted by electricity generated by the company, but corporation power is used for the electric band-saw. No ice is manufactured on the said hereditament.

B 13. . . . Chambers used in connection with meat. The processes carried on consist of freezing, chilling—an entirely distinct process not involving as in the case of freezing the destruction of any of the tissues of the meat under treatment—de-frosting, trimming, cutting and preparation of carcasses for sale, and on occasion special treatment of cargoes damaged in transit. A special charge is made for the processes by which produce is treated. . . . It was agreed before the respondent assessment committee that these charges greatly exceed the charges made by the C proprietors of warehouse depositories for the storage of goods committed to their charge.

14. Approximately 25 to 30 per cent. of the produce received by the occupiers is fresh and requiring to be refrigerated before export or sale in distant markets, and the remainder, approximately 75 per cent., has been already refrigerated and is kept by the occupiers in that state.

D 15. The said hereditament is registered as a non-textile factory under the Factory and Workshop Acts.

16. In connection with the general controlling of the temperatures in the said premises an engineer's inspection is held four times in each twenty-four hours, and the engineer making such inspection issues and signs a log which is preserved for future reference.

E 18. Meat, eggs, &c., subjected to refrigeration are not permitted to be sold as fresh. Frozen meat, chilled meat, fresh meat, fresh eggs and chilled eggs are recognised (in some instances by statute) as distinct marketable commodities.

The hereditament is registered as a non-textile factory under the Factory and Workshop Acts by reason of the presence thereon of the mechanically worked band-saw for trimming and cutting carcasses mentioned in the Special Case, but the F other purposes for which the hereditament is occupied and used are admittedly the primary purposes, and the question is whether such other purposes are factory or workshop purposes or fall within any of the categories (a) to (f) inclusive of s. 3 (1) of the Act of 1928.

I confess that upon first impression it is natural to conclude that premises occupied and used for storing goods until they are required by their owners are G used primarily for purposes of storage, even though refrigeration by means of an elaborate process involving the use of machinery is necessary for the preservation of the goods during storage. Your Lordships, however, heard from counsel for the appellants an ingenious argument to support the view that the processes by which goods are frozen, maintained frozen and de-frosted amount to an altering or adapting for sale of the goods within s. 149 (1) (c) (iii) of the Factory and Workshop H Act, 1901. It is pointed out that the freezing of some articles of food alters them by destroying tissue therein, that commercially all articles of food are altered by refrigeration in the respect that they cannot afterwards be sold as fresh, and that the several processes of freezing, maintaining frozen and de-frosting are for the most part carried out in order that the goods may be preserved for sale at some future time or may be made capable of transport to a distant market, or having I been preserved frozen for a future market may by de-frosting be made available at the appropriate time for that market. Upon this it is contended that the processes are really processes by which the goods are adapted for sale even if not altered in the freezing or de-frosting processes because without the application to the goods of the appropriate process or processes they could not be sold in the particular market for which they are destined by their owners.

It may be difficult or impossible to identify the essential quality of the operation described in s. 149 of the Factory and Workshop Act, 1901, "as the adapting for sale of any article," nor, in my view, is it necessary for the purposes of this case

to do so. The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms, namely, "the altering, repairing, ornamenting or finishing of any article," but it cannot, in my judgment, be stretched to cover the processes carried on by the appellants in the circumstances set out in the Special Case. Upon the facts of the Special Case storage is beyond question, at any rate as to about three-fourths of the goods handled, the primary purpose for which the hereditament is occupied and used, and though the processes in question as applied to such goods may alter them by affecting their quality, and though without their application the goods might not be available for sale in the markets in which they are in fact ultimately sold, yet it is as incidental to storage and to render storage possible, and not otherwise, that the processes are applied. In my judgment, the courts below were right in the conclusion at which they arrived, and this appeal should be dismissed with costs.

Solicitors: *Treasury Solicitor; Godden Holme & Ward; Field, Roscoe & Co., for Jobson & Marshall, Dudley; Corbin, Greener, & Cook, for Smith & Ibberson, Barnsley; Cunliffes, Blake, & Mossman, for Meek, Stubbs, & Barnley, Middlesbrough; Torr & Co., for Clough, Crabtree, & Ineson, Cleckheaton; Herbert Smith, for Westthrop, Cobbold, & Ward, Ipswich; Neve, Beck, & Crane; Charles H. Wright & Tracey.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

DEPENDABLE UPHOLSTERY, LTD. v. BRASTED (MCKENZIE (THIRD PARTY))

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), June 11, 1931]

[Reported [1932] 1 K.B. 291; 100 L.J.K.B. 631; 145 L.T. 588;
47 T.L.R. 521; (1926-31), 2 B.R.A. 485]

Landlord and Tenant—Outgoing—Claim against landlord—Sum repaid by tenant to sub-tenant on premises being classed as industrial hereditament and rates being reduced—Payment "in respect of demised premises"—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), s. 3—Local Government Act, 1929 (19 Geo. 5, c. 17), s. 73 (1).

By s. 73 (1) of the Local Government Act, 1929: "Where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord, then, so long as under any contract made before the commencement of this Act there is payable by the tenant in respect of the hereditament rent inclusive of those rates, the landlord shall . . . be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates . . . and the amount which would have been so payable at the rate in the pound current for the time being if the rateable value of the hereditament had been equivalent to the net annual value thereof."

By a lease dated Dec. 31, 1927, the third party leased premises to the defendants for a term of seven-and-a-quarter years from March 25, 1927, at a rent of £285 a year and a further rent of £291 by way of rates, and the third party covenanted to indemnify the defendants against all rates, taxes and outgoings whatsoever in respect of the demised premises. By a lease dated Jan. 2, 1928, the defendants demised the premises to B., Ltd., for a term of seven-and-a-quarter years less three days from March 25, 1927, at an inclusive rent of £850 a year, the defendants covenanting to indemnify B., Ltd., against all

A rates, taxes and outgoings whatsoever. On April 1, 1929, B., Ltd., assigned the residue of the term to the plaintiffs subject to the covenants contained in the lease of Jan. 2, 1928. Under the Rating and Valuation (Apportionment) Act, 1928, the premises were classed as an industrial hereditament and their rateable value was, accordingly, reduced. FINLAY, J., held that under s. 73 (1) of the Local Government Act, 1929, the defendants, as landlords, were liable to pay to the plaintiffs the difference between the amount of the rates payable before the Act of 1928 and those payable as a result of the application of that Act to the premises. On a claim by the defendants against the third party to be indemnified against this payment,

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C **Held:** (i) the payment could not properly be described as an "outgoing" within the covenant in the lease of Dec. 31, 1927, which connoted some expense to which the defendants, as tenants, were put;

(ii) the payment was not "in respect of the demised premises," and so not within the covenant, but was rather in respect of the demise of the premises by the defendants to the plaintiffs;

D (iii) the "outgoing" must be payable in respect, not only of the occupation, but also of the use of the premises, and the defendants were not using the premises;

and, therefore, the defendants were not entitled to the indemnity claimed.

Notes. As to covenants for payment of rates and taxes and outgoings, see 23 HALSBURY'S LAWS (3rd Edn.) 610 et seq.; and for cases see 31 DIGEST (Repl.) 324, 328 et seq. For Rating and Valuation (Apportionment) Act, 1928, and Local Government Act, 1929, see 20 HALSBURY'S STATUTES (2nd Edn.) 173 and 190 respectively.

E Case referred to:

(1) *Crosse v. Raw* (1874), L.R. 9 Exch. 209; 43 L.J.Ex. 144; 23 W.R. 6; 31 Digest (Repl.) 335, 4689.

Appeal from an order of FINLAY, J.

F By a lease dated Dec. 31, 1927, the third party, James McKenzie, leased certain premises to the defendants for a term of seven-and-a-quarter years from March 25, 1927, at a rent of £285 yearly and a further rent of £291 15s. 11d. by way of rates. McKenzie covenanted to indemnify the defendants against all rates, taxes and outgoings whatsoever. By a lease dated Jan. 2, 1928, the defendants demised the premises to S. and J. Breckman, Ltd., for a term of seven-and-a-quarter years less three days from March 25, 1927, at an inclusive rental of £850 a year. Under that lease the lessors covenanted to pay the rent reserved by and to observe the covenants contained in the lease and to indemnify the lessees against all rates, taxes and outgoings whatsoever, which were, or might become, payable in respect of the demised premises. On April 1, 1929, S. and J. Breckman, Ltd., assigned the residue of the term to the plaintiffs subject to the conditions and covenants contained in the lease at an inclusive rental of £850. At all the material times the premises were in the occupation of the plaintiffs and were used by them for the manufacture of furniture. Under the Rating and Valuation (Apportionment) Act, 1928, the premises were classed as wholly industrial, at a net annual value of £465 and a rateable value of £116. Under s. 68 (1) (a) of the Local Government Act, 1929, the rates payable as from Oct. 1, 1929, were £32 17s. 4d., based on the rateable value of £116. The plaintiffs claimed that they were entitled, as an allowance or deduction from rent by the defendants on account of rates, to the sum of £98 17s. 8d., being the difference between £131 15s. and £32 17s. 4d. They relied on s. 73 (1) of the Local Government Act, 1929, by which:

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I "Where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord, then, so long as under any contract made before the commencement of this Act there is payable by the tenant in respect of the hereditament rent inclusive of those

rates, the landlord shall, as from the appointed day, be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates, after deducting any allowance, commission, abatement, or deduction granted to him by the rating authority, and the amount which would have been so payable at the rate in the pound current for the time being if the rateable value of the hereditament had been equivalent to the net annual value thereof."

The defendants denied liability, contended that the word "landlord" in the above section meant "head-landlord," and served a third-party notice on the widow and executrix of James McKenzie, claiming indemnity in respect of any liability (if any) to the plaintiffs under the covenant in their lease.

FINLAY, J., held that the word "landlord" was not confined to "head-landlord," and that the defendants were liable as landlords under s. 73 (1) of the Local Government Act, 1929, to make the allowance claimed, and he held, further, that as between the defendants and the third party the word "outgoings" was a wide term and included such a payment as this, and, therefore, the defendants were entitled to be indemnified by the third party. The third party appealed.

Scholefield, K.C., and *H. H. C. Graham* for the third party.

Laski, K.C., and *Lawson Campbell* for the defendants.

SCRUTTON, L.J.—Most questions under the Rating and Valuation (Apportionment) Act, 1928, have given rise to difficulty, and it would seem that we have now arrived at a second stage in their elucidation. We have had a series of cases dealing with what premises are, or are not, to be de-rated, a series that still continues. The next series deal with the questions: When the premises are being de-rated who is to get the benefit of the de-rating—of the reduction from 100 per cent. to 25 per cent.—the landlord or the tenant? What is to happen when there is a series of landlords and tenants, the landlord letting to a tenant, who sub-lets to a tenant, and so on? To whom is the benefit of the de-rating to go?

The present case arises in this way. The plaintiff company, Dependable Upholstery, Ltd., were in occupation of a hereditament, carrying on thereon a business which entitled the hereditament to be put in the special list for de-rating as an industrial hereditament, so that 25 per cent. of the rates, instead of 100 per cent., were paid. They paid to their landlord an inclusive rent of £850 which was paid upon the footing that the landlord would ultimately bear the expense of the rates. What was to happen when the rates were by Act of Parliament reduced from 100 per cent. to 25 per cent.? The rent had been paid on the supposition that the rates were 100 per cent. Parliament evidently contemplated that that state of facts would arise, and in the Local Government Act, 1929, which followed the Act of 1928, they introduced s. 73 (1), which provides:

"Where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord, then, so long as under any contract made before the commencement of this Act there is payable by the tenant in respect of the hereditament rent inclusive of those rates, the landlord shall, as from the appointed day, be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference . . ."

The difference is set out in lengthy language; it is, in my view, merely the difference between 100 per cent. and 25 per cent. In the present case the landlord has undertaken to indemnify the tenant against the rates. The tenant is the person who primarily pays them, but the landlord has undertaken to indemnify him against them, and I do not myself think that you can draw a difference between the words "payable by" and "liable to indemnify against." The material contract was made before the commencement of the Act of 1928, and the rent was inclusive of rates because the landlord undertook to indemnify the tenant against them.

By s. 73 (1) the legislature are giving this benefit of 75 per cent. reduction to

A the occupying tenant. If the occupying tenant was left still liable to pay on the supposition that the landlord was to pay 100 per cent., the benefit would have been granted, not to the occupying tenant, but to the landlord. Acting under that section, the plaintiffs, who paid the 25 per cent., but whose contract with the defendants was fixed on the assumption that the rate was 100 per cent., claimed from them the payment of the 75 per cent., so that they might reap the benefit of the de-rating. That issue was fought in the court below, and FINLAY, J., decided that the defendants were liable to pay the plaintiffs 75 per cent., and there is no appeal before us in respect of that order.

The appeal before us arises in this way. The defendants were tenants of the third party. The third party were to pay a rent of £285 by equal quarterly payments, and also the further rent by way of rates of £291 15s. 11d. They were to pay the rent without any deduction, and then comes this provision, which is the one upon which this case turns :

D “Also that he, the lessor [the third party], will pay the rent reserved by and observe the covenants contained in the lease under which he holds the demised premises and keep the lessees [the defendants] indemnified against the same and against all rates and taxes and outgoing whatsoever which now are or hereafter may become payable in respect of the demised premises.”

The defendants, who have been held liable to pay £98 to their tenant because of the provisions of s. 73 of the Local Government Act, 1929, now say to their landlord, the third party : “The £98 is an outgoing against which you have to indemnify me.” It is an outgoing which hereafter becomes payable in respect of the demised premises. The learned judge has held that the defendants’ contention is right, and the matter now comes on appeal before us.

I think it is clear that s. 73 does not apply in this case, because it only applies to a case where rates in respect of an industrial hereditament occupied by a tenant are payable by the landlord, and the defendants are not in occupation of an industrial hereditament. A landlord is not in occupation of the premises which he has leased to a tenant, and the defendants have let these premises to an occupying tenant. We may, as a matter of fact, leave s. 73 out of consideration, except in so far as to explain what is the £98 for which the defendants have sued the third party. The question then is whether that sum, the nature of which I have already explained, is an outgoing in respect of the demised premises? To state accurately what it is, I think it is a sum which has had to be paid by the defendants to the sub-tenant, because the demised premises have been relieved of rates, for the rent payable to the lessee by the sub-lessee had been fixed on the assumption that full rates would have to be paid. The first question that occurs to me is this : Is this sum an outgoing at all? Is it not merely a balance transaction, a transaction which, when looked at, is not an outgoing? As I understand the position, it is this. It is anticipated that £100 will have to be paid on the premises by way of rates, and the landlord says : “Well, there is £100 to be paid. I will relieve you of that expense if you make the rent £100 higher.” Then comes the statute which turns the £100 into £25, whereupon the matter is rectified by Parliament by saying to the landlord : “You made your rent £200 on the assumption that you were to pay £100 rates, but if you are not going to pay £100, but only £25, the rent will have to be reduced by £75.” In that state of things, the payment of £75 by the tenant to the sub-tenant is not an outgoing. It is a balance transaction—£100 one way, £100 the other, £50 one way, £50 the other—and I do not think the phrase “outgoing” is at all appropriate to such a transaction.

Secondly, the covenant is to indemnify against an outgoing payable in respect of the demised premises; and with the best consideration I can give to the matter I think this payment is not in respect of the demised premises, but in respect of the demise of those premises by the defendants, which seems to me to be quite a different thing, and that this sum has become payable because of the particular lease which the defendants have made and the particular person to whom they have

made it. On those two grounds—(i) that I do not think it is an outgoing at all; (ii) that, if it is an outgoing, it is not an outgoing in respect of the demised premises—and on the further ground (iii) that, having regard to the language of s. 73, I do not think Parliament considered going beyond the actual tenant of the premises and his landlord, and did not contemplate following the matter back to another landlord and another landlord till at last you come to the head landlord, I come to the conclusion that the third party was right in his contention that he was not liable to pay to the defendants the sum that they had become liable to pay to the plaintiffs. Accordingly, the order made against the third party must be set aside, and the third party must have judgment against the defendants with costs. A B

GREER, L.J.—I am of the same opinion. The learned judge has ordered the third party to pay to the defendants by way of indemnity a sum of £98 17s. 8d., and made a declaration of indemnity in the terms of the statement of claim by the defendants against the third party, which I need not cite, on the ground that the defendants were entitled to that relief under a covenant contained in the lease of certain premises in Hackney which are described as a floor consisting of a workshop and offices. The lease is dated Dec. 31, 1927, and it is described as a lease for seven-and-a-quarter years of "all that large room offices and workshop on and consisting of the first floor of the building" described in the plan. And the rent is to be £285, payable by equal quarterly payments on the usual quarter days, and also the further rent by way of rates of £291 15s. 11d. It seems to me that the division of the rent in that way does not make any material difference to the question we have to determine. The question is the same as if the rent had been stated in one sum with an undertaking by the lessor to indemnify the lessee. The lease covenants for C D E

"the clear yearly rent of £285 by equal quarterly payments on the usual quarter days, without any deduction or abatement thereof except the landlord's property tax."

Later in the conveyance is the covenant which has to be interpreted for the purposes of this appeal and applied to the facts of this case. It is in these terms: F

"... and also that the lessor will pay the rent reserved by and observe the covenants contained in the lease under which he holds the demised premises and keep the lessees indemnified against the same and against all rates and taxes and outgoings whatsoever which now are or hereafter may become payable in respect of the demised premises." G

Now, I think on the same date there was a sub-lease by the defendants to the assignees of the plaintiffs in the action at a rent of £850 per annum, with a similar covenant to indemnify against the payment of rates. That was the position of affairs when was passed the Act of 1928 which granted relief in respect of the rates to industrial hereditaments. There is no question but that the premises we are considering in this case constitute an industrial hereditament, and, therefore, so far as this case is concerned, it is common ground that the defendants' tenants, the plaintiffs, were entitled to relief in respect of three-quarters of their rates. But it occurred to the legislature that, though in the Act of 1928 they intended that the benefit of the de-rating should go to the person carrying on the business in the industrial hereditament, there might be terms in leases which, instead of letting him have the benefit intended by Parliament, would give the benefit to his landlord. To prevent that happening, s. 73 of the Act of 1929 was passed. I regard that as a section intended to leave the lessor of an industrial hereditament in exactly the same position as he was in before the Act of 1928 was passed—that is to say, that, instead of paying the rates which he had to pay at the time he entered into the lease, he paid a lesser sum as rates and the difference to his tenant. The effect of this is that, notwithstanding the terms of the lease between the occupier of the industrial hereditament and his immediate landlord, the benefit of the de-rating goes to the occupier and is prevented from going to the landlord. H I A

A But to me it is quite clear, though counsel contends the contrary, that the position of the immediate landlord of the industrial hereditament is, by this section, made no worse than it was before the Act was passed. I am satisfied that, in those circumstances, it would be a misuse of words to describe the allowance which he has to make to his tenant, so as to prevent him (the landlord) getting the benefit of de-rating as an outgoing which he is incurring under the lease which he has with

B his own landlord. It seems to me it is not an outgoing at all. An outgoing means some expense that the tenant was put to. It may be by reason of a new Act of Parliament, but it must be in essence an expense that he is put to. The mere fact that, in order to maintain him in the same position as he was before, a provision is contained in an Act that what he got on the swings he shall lose on the roundabouts, if I may put it in that way, does not amount to providing for any outgoing

C on his part within the meaning of the covenant in his lease. It may be a piece of good luck for the head landlord that by reason of the legislation he is put in a better position than he was before, but that does not avail his tenant unless his tenant is able to show that the statute has imposed upon him by way of outgoing an expense which he had not to bear before the Act was passed. For these reasons I agree with my Lord that this appeal should be allowed and the order made in

D the terms my Lord mentioned. I also agree with the observations made by my Lord in reference to the order as regards costs.

SLESSER, L.J.—I agree for several reasons that the third party should succeed in this appeal. It is clear, I think, that when the lease of Dec. 31, 1927, put upon the third party an obligation to indemnify in respect of outgoings payable in respect

E of demised premises, the words "outgoings payable" there referred to some expense to which the lessee was put in respect of the demised premises. As **BRAMWELL, B.**, said in *Crosse v. Raw* (1) (L.R. 9 Exch. at p. 212):

"It [the outgoing] would certainly be something which had gone out, an expense which he had been at in respect of the premises, and it would have been an expense imposed upon him."

F For the reasons stated by my Lord, I think it is clear that here there was no expense so imposed upon him by reason of the provisions of s. 73 of the Local Government Act, 1929, in respect of relief of rates which had been given to his sub-tenant.

My second reason for thinking that the defendants cannot avail themselves of this language is this. It is said that the outgoings are payable in respect of the demised premises. In my view, the payments which were made here, which under

G s. 73 it is said the sub-lessee is entitled to recoup from his sub-lessor, were made in respect of the occupation and user of a certain hereditament. In s. 68 (1) of the Local Government Act, 1929, relief is given in respect of an industrial hereditament shown as being occupied and used wholly for industrial purposes as there stated. It is true that the lease and the sub-lease here speak of a workshop. It does not

H follow, merely because it is a workshop, that it is a fit subject for relief of rates within the meaning of the Act of 1929 or the Act of 1928, and, therefore, it is clear that it is because it is occupied and used in the manner there contemplated that the relief is given. I agree with my Lord that in those circumstances the outgoing must be payable in respect of the demise, in respect of not only the occupation, but also of the user, of the demised premises, and not only in respect of the demised

I premises as such, which might have been used for a different purpose, and so would not have obtained relief.

Speaking for myself, in addition to those two reasons, both of which are sufficient to justify this appeal, I think that it is at least arguable that this case ought never to have been held to have fallen within s. 73 at all. That point was not clearly before us. The notice of appeal does not raise it, and I certainly should not decide this case in favour of the third party upon that ground; but, in considering what is the meaning of the word "outgoing," which must, I think, mean an outgoing that someone is legally liable to pay, I do want to keep open for myself this question.

Section 73 speaks of the rates payable by the landlord and later on speaks of A
allowing as

"deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates, after deducting any allowance, commission, abatement, or deduction granted to him by the rating authority . . ."

That language does, in my view, appear to point to some payment which the landlord has, by agreement or otherwise, contracted to pay, and, though I have no doubt that the intention of the legislature was to cover cases where the tenant was to pay and the landlord was to indemnify against the payment, it is by no means clear to my mind that s. 73 has succeeded in covering the present case. In the present case the original obligation to pay is upon the tenant. The obligation upon the landlord is to indemnify the tenant for the payment of the rates. But, as I say, I do not base my decision on that ground. It would not be an outgoing in any view, because there would have been no obligation on the lessee, under the lease of Dec. 31, 1927, to have paid it or allowed a deduction by way of rates, because there would have been that sum, under any argument, payable by the landlord. That point, however, was not very clearly contested in the court below, and the parties have accepted the position that s. 73 does apply. I think the matter may have to be considered one day.

Appeal allowed.

Solicitors: *Cooper, Blake, Fettes, Roche, & Wade; Harris, Chetham, & Cohen.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

BLAKEY v. PENDLEBURY (A BANKRUPT) PROPERTY TRUSTEES

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 6, 7, June 8, 1931]

[Reported [1931] 2 Ch. 255; 100 L.J.Ch. 399; 145 L.T. 524;
47 T.L.R. 503; [1931] B. & C.R. 29]

Bankruptcy—Property available for distribution—Debts "growing due"—Future payments under hire-purchase agreements—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c).

At the commencement of the bankrupt's bankruptcy he had a right to receive a number of monthly sums which became payable thereafter under hire-purchase agreements entered into between him and hirers so long as the hirer in each case should see fit to continue the hiring.

Held: these monthly sums were debts "growing due" within the exception in the proviso to s. 38 (c) of the Bankruptcy Act, 1914, and so were property of the bankrupt divisible among his creditors.

Per ROMER, L.J.: The words "growing due" bring within the exception in the proviso sums which are payable on a contingency, that is to say, sums that are not at present debts at all, but which in a certain contingency may grow into debts.

Re Fastnedge, Ex parte Kemp (1) (1874), 9 Ch. App. 383, distinguished.

Notes. Considered: *Jatham v. Goldsbury*, [1933] All E.R. Rep. 565.

As to property available for distribution in a bankruptcy, see 2 HALSBURY'S LAWS

A (3rd Edn.) 404 et seq., and for cases see 5 DIGEST 630 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Fastnedge, Ex parte Kemp* (1874), 9 Ch. App. 383; 43 L.J.Bey. 50; 30 L.T. 109; 22 W.R. 462, L.J.; 5 Digest 802, 6856.
- B (2) *Helby v. Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 3 Digest 93, 245.
- (3) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 5 Digest 697, 6128.
- (4) *Re Davis, Ex parte Rawlings v. Pipe* (1888), 60 L.T. 157; 37 W.R. 142; on appeal, 22 Q.B.D. 193; 37 W.R. 203, C.A.; 5 Digest 775, 6663.
- C (5) *Re Isaacson, Ex parte Mason*, [1895] 1 Q.B. 333; 64 L.J.Q.B. 191; 71 L.T. 812; 43 W.R. 278; 11 T.L.R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C.A.; 3 Digest 97, 261.

Appeal by the trustees of the property of one Pendlebury, a bankrupt, from an order of the Vice-Chancellor of Lancaster Chancery Court.

The bankrupt had traded as Pendlebury & Co., and between February, 1929, and February, 1930, he entered into twenty-seven agreements with the Gresham Guarantee Co., by which, in consideration of advances to him by the Gresham company, he agreed to deposit the hire-purchase agreements specified in the schedules to each of the twenty-seven agreements and on demand to assign to that company or its nominees the benefit of the hire-purchase agreements and to stand possessed of that company's rights under such agreements in trust for that company until the transfer to that company of the agreements. On March 18, 1930, the Gresham company assigned the benefit of the twenty-seven agreements to the plaintiff, and appointed him as its nominee. The hire-purchase agreements were for the hire and purchase of pianos, and provided for payment by the hirer of £4 at the date of the agreement, and thereafter £1 a month, payable in advance, until the piano was paid for, when it became the property of the hirer. No notice of the assignment of March 18, 1930, was given by the plaintiff or the Gresham company to the hirers of the pianos. On July 23, 1930, Pendlebury was adjudicated bankrupt.

The plaintiff, James Blakey, claimed (i) a declaration that by virtue of twenty-seven agreements (hereinafter referred to as the traders' agreements) entered into between the Gresham Guarantee Co. and the bankrupt, which had been assigned to the plaintiff on March 18, 1930, he was entitled to have the benefit of the hire-purchase agreements specified in the schedules to the traders' agreements, so far as the same were legally assignable, assigned to him as assignee and/or nominee of the Gresham Guarantee Co. absolutely, or, in the alternative, by way of security for all moneys advanced by the Gresham Co. to Pendlebury, and that until such hire-purchase agreements should be transferred to the plaintiff they were held in trust for the plaintiff as such assignee and/or nominee absolutely or in the alternative by way of security; (ii) that the defendants might be ordered to assign to the plaintiff as such assignee or nominee the benefit of the hire-purchase agreements, so far as the same were legally assignable pursuant to the traders' agreements, and, if and so far as necessary, specific performance of such agreements; (iii) a declaration that all moneys already collected or received, or thereafter to be collected or received, by the defendants under the hire-purchase agreements were and should be held by them in trust for the plaintiff as such assignee or nominee; (iv) payment of all such moneys collected or received.

The defendants, trustees in the bankruptcy, contended that the moneys payable under the hire-purchase agreements were in the possession, order, or disposition of the bankrupt within s. 38 (c) of the Bankruptcy Act, 1914, as being "debts due or growing due to the bankrupt in the course of his trade or business" within the exception in the proviso to that paragraph. The Vice-Chancellor held that the sums payable under the hire-purchase agreements were, not debts, but

contingent claims which might or might not end in becoming debts. The Vice-Chancellor gave judgment for the plaintiff, and the trustees appealed. A

Sir Herbert Cunliffe, K.C., and W. Taylor for the trustees.

Cyril Atkinson, K.C., and Allan Walmsley for the plaintiff.

Cur. adv. vult.

June 8. The following judgments were read. B

LORD HANWORTH, M.R.—This is an appeal from a decision of the Vice-Chancellor given on Feb. 5, 1931, whereby he made the declaration asked for by the plaintiff in the statement of claim.

The question to be determined is whether the interests of the Gresham Guarantee Co. in the hire-purchase agreements entered into between the bankrupt and a number of his customers, of which interests the plaintiff is the assignee, have passed to the plaintiff, or whether they fall within s. 38 (c) of the Bankruptcy Act, 1914, and are part of the bankrupt's property divisible among his creditors. The words in the subsection which, it is argued, intercept the interests are those of the proviso: C

"Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section." D

Do the words "debts due or growing due" bring back these interests so as to include them in the goods of the bankrupt in the order or disposition of the bankrupt in his trade or business? It has been decided in *Helby v. Matthews* (2) that a hiring agreement drawn in the form which was in substance the form used by the bankrupt in his business does not involve or contain any legal obligation on the part of the hirer to buy the goods lent to him, and there is no agreement to buy. The hirer has an option either to return the goods or to pay in advance for the time he keeps them in his possession with a right to terminate the hiring and option at any time. As LORD HERSCHELL said ([1895] A.C. at p. 476): E

"I cannot think that an agreement to buy if he does not change his mind is an agreement to buy at all in the eye of the law." F

If there is no agreement in law, there is no debt due or accruing due, for the payments are to be made in advance if the hiring is to be continued. It was held by MELLISH, L.J., in *Re Fastnedge, Ex parte Kemp* (1), that so-called debts which were only contingent at the commencement of the bankruptcy did not fall within the expression "debts due to [the bankrupt] in the course of his business" within s. 15 (5) of the Bankruptcy Act, 1869, which was the Act then in force, and which the lord justice had to interpret. It is largely upon the principle embodied in that case that the Vice-Chancellor based his judgment and the case must, therefore, be examined with care. G

It will be observed that the terms of sub-s. (5) of s. 15 are not the same as those of s. 38 (c) of the Act of 1914, with which we have to deal; "other than debts due to him in the course of his trade or business" were its words. There was no addition of "or growing due." Those words were first inserted in the corresponding section, s. 44, of the Bankruptcy Act, 1883. MELLISH, L.J., in the course of his judgment said (9 Ch. App. at p. 388): H

"It is impossible that acceptances payable in futuro, or bills of exchange receivable in futuro, were intended to be excluded from the list of debts due to, or by, a bankrupt." I

Thus, the judgment must be based on the fact that the debts in that case were contingent only. It was uncertain whether they would mature into debts at all. But so-called "debts" payable in futuro were, in the opinion of the lord justice, within the narrower terms of the then Bankruptcy Act: see also his words (9 Ch. App. at p. 390), where he points out that the section is intended to apply to the ordinary course of business of traders, who are often compelled to give long

A terms of credit to their debtors, and that this, being known to their creditors, procures them credit also, the result being, that a debt, although its due date for payment is postponed, must be treated as within the term "debts due in the course of his trade or business." The present Bankruptcy Act maintains the phrase as altered by the Act of 1883, and some additional effect beyond that attributed by MELLISH, L.J., to "debts due to him in the course of his trade or business" must
B belong to the words "growing due." They are not required to cover a debt debitum in presenti solvendum in futuro.

The word "debt" seems to connote a contractual liability as between debtor and creditor, but "growing due" is not an apt expression to cover a debt which is already a contractual obligation, though the due date for payment has not yet been reached. It seems to intend something that in the course of the trade or business
C will ripen into a debt, though not a debt, and only in an inchoate state, at the commencement of the bankruptcy. If this be the true interpretation of s. 38 (c), it would seem that, although under the hiring agreement there was no engagement to hire for any particular time, and payment was to be made in advance for each continuation of the hiring, yet there was a relation between the bankrupt and hirer out of which a debt might grow. In *Tailby v. Official Receiver* (3) the House of
D Lords held that an assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business. LORD HERSCHELL states the question decided in the case to be this (13 App. Cas. at p. 527):

E "Whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid."

The word "debt" is thus used, not of an existing contractual liability, but of something which is to mature in the future, and which, as LORD WATSON said (13 App. Cas. at p. 533):

F "on its coming into existence, it shall answer the description in the assignment or, in other words, that it shall be capable of being identified as the thing, or one of the very things assigned."

In *Re Davis, Ex parte Rawlings* (4) CAVE, J., held that debts due under a hire-purchase agreement which had been assigned, but of which no notice had been
G given to the hirer, were in the order or disposition of the bankrupt.

It is said that in the present case there was no assignment of debts of any kind, because there were no debts properly so called accruing due under the hiring agreement, for there was no engagement on the part of the hirer to continue the hiring, and it was only continued if and when the payment of the hire or rent due had been made in advance—that the assignment, therefore, was only of the contractual and proprietary rights independently of the subject-matter of the hiring agreements—rights which are separate from the piano as in *Re Isaacson, Ex parte Mason* (5). This argument appears to give too narrow a construction to the subsection and to overlook the commercial sense attributable to the words we have to construe as demonstrated in *Tailby v. Official Receiver* (3). The opinion that I have expressed renders it unnecessary to consider the questions argued upon s. 43.

I The appeal must be allowed with costs here and below and the order of the Vice-Chancellor must be discharged. In lieu thereof, an order must be made upon the counter-claim for delivery-up of the agreements specified in the statement of claim to the trustees.

LAWRENCE, L.J.—The first and main question in this appeal is whether the monthly payments becoming due and payable after the commencement of the bankruptcy under certain hire-purchase agreements entered into before the bankruptcy were debts growing due to the bankrupt in the course of his trade or

business at the commencement of the bankruptcy within the meaning of s. 38 of the Bankruptcy Act, 1914. A

The bankrupt was a piano dealer, and in the course of his business entered into numerous hire-purchase agreements with his customers. Under each of these agreements (which were all in the same form) the bankrupt agreed to let on hire to the hirer a specified piano and the hirer agreed (inter alia) to pay to the bankrupt a sum of £4 down and thereafter a sum of £1 per month in advance so long as the hirer saw fit to continue the hiring, and the bankrupt agreed that, if the hirer should punctually pay the sum of £68 5s. in manner aforesaid, the piano should become the property of the hirer, but that unless and until the full sum of £68 5s. had been paid the piano should be and continue to be the sole property of the bankrupt. The present case is concerned with the hire of £1 per month, payable after the commencement of the bankruptcy under such of the hire-purchase agreements as were current at that date. B C

The bankrupt deposited about 200 of his hire-purchase agreements with the Gresham Guarantee Co. to secure advances made to him by that company and entered into twenty-seven covering agreements (therein and hereafter called traders' agreements). These traders' agreements were all in the same form, and by each of them the bankrupt agreed to deposit with the company certain specified hire-purchase agreements and to assign to the company or its nominees the full benefit of such agreements so far as the same were legally assignable, and further agreed that until such agreements should be transferred to the company or its nominees he should stand possessed of his rights thereunder in trust for the company. Each of the traders' agreements contained a provision that the chattels, the subject-matter of the hire-purchase agreements, were not intended to be assigned, but the ownership thereof should remain in the bankrupt until the hirer had exercised his option of purchase. On March 18, 1930, the Gresham Guarantee Co. assigned to the plaintiff the full benefit of the twenty-seven traders' agreements and the rights of the Gresham Guarantee Co. thereunder. Neither the Gresham Guarantee Co. nor the plaintiff gave notice of the traders' agreements or of the assignment of March 18, 1930, to the hirers of the pianos, and it is not disputed that all sums which had become due and payable under the hire-purchase agreements before the commencement of the bankruptcy (as well as all monthly sums thereafter to become due and payable thereunder if such last-mentioned sums should be held to be "debts growing due" to the bankrupt in the course of his trade or business within the meaning of s. 38) were at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner in such circumstances that he was the reputed owner thereof. The learned Vice-Chancellor held that as under the hire-purchase agreements there was no legal obligation to buy pianos (*Helby v. Matthews* (2)), and as the hiring could be determined at any time, the agreement to pay the monthly hire of £1 only created contingent claims, and, consequently, that all sums becoming due and payable in respect of hire after the commencement of the bankruptcy were neither debts due nor debts growing due within s. 38 (c). This decision was based upon the judgment of MELLISH, L.J., in *Re Fastnedge, Ex parte Kemp* (1). In that case (which was decided when the Bankruptcy Act, 1869, was in force) it was held that, although the expression "debts due" in s. 15 (5) of the Act was not confined to debts presently payable, yet it did not include debts which were only contingent at the commencement of the bankruptcy, such as the moneys retained by bankers against acceptances for which they had given marginal notes. In the Bankruptcy Act, 1883, the expression "debts due, &c.," was expanded into "debts due and growing due, &c.," and this latter expression was repeated in s. 38 of the Bankruptcy Act, 1914. D E F G H I

The Vice-Chancellor has, in my judgment, given too narrow a meaning to the words "growing due" added by the legislature since *Ex parte Kemp* (1) was decided. If, as the Vice-Chancellor has held, these added words were limited to debts due, but not presently payable, their insertion in the subsequent Acts

A would not have effected any expansion of the previous expression "debts due," as interpreted by the court, and would have rendered their addition otiose. In my judgment, the words "growing due" were added by the legislature to meet such cases as *Ex parte Kemp* (1) and the present case, and the added words ought not to be construed so as to exclude the monthly hire becoming due under the hire-purchase agreements after the commencement of the bankruptcy. All the monthly payments in question became and will become due and payable under agreements entered into by the bankrupt in the ordinary course of his business before the commencement of his bankruptcy. Each agreement, although determinable by the hirer at any time, created at the time it was entered into an obligation on the part of the hirer to make the monthly payments thereunder so long as he retained the piano and did not put an end to the agreement. Therefore, all payments becoming due and payable after the commencement of the bankruptcy under an agreement in force at the date of the commencement of the bankruptcy may properly be termed debts "growing due" to the bankrupt within the meaning of s. 38 (c). Such debts, when they mature, could only be recovered under the agreement out of which they may be said to have grown. The fact that some of the payments covered by the agreement may never ripen into debts does not, in my opinion, prevent those which do eventually so ripen from being debts which have grown due to the bankrupt in the course of his business. All the monthly payments under the hire-purchase agreements come directly within the mischief aimed at by s. 38 (c) of the Act of 1914; they are payments which a trader in good credit does not usually pledge or part with, and are, therefore, very likely to procure the bankrupt credit from the manufacturers of the pianos which he purchases and from other persons: see *Ex parte Kemp* (1) (9 Ch. App. at p. 389). In these circumstances I am of opinion that such payments are included in the expression of "debts growing due," &c., in s. 38. I am confirmed in this view by the use of the expression "debts growing due under specified contracts" in the proviso to s. 43, and of the expression "book debts growing due" in s. 55 (1), in both of which sections I think it is fairly plain that those expressions were intended to cover such payments as the monthly hire becoming due and payable under the hire-purchase agreements in the present case.

Having reached the conclusion that the trustees are right on their first and main contention, it becomes unnecessary to consider their second point under s. 43 on which I prefer not to express any opinion. I agree, therefore, that this appeal succeeds with the consequences indicated by the Master of the Rolls.

G **ROMER, L.J.**—At the commencement of Pendlebury's bankruptcy his right to receive the monthly sums thereafter payable in advance under each hire-purchase agreement so long as the hirer should see fit to continue the hiring was a thing in action which must be deemed to have been in his possession, order, or disposition, in his trade or business, by the consent and permission of the true owner. For H Pendlebury had by the trade agreements agreed to assign to the plaintiff's assignors the full benefit of the hire-purchase agreements, and neither the plaintiffs nor their assignors had given notice of their equitable title to the sums in question. But such things in action are not goods within the meaning of s. 38 (c) of the Bankruptcy Act unless they are "debts due or growing due to the bankrupt in the course of his trade or business." The learned Vice-Chancellor held that they were not I debts at all, being neither due nor payable at the commencement of the bankruptcy. That they were not at that date debts properly so called must, of course, be conceded. It is also quite clear that they were not then due. The question to be decided on this appeal, however, is whether they were not "debts growing due" within the meaning of the section.

In order to construe the section it is, I think, permissible to consider the mischief that the legislature had in view when enacting it. Under s. 15 (5) of the Bankruptcy Act, 1869, the only things in action that could be deemed goods and chattels for the purposes of the subsection were debts due to the bankrupt in the course of

his trade or business. The meaning to be attributed to these words was considered by MELLISH, L.J., in *Re Fastnedge, Ex parte Kemp* (1). He held that the words covered not only debts presently payable, but debts that, though presently due, were not payable until a future date. But he held, further, that the words did not include sums that might never become payable at all. Such sums, he said, were not debts properly speaking. That the lord justice put the proper construction upon the words of the section no one, so far as I know, has ever doubted. But it is permissible to doubt whether the legislature would have excluded such sums from the order and disposition section had its attention been drawn to the matter. Where, as in the present case, a trader having the practically, though not legally, certain prospect of receiving large sums in the future, assigns such sums to another, but is allowed by this third party to remain in ostensible possession of them, it is just as probable that credit will be given to the trader on the strength of such possession as would be done if the sums were legally due though not immediately payable. In the present Act (as in the Act of 1883) the legislature has added the words "or growing due." There must have been some good reason for this. *Ex parte Kemp* (1) was decided in the year 1874, and it was quite unnecessary to add the words "or growing due" for the purpose of giving in 1883 legislative affirmation of the correctness of MELLISH, L.J.'s decision. Nor would the words be those that one would expect to be chosen for the purpose if that had been the legislature's intention. The lord justice had held that the exception to the proviso to s. 15 (5) of the Act of 1869 did not include merely debts presently payable, but included also those payable in the future. If all that was intended by the alteration was to make this more clear, I should have expected the legislature to substitute for the phrase "debts due" the phrase "debts payable or growing payable."

For myself, I prefer to think that the new phrase was intended to include something that was not included in the old one, and that the words "or growing due" bring within the exception to the proviso sums which are payable on a contingency, that is to say, sums that are not at present debts at all, but which in a certain contingency may grow into debts. Such a use of the word "debts" is not uncommon in bankruptcy legislation. In s. 30 (3) the phrase "all debts and liabilities, present or future, certain or contingent" is used. In s. 43 (1), too, is to be found the expression "existing or future book debts." The ambit of this last-mentioned subsection was a matter of argument before us, but does not need to be decided in the view that I take of s. 38. It is, however, to be observed that there is some ground for thinking that the phrase in the proviso to the subsection, "debts growing due under specified contracts," would include not only debts properly so called, but also what are called in the subsection "future debts." But, whether this be so or not, I am of opinion that the sums which we have to deal with in the present case were "debts growing due" at the commencement of Pendlebury's bankruptcy, and that this appeal should be allowed with the consequences indicated by the Master of the Rolls.

Appeal allowed.

Solicitors: Vizard, Oldham, Crowder, & Cash, for William Furness, Manchester; Linklaters & Paines, for James Chapman & Co., Manchester.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

PROPRIETARY ARTICLES TRADE ASSOCIATION AND OTHERS v. ATTORNEY-GENERAL OF CANADA AND OTHERS

[PRIVY COUNCIL (Lord Blanesburgh, Lord Merrivale, Lord Atkin, Lord Russell and Lord Macmillan), May 29, 30, June 2, 3, 5, 1930, January 29, 1931]

[Reported [1931] A.C. 310; 100 L.J.P.C. 84; 144 L.T. 577;
47 T.L.R. 250]

Canada—Dominion and provincial legislation—Power of Dominion Parliament to legislate—Enactment that operation of commercial combine a criminal offence—Criminal Code (R.S.Can. 1927, c. 36), s. 498—Combines Investigation Act (R.S.Can. 1927, c. 26)—British North America Act, 1867 (30 & 31 Vict., c. 3), ss. 91, 92.

The accepted canon of construction of ss. 91 and 92 of the British North America Act, 1867, which prescribe the legislative powers of the Parliament of the Dominion of Canada and those of the provincial legislatures, is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament although they are subject to the exclusive powers of legislation committed to the provincial legislatures and enumerated in s. 92. But the provincial legislatures are themselves qualified in respect of the classes of subject enumerated in s. 91 as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the provincial legislatures.

The Combines Investigation Act (R.S.Can., 1927, c. 26) enacted, by s. 32: "Every one is guilty of an indictable offence and liable to a penalty . . . who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act." By s. 2 "combines" were defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public . . ." By ss. 29 to 31 power was given to the Governor in Council to reduce customs duties and to revoke licences where the duties were used to facilitate a combine or when the holder of a patent used it so as unduly to limit the manufacture or enhance the price of any article. The Criminal Code (R.S.Can., 1927, c. 36) provided by s. 498 that every one was guilty of an indictable offence, and liable to a fine or imprisonment, who conspired, combined, agreed, or arranged with any other person or company unduly to limit transportation facilities in any commodity, or restrain commerce, or unduly lessen manufacturing, or unduly prevent competition.

Held: (i) the power of the Parliament of the Dominion of Canada to legislate in all matters coming within the criminal law extended to legislation to make new crimes, and, if that Parliament genuinely determined that commercial activities which could be described as operating or likely to operate to the detriment of and against the public interest should be suppressed, there was no reason why it should not make them crimes;

(ii) the power given to reduce customs duties and revoke licences could be justified as being reasonably ancillary to the powers given to the Dominion Parliament by s. 91 (3) and s. 91 (22) of the British North America Act, 1867, to legislate with regard to taxation and patents of invention and discovery;

(iii) in those circumstances it was not to the purpose to say that the provisions of the Acts of 1927 concerned property and civil rights in the province or the administration of justice in the province within s. 92 (13) and (14) of the British North America Act;

and, therefore, both the Combines Investigation Act and s. 498 of the Criminal Code were *intra vires* the Dominion Parliament.

Semle: It was not true to say that the power to regulate trade and commerce given to the Dominion Parliament by s. 91 (2) of the British North

America Act, 1867, could be invoked only in furtherance of a general power which the Parliament possessed independently of it. A

Notes. Considered: *O'Connor v. Waldron*, [1934] All E.R.Rep. 281. Applied: *A.-G. for British Columbia v. A.-G. for Canada*, [1937] A.C. 368. Referred to: *Toronto City Corp'n. v. York (Township)* and *A.-G. for Ontario*, [1938] 1 All E.R. 601; *Canadian Federation of Agriculture v. A.-G. for Quebec*, [1951] A.C. 179.

As to the legislative powers of the Dominion Parliament and those of the provinces, see 5 HALSBURY'S LAWS (3rd Edn.) 494 et seq.; and for cases see 8 DIGEST (Repl.) 705 et seq. For British North America Act, 1867, see 6 HALSBURY'S STATUTES (2nd Edn.) 303. B

Cases referred to:

(1) *Citizens' Insurance Co. of Canada v. Parsons, Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; 51 L.J.P.C. 11; 45 L.T. 721, P.C.; 8 Digest (Repl.) 727, 227. C

(2) *John Deere Plow Co., Ltd. v. Wharton and Duck*, [1915] A.C. 330; 84 L.J.P.C. 64; 112 L.T. 183; 31 T.L.R. 35, P.C.; 8 Digest (Repl.) 709, 149.

(3) *Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; 91 L.J.P.C. 40; sub nom. *A.-G. of Canada v. A.-G. of Alberta, etc.*, and *A.-G. of Quebec*, 126 L.T. 290; 38 T.L.R. 90, P.C.; 8 Digest (Repl.) 704, 123. D

(4) *A.-G. for Ontario v. Hamilton Street Rail. Co.*, [1903] A.C. 524; 72 L.J.P.C. 105; 89 L.T. 107; 19 T.L.R. 612, P.C.; 8 Digest (Repl.) 730, 249.

Appeal by special leave from an order of the Supreme Court of Canada on a reference by the Governor-General in Council to the Supreme Court of certain questions for hearing and consideration pursuant to s. 55 of the Supreme Court Act. E

The questions so referred were:

"(a) Is the Combines Investigation Act (R.S.Can., 1927, c. 26) ultra vires the Parliament of Canada, either in whole or in part, and if so, in what particular or particulars or to what extent? (b) Is s. 498 of the Criminal Code ultra vires the Parliament of Canada, and, if so, in what particular or particulars or to what extent?" F

Section 2 of the Combines Investigation Act, 1927, defined "combines" as "combines which had operated or were likely to operate to the detriment or against the interest of the public." The Act provided for inquiries to be held by commissioners whether a combine existed, and armed them with large powers of examining books and papers, demanding returns, and summoning witnesses. By s. 32 everyone was guilty of an indictable offence and liable to a penalty who was a party to or knowingly assisted in the formation or operation of a combine. By ss. 29 to 31, entitled "Remedies," power was given to the Governor in Council to reduce customs duties, and to the Exchequer Court to revoke licences where the duties were used to facilitate a combine or when the holder of a patent used it so as unduly to limit the manufacture or enhance the price of any article. Section 498 of the Criminal Code made it an indictable offence punishable by fine or imprisonment to be a party to combining with any other to limit unduly the facilities for transport in any commodity or to restrain or injure trade or commerce in relation to any such commodity. The Supreme Court answered both questions in the negative. G

Tilley, K.C., for the appellant association; *Tilley, K.C.*, and *Frank Gahan* for the appellant, the Attorney-General for Ontario; *Geoffrey Lawrence, K.C.*, and *Maurice Alexander* for the appellant, the Attorney-General for Quebec. H

Rowell, K.C., and *Varcoe* for the respondent, the Attorney-General for Canada. I

Cur. adv. vult.

Jan. 29. **LORD ATKIN.**—This is an appeal from the Supreme Court of Canada on a reference by the Governor in Council under s. 55 of the Supreme Court Act. The questions submitted to the court were:

- A “(a) Is the Combines Investigation Act (R.S.Can. 1927, c. 26) ultra vires the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent? (b) Is s. 498 of the Criminal Code ultra vires the Parliament of Canada, and if so, in what particular or particulars or to what extent?”

B The Supreme Court answered both questions in the negative. The appellants are the Proprietary Articles Trade Association, who had been found by a commission appointed under the Combines Investigation Act to have been party to a combine as defined in the Act, and had been admitted to be heard on the reference under s. 55 (4) of the Supreme Court Act. The other appellants are the Attorney-General for the province of Quebec and the Attorney-General for the province of Ontario. The reference involved important questions of constitutional law within the

C Dominion, and their Lordships have had the assistance of full and able argument in which all the numerous relevant authorities were brought to their notice. After careful consideration of the arguments and the authorities their Lordships are of opinion that the decision of the Supreme Court is right.

In determining judicially the distribution of legislative powers between the Dominion and the provinces made by the two famous sections, ss. 91 and 92, of the

D British North America Act, 1867, two principles have to be observed. First, the accepted canon of construction as to the general effect of the sections must be maintained. This is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the provincial legislatures and enumerated in s. 92. But the provincial powers are themselves

E qualified in respect of the classes of subjects enumerated in s. 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the provincial legislatures. This almost reproduces the express words of the sections, and this rule is well settled. The second principle to be observed judicially was expressed by the Board in 1881 in *Citizens' Insurance Co. v. Parsons* (1) (7 App. Cas at p. 109) :

“it will be a wise course to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.”

It was re-stated by HALDANE, L.C., in *John Deere Plow Co., Ltd. v. Wharton and Duck* (2) ([1915] A.C. at p. 338) :

G “The structure of ss. 91 and 92 and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration

H was framed, must almost certainly miscarry.”

The object is as far as possible to prevent too rigid declarations of the courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached. The claim of the Dominion is that the Combines Act, 1927, and s. 498 of the Criminal Code can be supported as falling within two of the enumerated classes in s. 91, namely, (2) the regulation of trade and commerce, and (27) the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters. Reliance is also placed on (3) the raising of money by any mode or system of taxation, (22) patents of invention and discovery, and on the general power of legislating for peace, order and good government. The appellants, on the other hand, say that the Act and the section of the Code violate the exclusive right of the provinces under s. 92 to make laws as to (13) property and civil rights in the province, and (14) the administration of justice in the province. Both the Act and the section of the Code have a legislative history, which is

I

relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which, when challenged, is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value. A B

The history of the Act and the section of the Code so far as it has been laid before their Lordships is as follows. In 1888 a select committee of the House of Commons of Canada reported upon the existence of combinations in manufacturers, trade and insurance in Canada, and that legislative action would be justified for suppressing the evils resulting from these and similar combinations and monopolies. C In 1889 [the Canadian] Parliament passed an Act for the prevention and suppression of combinations formed in restraint of trade (52 Vict., c. 41), which made it a misdemeanour punishable with fine or imprisonment to be a party to a combination as defined in the Act, for this purpose sufficiently described as in restraint of trade. One may complete the history of the section by recording that in 1892 the material section of the Act of 1889 was placed in the Criminal Code as s. 520. In 1899 the wording of the definition was varied by omitting in certain phrases the words "unduly" and "unreasonably"; but in 1900 the words were restored, and the section has since stood in the Criminal Code in the form then enacted and now forms s. 498 of the Criminal Code (R.S.Can., 1927, c. 36), which is the section attacked. To revert to the Act, in 1897 by s. 18 of the Customs Tariff Act of that year the Governor in Council was authorised to empower any judge to hold an inquiry into whether with regard to any article of commerce there existed any combination to unduly enhance (the split infinitives are throughout the work of the legislature) the price of such article or otherwise to unduly promote the advantage of the producers at the expense of the consumers. The judge was empowered to compel the attendance of witnesses, and the production of documents. Upon his report the Governor in Council was empowered to reduce or withdraw any customs duty which facilitated such a combination. The powers conferred by this section appear to be the germ from which have sprung the more elaborate powers conferred by more recent Acts. In 1904, by the Inland Revenue Amendment Act (4 Edw. 7, c. 17), the Minister of Inland Revenue was empowered to withdraw from a manufacturer any excise licence in case of a sale or consignment by him of goods under restrictive conditions as there defined. In 1907, by the Customs Tariff Act of that year, the power of the Governor in Council to appoint a judge to inquire into the existence of combinations was enlarged; and his power to deal with any customs duty facilitating such combination was extended to cases where the existence of a combination appeared as a result of a judgment of any of the courts. D E F G

In 1910 the Combines Investigation Act (9 & 10 Edw. 7, c. 9) was passed. It made more elaborate provision for an investigation into the existence of trade combinations and provided additional remedies. It contained a definition of "combine" in very general terms. An investigation was to be ordered by a judge on application by persons interested. When ordered the investigation was to be held by a board of three commissioners appointed ad hoc, who were armed with large powers of obtaining evidence. Their report was to be published. If any person was reported to have been guilty of doing the acts already prohibited in s. 520 of the Criminal Code and continued so to offend after the report, he was to be guilty of an indictable offence and liable to a penalty not exceeding \$1,000 a day for each day the offence continued. The Governor in Council's power to reduce or withdraw customs duty was reaffirmed; and if a patent was used so as to unduly assist a combination it was made liable to revocation. H I

In 1919 were passed two Acts of some importance in this history, inasmuch as they have both been held by this board to have been ultra vires the Dominion Parliament. The first is the Board of Commerce Act (9 & 10 Geo. 5, c. 37).

A Under this Act a permanent board of three commissioners was set up which was to be a court of record. The board might sit anywhere in Canada, and either in public or in camera. Its duties were to have charge of the general administration of the contemporaneous Act, the Combines and Fair Prices Act, 1919 (which is the second Act above referred to), and to investigate or make orders as it might be empowered by either Act, or from time to time by the special direction of the Governor in Council. It had power to make future, contingent or conditional orders, either final or interim; and its orders could be enforced by being made a rule of court, either of the Exchequer Court or any superior provincial court. Any order might be reviewed and varied or rescinded by the Governor in Council; and there were provisions by which questions of jurisdiction and questions of law could be brought by way of appeal before the Supreme Court of Canada. Large powers of securing the attendance of witnesses and the production of documents were given to the board.

The second Act of 1919, above referred to, is the Combines and Fair Prices Act (9 & 10 Geo. 5, c. 45), with the administration of which the Board of Commerce, as above constituted, was specially charged. The Act was divided into two parts, Combines and Fair Prices. A combine was defined as having only reference to such combines as thereafter defined as had, in the opinion of the Board of Commerce, operated, or were likely to operate, "to the detriment of or against the interest of the public, consumers, producers, or others," and subject to such qualification was defined in terms which appear to be substantially wider than those in the Act of 1910 or in the Criminal Code, and include fixing a common price, or enhancing the price or cost of articles and lessening competition within any particular district, or generally, in production, sale or supply. The first part, dealing with combines, empowered the board to restrain and prohibit the formation and operations of combines. For this purpose, the board, of its own initiative, or a commissioner, on application, could order an investigation into the existence of a combine. The board itself held the necessary inquiry, and, if of opinion that a combine existed, could order the person or persons complained of to desist from the acts forming part of the operations of the combine. Disobedience constituted an indictable offence and exposed the party guilty to a penalty not exceeding \$1,000 a day. Whenever, in the opinion of the board, such an offence had been committed, the board had power to remit the record to the Attorney-General of the province where it had been committed with a recommendation to prosecute, but no prosecution was to be commenced for such an offence or under s. 498 of the code without the written authority of the board. The powers of the Governor in Council to reduce customs duties and the power of the court to revoke patents in cases of combines, were re-enacted. The second part, dealing with fair prices, was restricted to the control of necessities of life defined in the Act as staple and ordinary articles of food, clothing and fuel, including the material of which they might in part be manufactured, and such other articles as the board might prescribe. In respect of such articles, no person was to accumulate or withhold from sale any amount in excess of what was necessary for the consumption of his household or the ordinary purposes of his business: and any excess was to be offered for sale at prices not higher than were reasonable or just. The board were directed to inquire into and restrain and prohibit any breach of the Act, or the making of unfair profits on necessities of life. An unfair profit was to be deemed to be made when the board declared that it had been made. Elaborate powers of inquiry, and of ordering statistical returns, were entrusted to the board. The board might make declarations as to the guilt of any person concerned, and might order or prohibit the doing or omission of any act connected with the offence. Disobedience to such orders was an indictable offence, subject to a continuing penalty not exceeding \$1,000 a day, or to imprisonment for a term not exceeding two years. Similar provisions to those in Part I were enacted as to prosecutions.

Their Lordships have dealt at some length with the provisions of the Acts of 1919, inasmuch as the appellants relied strongly on the judgment of the board in

A.-G. of Canada v. A.-G. of Alberta, etc., and A.-G. of Quebec (3), which held both Acts to be ultra vires. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this board to follow the previous decision. It is necessary, therefore, to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute. The judgment above referred to was given in November, 1921, and on June 13, 1923, there was passed the Combines Investigation Act, 1923 (13 & 14 Geo. 5, c. 9), which repealed the two Acts of 1919 and enacted provisions which were substantially those of the present Act. The Act of 1923 was revised in 1927 and appears substantially in the original form in the revised Act, the Combines Investigation Act (R.S.Can., 1927, c. 26). By this Act "combines" are defined as combines

"which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others, [and which] are mergers, trusts or monopolies so-called"

or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce." By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a registrar of the Combines Investigation Act. The registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by commissioners appointed from time to time; and the registrar and a commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the registrar who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity. By s. 32:

"(1) Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years' imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act. (2) No prosecution for any offence under this section shall be commenced otherwise than at the instance of the Solicitor-General of Canada or of the Attorney-General of a province."

By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction and appropriate penalties are imposed. Under a group of sections, ss. 29-31, entitled "Remedies," powers are given as in previous Acts for the Governor in Council to reduce customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price of any article. Power is given to the minister to remit to the Attorney-General of a province any returns made in pursuance of the Act or any report of the registrar, or any commissioner; and if no action is taken thereon by the Attorney-General of the province, the Solicitor-General (representing the Dominion) may take the appropriate action.

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the

A Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal, but only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others," and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *A.-G. for Ontario v. Hamilton Street Rail. Co.* (4). It certainly is not confined to what was criminal by the law of England or of any province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence," for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Their Lordships agree with the view expressed in the judgment of NEWCOMBE, J., that the passage in the judgment of the board in *A.-G. of Canada v. A.-G. of Alberta, etc.*, and *A.-G. of Quebec* (3), to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. The board considered that the Combines and Fair Prices Act, 1919, came within the latter class, and was in substance an encroachment on the exclusive power of the provinces to legislate on property and civil rights. The judgment of the board arose in respect of an order under Part II of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be *intra vires*, the enforcement

of orders genuinely authorised and genuinely made to secure that object are not open to attack. A

It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30, reducing customs duty and revoking patents, have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91 (3) of the British North America Act, 1867, and affirmed by s. 122—the raising of money by any mode or system of taxation—and under s. 91 (22), “patents of invention and discovery.” B
It is, unfortunately, beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. C
The same reasoning applies to grants of monopolies under any system of patents.

The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under s. 91 (2), for “the Regulation of Trade and Commerce.” Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in *A.-G. of Canada v. A.-G. of Alberta, etc.*, and *A.-G. of Quebec* (3), under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. D
The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground. E F

If, then, the legislation in question is authorised under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the provinces. Most of the specific subjects in s. 91 do affect property and civil rights, but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers, there is constitutional authority to interfere with property and civil rights. G
The same principle would apply to s. 92 (14), the administration of justice in the province, even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated. H

Their Lordships are of opinion that the Supreme Court of Canada were right in answering both questions in the negative, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Appeal dismissed. I

Solicitors: *Lawrence Jones & Co.; Blake & Redden; Charles Russell & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

HARRODS, LTD. v. LEMON

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 2, 3, 1931]

[Reported [1931] 2 K.B. 157; 100 L.J.K.B. 219; 144 L.T. 657; 47 T.L.R. 248; 75 Sol. Jo. 119]

Agent—Conflict of interest—Acting for principal and other contracting party—Two departments of company—Each department acting for different party to contract—Knowledge of principal—Right of company to commission on sale.

A trading company had two separate departments, an estate agency and a building department. The owner of a house gave instructions to the estate agency to find a purchaser, and this department arranged for the purchase of the property, subject to contract and surveyor's report. Without the knowledge of the estate agency, the intending purchaser employed the building department to report on the condition of the drains, and the building department made an adverse report on that matter. When it became known that the building department had acted for the purchaser the vendor refused an offer by the company that an independent surveyor should report on the drains, and she completed the purchase through the company as her agents at a reduced price. On the company claiming from the vendor commission on the sale, she declined to pay on the ground that they had committed a breach of their duty as her agents in acting for the purchaser.

Held: it was quite clear that so long as an agent was the agent of one party to a contract he could not act as agent of the other party without the knowledge and permission of the party with whom he had originally established an agency, but in the present case the vendor had rejected the company's offer that the matter should be put right by employing an independent surveyor, and, with full knowledge of the facts, had continued to accept the services of the company's estate department, and, therefore, the company were entitled to the commission which they claimed.

Notes. As to the relations between principal and agent, see 1 HALSBURY'S LAWS (3rd Edn.) 181 et seq., and for cases see 1 DIGEST 424 et seq.

Cases referred to:

- (1) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch.D. 339; 59 L.T. 345; 1 Digest 484, 1632.
- (2) *Keppel v. Wheeler*, [1927] 1 K.B. 577; 96 L.J.K.B. 433; 136 L.T. 203, C.A.; Digest Supp.
- (3) *Parker v. McKenna* (1874), 10 Ch.App. 96; 44 L.J.Ch. 425; 31 L.T. 739; 23 W.R. 271, L.C. & L.JJ.; 9 Digest (Repl.) 518, 3414.
- (4) *Fullwood v. Hurley*, [1928] 1 K.B. 498; 96 L.J.K.B. 976; 138 L.T. 49; 43 T.L.R. 745, C.A.; Digest Supp.
- (5) *Hippisley (Hippesley) v. Knee Bros.*, [1905] 1 K.B. 1; 74 L.J.K.B. 68; 92 L.T. 20; 21 T.L.R. 5; 49 Sol. Jo. 15; 1 Digest 481, 1616.

Action tried by AVORY, J.

The plaintiffs, Harrods, Ltd., were employed by the defendant, Mrs. Lemon, to find a purchaser for a property at Ascot. On July 3, 1929, in such capacity and with the defendant's authority, they arranged for the purchase of the property at £7,500 by a Mrs. Campbell, subject to contract and surveyor's report. On July 8 Mrs. Campbell called on the manager of the building department, which was in a different building from that occupied by the estate agency department, and asked him to inspect the house with a view to alterations and improvements. On July 12 the manager of the building department sent a telegram and letter to Mrs. Campbell, reporting that the drains were in a bad condition and would have to be renewed at an approximate cost of £400. At the time when this telegram and

letter were sent, the fact that the sale of property had been negotiated by the estate department was not known to the building department, and the fact that the building department was reporting on the condition of the premises was not known to the estate department. On July 31 the contract for the sale of the property was completed at the reduced price of £7,337 10s., the reduction being made on account of the work which had to be done to the drains. At the time of completion, the defendant knew that the building department of the plaintiffs had been acting on behalf of the purchaser in the manner described above. The plaintiffs claimed £167 10s. commission from the defendant on the sale of the property at £7,337 10s. The defendant, before action, tendered to the plaintiffs the sum of £5 10s. in satisfaction, and, in her defence, alleged that the plaintiffs had been guilty of a breach of their duty as agents, and were not entitled to any commission. In the alternative, she counter-claimed £162 10s. as damages for the alleged breach of duty.

AVORY, J., in giving judgment said that he could not accept the contention put forward by the plaintiffs that the estate department and the building department were to be regarded as two separate entities. Harrods, Ltd., were one person in law, however many businesses they might carry on, and in acting as they did through their building department for the purchaser they were committing a breach of their duty as agents for the vendor. They were, in the words of COTTON, L.J., in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1), putting themselves in such a position that they had a temptation not faithfully to perform their duty to their employer. In so acting they were not guilty of any fraud or dishonesty, but, in the words of BANKES, L.J., in *Keppel v. Wheeler* (2), they "were acting in good faith . . . but under a misapprehension as to their legal position in reference to their client." No damage had been suffered by the defendant by reason of anything done by the plaintiffs. The purchaser would in any event have had a report on the drains before completing the purchase, and the report by any competent person would have recommended the expenditure of at least £200 on the drains as necessary, apart from improvements, and the purchaser would not, in the circumstances, have been willing to complete the contract for any sum greater than the £7,337 10s. The defendant, with full knowledge of the alleged breach of duty and of the fact that a sum of over £200 was estimated to be required to put the drains in order, agreed, after negotiations with the purchaser, to accept the reduced price of £7,337 10s., and in view of the judgments in the Court of Appeal in *Keppel v. Wheeler* (2), in which it was held that the agent was entitled to recover the commission notwithstanding that he was liable to substantial damages for breach of duty, the plaintiffs were entitled to recover the commission of £167 10s. on the purchase price of the property. The defendant appealed.

Linton Thorp for the defendant.

du Parcq, K.C., and *S. O. Henn Collins* for the plaintiffs.

LORD HANWORTH, M.R.—This appeal fails, and the judgment of AVORY, J., must be affirmed. The action is brought by Messrs. Harrods, Ltd., the company that carry on in the Brompton Road a business which has many branches and activities. Among other branches it has, in a separate building (though that matters but little), a branch where an estate agency is carried on, and in the main block of buildings there is a branch called the building construction department. The action is brought to recover from Mrs. Helen Kent Lemon two sums, the first for some out-of-pocket expenses incurred for the defendant, who was the owner of a property called Blythswood, at Ascot, and the second for a sum of £167 10s., being the fee calculated according to the usual scale on which commission is payable to a house agent who introduces a purchaser to the owner of estate property. With regard to the first item, the out-of-pocket expenses, no question arises. That money was paid into court and has been accepted in full satisfaction by the plaintiffs.

The issue in the case arises upon the question whether or not Messrs. Harrods

A are entitled to receive their scale fee in the circumstances which I must shortly state. Mrs. Lemon, as I have said, was the owner of Blythswood, at Ascot; she was minded to sell it, and in the summer of 1929 she put it into the hands of the estate agency carried on by Messrs. Harrods. By about July 3 of that year, in their capacity of estate agents, and with the defendant's authority, they arranged for the purchase of the property by a Mrs. Campbell at a sum of £7,500, but a term of that bargain was that it was "subject to contract and surveyor's report." IB Pausing there, at that time, therefore, Messrs. Harrods, as estate agents, had succeeded in bringing a purchaser to the vendor, but the purchaser had not entered into any contract with the vendor, because of those two terms—the first, "subject to contract," meaning, of course, that the actual terms would have to be stated in detail as to what was to be sold and the conditions on which it was to be sold; and C the second, "subject to survey," was intended to reserve the purchaser's right until she was satisfied as to the structure of the house, which would, of course, include the drains. Having got as far as that on July 3, Mrs. Campbell turned to the persons who had previously carried out construction work or repairs for her, namely, the building construction department of Harrods, Ltd. She went to them and asked them to make a report to her on this property, Blythswood, of which she was D contemplating the purchase. A representative of Messrs. Harrods went down to Ascot, and we find that he sent a telegram on July 12: "Drains very bad, approximately £400 to put in order." He followed that up with a letter to the same effect. Mrs. Campbell then asked him for an estimate, and he made a more or less roughly detailed report of what would be necessary, on which he based the estimate of cost. That report is dated July 15. Pausing there, that meant, of course, that E Mrs. Campbell had got materials in her possession which would justify her in saying: "I cannot give so much as £7,500, by reason of the survey which shows that the property is not worth the full sum of £7,500." At that time the estate department had no knowledge whatever that the building department had been called into activity, and equally the building department had no knowledge whatever that Mrs. Campbell had been brought into touch with the vendor by their F estate agency department. Counsel for the defendant fairly and rightly made it abundantly plain in this court, as he had done at the trial, that there is no charge against Messrs. Harrods of fraud or mala fides; he accepts the position that they acted throughout quite bona fide but in ignorance of the true position of the two departments towards each other or toward the purchaser.

G Then comes some correspondence. On July 16 the solicitor for Mrs. Campbell, the purchaser, writes to the solicitors for the vendor, saying that the drains are out of order.

H "In view of the state of the property in other respects it is possible that the drains may require a great deal of repair, and my client considers that this matter should be dealt with by the vendor. If, however, your client would prefer that Mrs. Campbell should have the work done, then there must be a deduction from the proposed purchase price to cover the cost. I should be obliged if you would let me know as soon as possible what your client decides."

Then on July 17 the manager of the plaintiffs' estate department writes to the vendor's solicitors, saying:

I "We understand from you that she [the purchaser] has intimated to your client that she is prepared to go on with the matter if she [the vendor] will allow her the cost of putting the drains in order, but we confirm what we stated to you this afternoon, that this request was not made at our suggestion nor upon our recommendation."

At that time, or thereabouts, it was discovered that the two departments were acting in the matter—that the estate office had acted for the vendor, and that Harrods, Ltd., were acting also for the purchaser in making this report, and a complaint is made. The letter on behalf of the vendor is written on July 18:

"It seems to us that on these facts you are acting as agent for our client and

in derogation of your employment by her you are also acting for the purchaser without reference to our client, and it is, of course, an elementary principle of agency that the agent is not entitled to act for both sides without full disclosure to his principal, which has not been done in this case. We have reported your advice to our client and on her instructions we are writing to the purchaser's solicitor informing him that she [the vendor] is not prepared to make any contribution towards the costs of the drains and we think we ought to put it on record that subject to anything further you may have to add we must hold you responsible should the sale not proceed and in the event of further negotiations rendering it necessary for her to pay any amount we shall, of course, look to you for such a sum as she may have to pay, and the question of your commission will also require consideration."

The answer to that is, to my mind, quite a proper answer. The matter was placed in the hands of Messrs. McKenna, who are the solicitors to Messrs. Harrods, and on July 23 they reply and set out the facts as to the two departments, which I have already recounted. But they go on:

"Our clients are quite satisfied that if any other contractor had been asked to give an estimate for putting the property in order the result would have been the same. In these circumstances we do not know what complaint your client has unless she suggests that our clients' building construction department has made a wrong report."

I think that that statement goes beyond the mark, because it was the principal who was entitled to say to the agent: "I will, or I will not, allow you to have any dealings with the other side." If the agent has any correspondence of any sort with the person with whom he is negotiating on behalf of his principal that must be with the full knowledge and acquiescence of the principal. But Messrs. Harrods' solicitors go on:

"If you feel that this is so, we will advise our clients to ask the purchaser to have the drains tested by another firm. As we have stated, the purchase was subject to survey and consequently whether our clients' building construction department pointed out the deficiencies in the drains or some other person did so, the fact remains that the vendor would have been left in the same position as she now is so far as the purchaser is concerned."

I pause there for a moment, because the facts in this case are very important. It appears to me that that is a clear indication on the part of Messrs. Harrods as follows: We did not know that another department of our company was acting, but, as the facts stand, whoever has to make a survey and a report will come to much the same conclusion as that to which we have come. But if you think, now that you know, it would be better to have an independent survey by an outside surveyor, we are prepared to stand aside. When that letter had been written to the vendor, Mrs. Lemon, it appears to me quite clear that she had at that time an election. She could have said: Now I know all the facts, I do prefer that my agents who have so far acted, should have nothing whatever to do with the matter of the survey. I will send the matter to another firm; there must be an independent survey by wholly independent surveyors. She did not do that. What was done was that the contract was sent backwards and forwards between the solicitors, and, after full knowledge of what had been done by Messrs. Harrods' construction department, a contract was signed on July 31, and the contract price was reduced, not by £400, not by £248, which was a subsequent estimate of the outlay necessary upon the drains, but by a sum of £162 10s., which was deducted from the £7,500. Subject to that, and the other terms contained in the contract, which had been adjusted, there was a firm contract made on July 31 by Mrs. Lemon to sell to Mrs. Campbell. In the result, therefore, Mrs. Lemon accepts the services of Messrs. Harrods, acts in accordance with the advice that those services have given her, namely, to sell to Mrs. Campbell, rejects the alternative offered to her of an independent survey, and is content to reduce the purchase price, upon the

A survey, which was a necessary part or necessary ingredient before the firm contract was signed, by a sum which is much smaller than the original report had adumbrated.

It is said by the defendant that Messrs. Harrods have lost all right to be paid their commission. We are most anxious that nothing should be said in this court which should in any way derogate from the clear statement that has been made
B time and again in the courts. I repeat the words of JAMES, L.J., in *Parker v. McKenna* (3) (10 Ch. App. at p. 124):

"It appears to me very important that we should concur in laying down again and again the general principle that in this court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule,
C and must be applied inexorably by this court."

The same has been said in this court in *Fullwood v. Hurley* (4) ([1928] 1 K.B. at p. 502), and, perhaps, as repetition is an easy form of emphasis, I may repeat what I said in that case:

"If and so long as the agent is the agent of one party, he cannot engage to
D become the agent of another principal without the leave of the first principal with whom he has originally established his agency."

I might quote also the words of ATKIN, L.J., in *Keppel v. Wheeler* (2) ([1927] 1 K.B. at p. 592):

"I am quite clear that if an agent in the course of his employment has been
E proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established."

In *Keppel v. Wheeler* (2) it was decided that the agent who introduces the purchaser has not earned his commission by the mere introduction; that he is not entitled to his commission until the final contract of sale and purchase has been signed and exchanged; in other words, he has not rendered the services for which
F he is to be paid his commission until a firm contract is entered into between the parties; and it is also explained that the agent must render the services to his principal right down to the time when the final and firm contract is signed.

Counsel for the defendant has argued the present case on the ground that Messrs. Harrods have neglected these rules which I have re-affirmed, and that, by reason
G of that, they have lost all right to commission. It is true, he says, that their introduction of Mrs. Campbell to Mrs. Lemon was the effective cause of the sale, but they have lost their commission because they have undertaken duties which were in conflict with the original appointment of them as agents to find a purchaser. Their business as agents to find a purchaser was to find a purchaser at the highest price possible, and in fact they found a purchaser who, on their advice, gave less
H than the £7,500. It must, however, be pointed out that on July 3, when the parties had been brought together, there was no contract, because the negotiations were still "subject to contract and to survey," and it was not until a survey had been made that a contract would have been entered into. Here comes, to my mind, the importance of the offer which was made by Messrs. McKenna to the defendant: "If you feel that this is so, we will advise our clients to ask the purchaser to have
I the drains tested by another firm," which means: "We will not act upon this; let there be, for the purposes of the survey, a wholly independent person called in." That offer is not accepted; the services are accepted, and the defendant proceeds to enter into a firm contract on July 31, with full knowledge of the facts, after the position had been one in which she could have repudiated the contract, and after she had declined to accept the offer to have a survey made by an independent person.

Have the plaintiffs, then, lost the right to commission? It is right that I should repeat, on behalf of Messrs. Harrods, that they make it quite plain that they regret

that they acted in an equivocal position. Mr. Ford, who negotiated the sale to Mrs. Campbell, says this: "It would be wrong for us to act for both vendor and purchaser"; and he also says this: "I never said anything to Mrs. Campbell or Mrs. Lemon about the drains, and knew nothing about their condition." The manager of the estate office, Mr. Robinson Steele Smith, agrees that the telegram of July 12 would tend to diminish the price and would be in the interest of the purchaser. Reliance has been placed on a decision of LORD ALVERSTONE as justifying the view that the commission is not recoverable. In *Hippisley v. Knee Bros.* (5) he said ([1905] 1 K.B. at p. 8):

"If the court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform."

It is said that there was a conflict, and, therefore, that the principle of *Hippisley v. Knee Bros.* (5) does not apply. But it must be remembered that the offer was made that Harrods should drop out of it, and that was not accepted. It appears to me that after that acceptance of the situation, it is not possible for the defendant to impute to Harrods that they have lost their right to commission, when she has accepted their services with full knowledge, and rejected the opportunity to put the matter right by having an independent surveyor. If the facts were different, if the whole transaction had gone off and this was an action by Mrs. Lemon for a loss of part of the price, different considerations might have applied. If the eventualities contemplated in the letter which I read, of July 17, had been carried out, again we might have had to apply a different set of rules. But all that we have to consider here is whether, in the present circumstances, after the knowledge was conveyed to Mrs. Lemon and she acted as she did, it can be said that Messrs. Harrods have lost their right to commission. It appears to me, re-affirming the principles which I have already laid down, and which are not in any way contested by Messrs. Harrods, that they are entitled to be paid for their services. It may be observed, too, that the defendant herself feels some difficulty about it, because in the early part of the defence there is a confession that they are entitled at least to some small sum—a sum which was paid into court. On these grounds it appears to me that the judgment of AVORY, J., was right, and that the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree. It is said that when Messrs. Harrods undertook the task of reporting to Mrs. Campbell as to the state of the drains at "Blythwood," and gave an estimate of the cost that would be incurred in putting those drains into order, Messrs. Harrods were entering upon a position in which their interest conflicted with the duty which they owed to Mrs. Lemon, of obtaining the best purchase price for the property in question. I will assume that that was so; but on that assumption, when Mrs. Lemon discovered the position in which Messrs. Harrods had placed themselves, there were two or three courses open to her. She might, in the first place, have put an end to the contract of agency altogether, and taken the house out of the hands of Messrs. Harrods. She might have said: I will have nothing to do with this purchaser that you have introduced, because obviously that purchaser is not going to give me the best price obtainable, having regard to what you have done in the matter of the drains. And she might conceivably, in both those cases, have sued Messrs. Harrods for damages if—and it is a big "if"—she could have proved that she had suffered any. Another course she might have taken would have been to say: I will go on with this purchaser, but only on the condition that you cease to act for her, and get somebody else to report upon the drains. That was a thing which had been offered to Mrs. Lemon by Messrs. Harrods themselves. What she was not entitled to do was to accept the purchaser

A introduced by Messrs. Harrods, enter into a contract with that purchaser at a price arranged between her own solicitor and the purchaser's solicitor, and then to refuse to pay Messrs. Harrod's the commission. For these reasons I am satisfied that this appeal is without foundation and should be dismissed.

Appeal dismissed.

B Solicitors: *Edward Bettleley, Smith, & Stirling; McKenna & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

C

WARING v. FODEN. WARING v. BOOTH CRUSHED GRAVEL CO., LTD.

D [COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 20, 21, 22, 23, November 13, 1931]

[Reported [1932] 1 Ch. 276; 101 L.J.Ch. 33; 146 L.T. 107;
75 Sol. Jo. 852]

Mineral—Exception from sale of land—"All minerals and mineral substances"—

E *Substances not exceptional in use, value, or character—Sand and gravel—Test of meaning of "minerals."*

The word "minerals," when found in a reservation out of a grant of land, means substances, exceptional in use, value, and character, e.g., china clay, and does not mean the ordinary soil of the district which, if reserved, would practically swallow up the grant. In deciding in a particular case whether or not exceptional substances are "minerals" the true test of what that word means is whether in the vernacular of the mining world, the commercial world, and landowners at the time of the grant the particular substance was so regarded as a mineral. Both in private deeds and in statutory provisions the *prima facie* meaning of the word "minerals" will yield to the expressed or implied intention of the parties. For all practical purposes "minerals" and "mineral substances" are synonymous terms.

G On July 28, 1926, the plaintiff conveyed certain land to the defendant with a reservation of "all mines, minerals, and mineral substances," with power to work and get the same "by underground workings only." By a lease dated July 12, 1928, the defendant demised for the term of fourteen years the right to get gravel and sand from the land to the predecessors of the defendant company. H The court found that at the time of the sale in July, 1926, the plaintiff had held out to the defendant that the land was capable of development as a building estate, and that the common soil of the district in which the land was situate consisted of sand and gravel lying immediately beneath a thin layer of topsoil. There were seams of coal, ironstone, and fireclay at a considerable depth below the surface of the land, all of which were "minerals" in the vernacular of the mining world, the commercial world, and landowners. I The plaintiff claimed a declaration that all sand and gravel situate within or under the land were his property, and an injunction restraining the defendant, his agents or assigns from trespassing upon or working or carrying away any of that sand or gravel.

Held: the grant and the reservation must be construed with reference to the circumstances existing at the time of the grant; a reservation of the sand and gravel would be a reservation, not of what was exceptional, but of what was of general importance to the land conveyed; underground working was wholly

inapplicable in the case of the sand and gravel claimed; it would be impossible to construct a house, road, or drain without cutting into the sand and gravel; and, therefore, to hold that the sand and gravel was excepted from the grant would be a negation of the substance of the transaction, and the plaintiff was not entitled to the relief claimed.

Notes. Referred to: *Mosley v. George Wimpey & Co.*, [1945] 1 All E.R. 674.

As to the meaning of "minerals," see 22 HALSBURY'S LAWS (2nd Edn.) 528 et seq., and for cases see 34 DIGEST 606-610.

Cases referred to:

- (1) *Robinson v. Milne* (1884), 53 L.J.Ch. 1070; 34 Digest 608, 63.
- (2) *Great Western Rail. Co. v. Blades*, [1901] 2 Ch. 624; 70 L.J.Ch. 847; 85 L.T. 308; 65 J.P. 791; 17 T.L.R. 693; 45 Sol. Jo. 707; 34 Digest 608, 50.
- (3) *North British Rail. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; 79 L.J.P.C. 31; 101 L.T. 609; 26 T.L.R. 79; 54 Sol. Jo. 79, H.L.; 34 Digest 607, 43.
- (4) *Glasgow Corpn. v. Farie* (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 34 Digest 604, 12.
- (5) *Hext v. Gill* (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957, L.J.J.; 34 Digest 606, 41.
- (6) *Caledonian Rail. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290; 80 L.J.P.C. 128; 104 L.T. 657; 75 J.P. 377, H.L.; 34 Digest 606, 36.
- (7) *George Skeg & Co., Ltd. v. Parsons* (1909), 101 L.T. 103; 25 T.L.R. 708; 34 Digest 609, 79.
- (8) *Great Western Rail. Co. v. Carpalla United China Clay Co.*, [1910] A.C. 83; 79 L.J.Ch. 117; 101 L.T. 785; 74 J.P. 57; 26 T.L.R. 190; 54 Sol. Jo. 150, H.L.; 11 Digest (Repl.) 162, 358.
- (9) *Symington v. Caledonian Rail. Co.*, [1912] A.C. 87; 81 L.J.P.C. 155; 106 L.T. 193; 56 Sol. Jo. 87, H.L.; 34 Digest 609, 73.
- (10) *Earl of Jersey v. Neath Poor Law Union Guardians* (1889), 22 Q.B.D. 555; 58 L.J.Q.B. 573; 53 J.P. 404; 37 W.R. 388; 5 T.L.R. 337, C.A.; 34 Digest 605, 26.
- (11) *Todd v. North Eastern Rail. Co.*, [1903] 1 K.B. 603; 88 L.T. 112; 28 Digest 542, 1502.

Appeal by plaintiff from an order of Eve, J., in two actions tried together.

Sir Leslie Scott, K.C., R. L. Daniell and P. Gordon Bamber for the plaintiff.
W. P. Spens, K.C., and Andrewes Uthwatt for the defendants.

LORD HANWORTH, M.R.—By a deed of conveyance dated Dec. 30, 1925, Lord Calthorpe as tenant for life in possession conveyed to Sir Hulburt Jacob Waring, the plaintiff in both these actions, in fee simple certain lands in the county of Stafford, including Booth's Farm, hereinafter more particularly referred to. By a contract made Sept. 4, 1925, between the plaintiff, as vendor, and George Albert Barton, as purchaser, the plaintiff agreed to sell to the purchaser "Booth's Farm, described as lot eighty in the particulars and conditions of sale of the Perry Hall Estate, put up for sale on Feb. 1, 1923, at the price of £8,750, subject to the special conditions of sale printed in those particulars and the conditions contained in the said contract." By a deed of conveyance dated July 28, 1926, made inter alios between the plaintiff and George Albert Barton and the defendant, Foden, as sub-purchaser, there was conveyed to the defendant the freehold property described in the first schedule to the said conveyance, which included Booth's Farm, which was coloured pink and green on the plan annexed to the conveyance, but excepting and reserving thereout from the land coloured pink

"all mines, minerals and mineral substances within or under the same together with full power and liberty for the vendor his heirs and assigns to work and get the same by underground workings only without any obligation to leave

A any subjacent or lateral support for the surface or any building for the time being erected thereon or any adjoining land or building and for the purpose of such workings from time to time and at all times to do all acts and things necessary or proper for working or getting such mines minerals and mineral substances and also the right to use all existing underground roadways gateways and airways lying under the said land and to drive and make additional
B underground roadways gateways and airways in such land not being nearer than 300 yards from the surface which may be deemed advisable for the purpose of working getting and developing"

certain mines and minerals therein mentioned. By a lease dated July 12, 1928, and made between the defendant, Foden, and one Alfred Richards, the defendant
C demised to Richards the right for the term of fourteen years to get gravel and sand from some convenient part of Booth's Farm to be selected by the defendant. The benefit of that lease is now vested in the defendant company, the Booth Crushed Gravel Co., Ltd., and they are working the gravel pit upon Booth's Farm and have already carried away therefrom large quantities of gravel and sand and are continuing to do so. The second action is brought against this company to recover
D damages for alleged trespass and conversion, and the company justify their action under the rights acquired by Foden and leased by him to Richards, which rights are now vested in the company. In other words, the question whether the company can justify their action depends upon whether Foden took the right to the sand and gravel under the conveyance of July 28, 1926, or whether they were reserved to the plaintiff vendor. The actions were called on for determination together, the
E appellant agreeing that the decision of this point in the first action would determine the issue in the second—no question of figures or amounts being now raised. EVE, J., who tried the cases, decided in favour of the defendants, and from his decisions given on June 18 the plaintiff appeals.

There are certain data and facts which were accepted and admitted on both sides at the trial. (i) While the plaintiff alleges that it is incorrect to say that the gravel
F and sand prevailed as the common soil of the district, it is common ground that there was in or near this area a number of gravel pits, some of which were being worked from the surface at the time of the conveyance, or which had been worked recently, if not then still being worked. On looking at the ordnance survey map, which was referred to in the evidence, I find marked on it three old gravel pits and one other gravel pit on the west side of the area in question near the road from
G Hamstead to Great Barr. On the east side, without going far from Booth's Farm, two existing pits are marked in the line of the road running north and south and leading to Queslett. (ii) It is admitted that a stratum of coal and ironstone lies under the land conveyed in 1926. (iii) The gravel pit from which the gravel and sand has been abstracted by the working which the plaintiff seeks to prevent has been worked for years by open quarrying from the surface. There was evidence
H that there was a gravel pit worked on Booth's Farm over a span of forty-five years, and the plaintiff's counsel admitted that this gravel pit as such has been shown on the ordnance maps ever since 1904. (iv) It is also admitted that the land has a potential building value, and that, if it became necessary to build, the defendant, Foden, would be entitled to dig his foundations and use or sell the out-coming soil; but counsel contests his right to do more, on the ground that the property in the
I gravel and sand has been reserved to the plaintiff, and he contends that there is nothing inconsistent with the defendant Foden having a right to build and to sink his foundations in the "minerals"—that is, the gravel and sand which, it is said, are reserved to the plaintiff—while the latter retains the property in the subsoil generally. The plaintiff contends that the defendant had not the right to dig and remove this subsoil in gross—a term suggested by NORTH, J., in *Robinson v. Milne* (1)—but only where such action was necessary to the building of a particular house or structure.

The plaintiff objected to the judgment of EVE, J., on the ground that it was—

in part at least—based upon evidence which the learned judge had wrongly admitted at the trial. That evidence was: (i) As to the meaning of the words “mines, minerals, and mineral substances,” and the objection to it is because there was no suggestion of local custom or trade usage which would justify such admission. (ii) Of particulars of auction sales for the purpose of interpreting the conveyance. He objected to it also on the ground that the contract of sale by Barton to the defendant Foden, the sub-purchaser, was relied upon as throwing light upon the interpretation of the conveyance. That contract provided that Barton as vendor should sell to the defendant Foden lot eighty—

“described in the above particulars and subject to the foregoing special conditions of sale and the general conditions of 1925 so far as the same are applicable to a sale by private treaty.”

The particulars contained the words: “The freehold property known as Booth’s Farm described as lot eighty in the particulars hereunto annexed,” and these latter particulars described the property as possessing “valuable frontages to the Walsall, Aldridge, and other roads.” Under lot eighty there was a note that the land was leased for the term of twenty-one years from March 25, 1913, and that that lease contained a covenant by the lessee to

“give up at any time on receiving twenty-one days’ notice any lands that may be required by the lessor for building purposes, roads, roadways, or other reasonable purpose, such land not to exceed in the whole five acres.”

The conveyance of July 28, 1926, to the defendant sub-purchaser recited the above contract and stated that it was made in pursuance of the recited agreements. I have set out these points of objection in extenso, though it is not, in my opinion, necessary to treat them as essential to the decision of this court.

Accepting the objection to the evidence firstly set out above, it appears to me that, apart from the evidence admitted by EVE, J., and assuming that it was inadmissible, there is sufficient in the facts accepted and the matter admitted to decide that case, within the cases to which our attention has been called, without reference to the evidence objected to. Upon the second point, the admission that the land has a potential building value, and the fact that it is situate where it is, connotes that one purpose to which it could be put was to build upon it, and that that feature must have been present to the parties to the conveyance of July 28, 1926. I will add that it appears to me that the particulars and conditions are relevant to the construction of the conveyance and can be properly referred to for that purpose.

Before construing the terms of the exception I desire to make one or two observations upon the cases dealt with by counsel for the plaintiff in his very able argument. He claimed that the court ought to look at the cases decided in reference to land taken for railways or the like, where the system of appropriating the soil to the railway and leaving the minerals to the owner except and until a certain procedure prescribed by statute was followed out, and to apply a scrutiny to them different from that applicable to those where the surface and mines or minerals are dealt with by contract and conveyance, between private individuals. There is authority for this contention to be found in the judgment of BUCKLEY, J., in *Great Western Rail. Co. v. Blades* (2) ([1901] 2 Ch. at p. 632). But that view is definitely rejected by LORD LOREBURN in *North British Rail. Co. v. Budhill Coal and Sandstone Co.* (3) ([1910] A.C. at p. 127) and by LORD SHAW ([1910] A.C. at p. 138); and LORD HALSBURY had said in *Glasgow Corpn. v. Farie* (4) (13 App. Cas. at p. 672):

“I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed.”

It is the duty of this court to follow the decision of the House of Lords. I cannot, therefore, accept the criticism that the so-called “code” cases are to be differentiated in their meaning and effect from those that were decided upon conveyances

A between private owners and purchasers. The suggestion of BUCKLEY, J., was, I think, put forward in an effort to reconcile some of the cases—a task by no means easy of accomplishment. It is not, in my judgment, necessary to go through all the cases cited, and I turn at once to *Hext v. Gill* (5). It was held in that case that china clay was included in the reservation of “mines and minerals,” but that the reservation of that property did not justify the owner of the minerals in getting

B the clay in such a way as to destroy or seriously injure the surface. MELLISH, L.J., in giving his own judgment, which was assented to by JAMES, L.J., said that when an owner of both surface and minerals sells the surface and reserves the minerals with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the court may be able to say that such was clearly the intention of the parties.

C This observation is, to my mind, relevant to the construction of the reservation to which I will come later on. JAMES, L.J., while agreeing with MELLISH, L.J., gave expression to a dictum which has given rise to much discussion. But for the authorities he would have thought that what was meant by (7 Ch. App. at p. 719)

D “mines and minerals in such a grant was a question of fact what these words meant in the vernacular of ‘witnesses of three classes’—the mining world, the commercial world, and landowners.”

Glasgow Corpn. v. Farie (4) was what has been termed a code case under the Waterworks Clauses Act, 1847, s. 18. The decision was that a reservation under the Act of “mines of coal, ironstone, slate, or other minerals” did not include common clay forming the surface or subsoil of the land. The speeches of LORD HALSBURY and the other Lords contain many observations that are germane to the present case. LORD HALSBURY (13 App. Cas. at p. 670) says that he doubts whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word “minerals” has acquired a meaning of its own independently of any question as to the manner in which minerals themselves are gotten; and he accepts the view of the Lord Ordinary as correct (13 App. Cas. at p. 672):

F “In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser’s estate, because we should hold that the conversion of the estate into a clay field was not within the fair meaning of the reservation.”

G LORD WATSON (13 App. Cas. at p. 675) extracts the principle from the authorities

H “that in construing a reservation of mines or minerals whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. ‘Mines’ and ‘minerals’ are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used.”

I Counsel for the plaintiff brought to our attention a great number of cases which illustrated the movement and also the divergence of opinion among the judges who decided them. Some cases, he contended, were to be read *cum grano* as code cases, while others were more trustworthy guides to a right judgment in the present case because they were cases decided between private persons. I have already pointed out that differentiation between the cases can no longer be adhered to since the decision of the *North British Rail. Co. v. Budhill Coal and Sandstone Co.* (3). But that case also demonstrates the futility of trying to extract a principle which will determine the problems of what is granted and what is excepted. LORD LOREBURN said ([1910] A.C. at p. 134):

“No one principle has been accepted and every principle appears to have its friends. In these circumstances it would be quite unprofitable to expect a

solution by piecing together the dicta of even the most eminent authorities. A
They are contradictory. Your Lordships find the matter at large so far as
this house is concerned."

It may be noted, however, that he thought it clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. LORD GORELL adds a useful canon of construction ([1910] A.C. at p. 134): B

"The enumeration of certain specified matters tends to show that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone":

see also on this point *Caledonian Rail Co. v. Glenboig Union Fireclay Co.* (6) ([1911] A.C. at p. 299), per LORD LOREBURN. The words in the present exception are "mines, minerals, and mineral substances." The last two words seem to have been added in accordance with the observation of LORD HERSCHELL in *Farie's Case* (4) (13 App. Cas. at p. 683), where he suggests that they embrace such substances as slate and ironstone which cannot be covered by a single genus of materials. C

After considering the above observations of learned judges carefully, I turn to the exception in the conveyance. Upon the admitted facts relating to the area and the purpose for which the land of Booth's Farm was suitable, I cannot hold that the exception was intended to detract from the surface area conveyed, or to allow the vendor to retain the property in the substrata of the surface conveyed even if he was unable to get them. I think the grant and the exception must be construed in reference to this district and this area in which open quarrying for sand and gravel was knowingly to both parties exercised. Regard must be had, as LORD WARSON said (13 App. Cas. at p. 675), to the relative position of the parties' interests and to the substance of the transaction or arrangement embodied. These considerations, in my opinion, point to the exclusion of gravel and sand from the exception reserving minerals and mineral substances, and to an intention that the purchaser should acquire his land without burdensome limitations which might restrict its full user as the soil and subsoil is used in the district: see also *George Skej & Co., Ltd. v. Parsons* (7). In my judgment, this view is reinforced strongly by the other words to be found in close collocation with the exception. The reservation is of the D E F

"mines, minerals, and mineral substances [within or under the land coloured pink] together with full power and liberty for the vendor . . . to work and get the same by underground workings only without any obligation to leave any subjacent or lateral support for the surface or any building for the time being erected thereon." G

The underground workings only are specified for the purpose of getting the mineral substances that lie "under the same," that is, under and without destroying the surface conveyed. It seems to me that it would be a negation of the substance of the transaction to hold that all sand and gravel which is very generally a part of the soil and subsoil of this farm and worked and gotten from the surface was excepted from the grant and remained the property of the plaintiff. It would not be a reservation of what is exceptional, but of what is general and of general importance to the utility and efficiency of the land conveyed. The exception ought, as MELLISH, L.J., points out, if it was intended to have the effect now claimed, to have been expressed in far clearer terms. For these reasons, which do not invoke assistance from the evidence which is objected to, and without expressing a final opinion upon that part of the case, in my judgment, the appeals in both cases fail and must be dismissed with costs. H I

LAWRENCE, L.J.—The question to be determined in these actions is whether the reservation of mines, minerals, and mineral substances in the conveyance of July 28, 1926, operated to reserve the sand and gravel lying within or under the

A land granted. It is plain from the numerous authorities cited by counsel that the *prima facie* meaning of the word "minerals" both in private deeds and in statutory provisions will yield to the expressed or implied intention of the parties. In *Glasgow Corp'n. v. Farie* (4) (13 App. Cas. at p. 675) LORD WATSON said:

B "The only principle which I can extract from these authorities is this: that in construing a reservation of mines or minerals, whether it occurs in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. 'Mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used."

C In *Caledonian Rail. Co. v. Glenboig Union Fireclay Co.* (6) ([1911] A.C. at p. 299) LORD LOREBURN, L.C., said:

D "My Lords, the principle of the decision in this House in the *Budhill* (3) and *Carpalla* (8) cases seems to me to have been this: The court has to find what the parties must be taken to have bought and sold respectively remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of being itself the source of all the difficulty."

In *Hext v. Gill* (5) (7 Ch. App. at p. 712) MELLISH, L.J., stated that the result of the authorities appeared to be

E "that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to give it a more limited meaning."

F JAMES, L.J., in the same case, whilst concurring with MELLISH, L.J., that the authorities had established the proposition stated by him, said that but for those authorities he should have thought that what was meant by "mines" and "minerals" in a grant was a question of fact what those words meant in the vernacular of the mining world and commercial world and landowners at the date of the grant: see *L.Rep.* 7 Ch. App. at p. 719. The decision in *Hext v. Gill* (5) was followed by a sharp difference of judicial opinion on the question whether the true principle was that laid down by MELLISH, L.J., or that suggested by JAMES, L.J. This difference of opinion was finally settled by the *Budhill* (3) and *Glenboig* (6) cases, in which the House of Lords definitely decided that the view suggested by JAMES, L.J., was the right view. In my judgment, it is not necessary to travel beyond the pronouncements in these two last-mentioned cases in order to ascertain the principles upon which the present cases fall to be determined.

H The two main principles to be gathered from these pronouncements are, first, that the word "minerals," when found in a reservation out of a grant of land, means substances, exceptional in use, in value and in character (such as, for instance, the china clay in the *Carpalla Case* (8)), and does not mean the ordinary soil of the district which, if reserved, would practically swallow up the grant (such as, for instance, the sandstone in the *Budhill Case* (3)); and, secondly, that in I deciding whether or not in a particular case exceptional substances are "minerals" the true test of what that word means is the vernacular of the mining world, the commercial world and landowners at the time of the grant and whether the particular substance was so regarded as a mineral: see per LORD LOREBURN, L.C., in the *Budhill Case* (3) ([1910] A.C. at p. 127). Further, it is to be noted that the fact that certain substances can be worked for the purpose of profit may have a bearing upon the question whether they have been recognised as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included: see per LORD GORELL in the *Budhill Case* (3) ([1910]

A.C. at p. 132). It follows from the decisions in the *Budhill* (3) and *Glenboig* (6) A cases that the question whether a given substance is or is not a "mineral" within the meaning of the instrument in which it is mentioned is a question of fact to be decided according to the circumstances of the particular case: see *Symington v. Caledonian Rail. Co.* (9).

The relevant facts in the present case have already been stated by the Master of the Rolls. I will, therefore, content myself with briefly referring to such facts as B have led me to the conclusion that EVE, J., was right in his decision. The Perry Hall estate of which Booth's Farm formed part, was twice put up for sale by public auction, once in 1921 and again in 1923. On each occasion the particulars of sale stated generally that the property possessed many miles of valuable road C frontages to Walsall and other roads, and that much of it was ripe for present or future building developments, and in the particular relating to Booth's Farm it was stated that the farm was just off the Walsall road, and that the lessee was D under covenant to give up any land (not exceeding five acres) required for (inter alia) building purposes or roads. In the contract for sale to the defendant's vendor, Barton, and in the contract for the sub-sale by Barton to the defendant, the auction particulars which I have mentioned were referred to, and in the conveyance to the defendant both contracts are recited. I think, therefore, that the fair inference E is that the plaintiff was holding out, not only to the general public, but also to the defendant in particular, that the land conveyed by him was land capable of development as a building estate. The defendant in the witness-box stated that he purchased the land for development purposes. The liberty reserved to the plaintiff in the conveyance of July 28, 1926, of getting the reserved mines, minerals and mineral substances was by underground workings only, a method of getting wholly F inapplicable to the sand and gravel claimed in the present action. The common soil of the district in which Booth's Farm is situate consists of sand and gravel lying immediately underneath a thin layer of the cultivated top-soil averaging about 12 in. in thickness. The evidence of geologists is that this substratum of sand and gravel forms one of the triassic group of strata known as the Bunter pebble beds with an addition of some glacial drift. There is a wide belt of this pebble bed G and glacial drift formation stretching from the mouth of the Tees to the mouth of the Exe, comprising many thousands of square miles. In the particular locality in question this belt is from three to four miles wide. There are many gravel and sand pits scattered over a wide area in the immediate neighbourhood of Booth's Farm, and one of the gravel pits is on the farm itself. In these circumstances it cannot possibly be said that in the district in question sand and gravel are sub- H stances which are rare and exceptional in character. Further, the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport. It would be impossible to build a house, make a road or lay down a drain on Booth's Farm without cutting into the underlying sand and gravel. The I trees and shrubs growing on this farm have their roots embedded in the sand and gravel. It is difficult to imagine that the real nature of the transaction between the parties was as is now alleged by the appellant, and that all he was selling and the defendant was buying was the layer of top-soil (which in some places was practically non-existent) with an implied easement to construct and maintain any buildings, road and drains he might desire upon and within the underlying sand and gravel retained by and belonging to his vendor. There are admittedly seams of coal, ironstone, and fireclay at a considerable depth below the surface of Booth's Farm, all of which are "minerals" in the vernacular of the mining world, the commercial world, and landowners. The existence of these mineral substances is amply sufficient to explain the reason for and object of the reservation in the conveyance of July 28, 1926. Moreover, evidence was adduced at the trial that sand and gravel are not "minerals" in the vernacular of the mining world, the commercial world, or landowners. Regard being had to the fact that sand and gravel

A constituted the ordinary soil of the district, this evidence was really unnecessary, as, according to the proposition laid down by LORD LOREBURN in the *Budhill Case* (3), it would only become necessary to consider such evidence if the plaintiff had proved that the sand and gravel claimed by him were exceptional substances. However, the learned trial judge has carefully analysed this evidence, and I agree with his view of the result of it.

B But the plaintiff contended that the addition of the words "mineral substances" to the words "mines" and "minerals" made all the difference and operated to reserve the sand and gravel. EVE, J., held, and I entirely agree with him, that the expression "minerals" and "mineral substances" mean as nearly the same thing as two expressions can mean. LORD MACNAGHTEN in *Farie's Case* (4) (13 App. Cas. at p. 689) said that the word "minerals" in its widest signification meant

C every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. The plaintiff did not suggest that any wider or other meaning could properly be given to the words "mineral substances." We were told by counsel for the defendants that the expression "minerals and mineral substances" had been adopted by conveyancers in lieu of the more cumbersome expression "coal slate ironstone and other minerals" formerly in use, in

D consequence of the remark made by LORD HERSCHELL in *Farie's Case* (4) that there is no common genus within which coal, slate, and ironstone can be comprised except that they are mineral substances of sufficient value to be commonly worked. Be that as it may, however, I am of opinion that for all practical purposes "minerals" and "mineral substances" are synonymous terms, and that the latter yields to the expressed or implied intention of the parties just as much as the

E former. Accordingly, what is said in the authorities as to the meaning of the word "minerals" applies with equal force to the words "mineral substances." In the result, for the reasons stated I agree that these appeals fail and should be dismissed with costs.

ROMER, L.J.—The plaintiff sought by his pleadings to obtain a declaration that

F all sand and gravel situate within or under the lands conveyed by him to the defendant Foden by the deed of July 28, 1926, were and are the property of the plaintiff by virtue of the exception in that conveyance of all minerals and mineral substances. Seeing that it is almost impossible to disturb any part of the surface of the land without finding some bit of sand or gravel, or both, such an exaggerated claim obviously could not be supported, and, on the appeal, counsel confined the

G plaintiff's claim to such beds of gravel and sand as might ordinarily be worked for the purposes of profit. The plaintiff is, therefore, in effect, claiming the beds of sand and gravel now being worked by the defendant company, and, of course, any similar beds of sand and gravel that may be within or under the defendant's land. Whether such beds do or do not fall within the exception is the question to be

H determined upon this appeal. For the purpose of assisting us in the determination of this question, our attention has been called to a great number of authorities in which the courts have been called upon to ascertain the true effect of a conveyance of land containing an exception of "mines and minerals" or "mines of minerals" or the like. I do not recollect that in any of these cases there was in addition an

I exception of "mineral substances," but I agree with EVE, J., in thinking that this expression in no way enlarges the exception. If the word "minerals" had to be given its strict mineralogical meaning, the words "mineral substances" might possibly be regarded as intended to include within the exception substances that were minerals in popular parlance only. But it is clear that the court has never in modern times treated the word "minerals" as including only things that a mineralogist would designate minerals, but has given to the word a meaning that renders the addition of the words "mineral substances" quite unnecessary.

In order to see what this meaning is it is sufficient to begin with *Hext v. Gill* (5), for the definition of the word "minerals" given by MELLISH, L.J., in that case is probably as favourable to the plaintiff as any that can be found in the books within

the last sixty years. That definition, stated by the lord justice to be the result A
of the earlier authorities, was this :

"A reservation of minerals includes every substance which can be got from
underneath the surface of the earth for the purpose of profit."

Pausing there, the beds of sand and gravel claimed by the plaintiff would clearly B
fall within the definition. The learned lord justice, however, proceeded to add

"unless there is something in the context or in the nature of the transaction
to induce the court to give it a more limited meaning."

The defendants contend that in the present case the court should, having regard
to the context and the nature of the transaction, give the word a more limited
meaning and exclude from it the beds of sand and gravel even if the definition of C
MELLISH, L.J., can now be accepted as being the correct one. But they further
contend that this definition cannot now be relied upon, and that the meaning
which JAMES, L.J., in the same case would have given to the words "mines and
minerals" but for the earlier authorities, is the one that now holds the field.
JAMES, L.J., said this :

"But for these authorities I should have thought that what was meant by D
'mines and minerals' . . . was a question of fact what these words meant in
the vernacular of the mining world and commercial world and landowners . . .
at the date of the conveyance that has to be construed."

Both these definitions have been considered in many subsequent authorities, and
each of them has found adherents of eminence : see, e.g., *Farie's Case* (4); *Earl of* E
Jersey v. Neath Poor Law Union Guardians (10); *Great Western Rail. Co. v.* E
Blades (2); *Todd v. North Eastern Rail. Co.* (11); and *North British Rail. Co. v.* E
Budhill Coal and Sandstone Co. (3). It is, however, in my judgment unnecessary
to refer to these authorities in detail, inasmuch as I have come to the conclusion
that, whichever of the two definitions be applied to the present case, the beds of
sand and gravel claimed by the plaintiff are not within the exception contained in
the conveyance of July 28, 1926. Both the context in that deed and the meaning F
attributed to the word "minerals" in the vernacular of the mining world and com-
mercial world and landowners seem to me to exclude these beds from the exception.
Looking at the conveyance first, it is to be observed that the only power expressly
reserved to the vendor of working and getting the excepted mines, minerals and
mineral substances is a power to do so by underground workings. At and before
the date of the conveyance, sand and gravel was being obtained from the pit at G
Booth's Farm. The pit admittedly has been shown on the ordnance maps of the
district ever since 1904 and, according to Mr. Foden's evidence, was worked by
the plaintiff's predecessor in title thirty years ago. Its existence must, therefore,
have been well known to both parties to the conveyance of July 28, 1926. In these
circumstances it seems to me incredible that if the parties contemplated an excep-
tion of the sand and gravel in this pit, and sand or gravel in similar beds H
that might be found, the power of getting these materials by open workings from the
surface should not have been reserved to the vendor. It was, indeed, suggested
in argument that the parties intended that, so far as obtaining the materials and
mineral substances by surface workings was concerned, the vendor was content to
rely upon the provisions of the Mines (Working Facilities and Support) Act, 1923.
This appears to me a far-fetched and extravagant contention. If the vendor had I
the provisions of this Act in mind it is difficult to understand why he did not rely
upon them in respect of underground workings as well. It is still more difficult
to understand why, if he was relying upon the provisions of that Act to enable him
to work the sand and gravel in question, he did not avail himself of the definition
of the word "minerals" in that Act and include in the exception all substances in
or under the land obtainable by underground or surface working. This would
have effectually prevented any questions arising whether the sand and gravel was
included. I cannot think that if he had possessed so intimate a knowledge of the

A law as to bear in mind the provisions of the Act, he would have been ignorant of the danger of relying upon the words "minerals and mineral substances" for the purpose of reserving the sand and gravel beds. I prefer to think that he was ignorant alike of the Act and of the dangers from which the definition in the Act would have saved him. The reservation of a power of getting the excepted minerals by underground workings was, in my opinion, meant to exclude a power of working from the surface, and clearly indicates that the beds of sand and gravel in question were not intended to be excepted.

But, apart from this indication of intention afforded by the context in the conveyance, the evidence as to the meaning of the words "minerals and mineral substances" in the relevant vernacular leads to the same conclusion. Mr. Nightingale, who is a mining engineer, land agent and surveyor, and has been well acquainted with this particular district for years, was called as a witness for the plaintiff. In the course of his cross-examination he was asked this question: "I suggest to you that nobody—no contractor or mining engineer or anybody else—in this area who wanted to get or to find surface sand or gravel, such as we say exists throughout this area, would have considered for one moment an advertisement of mines, minerals, and mineral substances under any part of this area?" and he answered "No." Mr. Ridsdale, a mining engineer who has known the area in question all his life, said that he had never come across a case in which gravel or sand in the area had been offered for sale as minerals or mineral substances. Mr. Holland, another mining engineer, who, like Mr. Ridsdale, has known the area intimately all his life, said that he had never heard the sand and gravel referred to as minerals or mineral substances. Mr. Walters, an auctioneer who has carried on business in the area for over forty years, said that he had never heard it suggested that this sand and gravel below the subsoil was a mineral or a mineral substance, and that he had never known of sand and gravel being dealt with or described in the area as mines and minerals. He said that the usual expression in the neighbourhood was "mines and minerals, sand, gravel, and clay." This evidence, which, if the definition of minerals given by JAMES, L.J., is to be accepted, must, as it seems to me, necessarily be admissible, was uncontradicted so far as I have been able to ascertain, and this is not surprising. For it is only what I should have expected in view of the evidence as to the geological formation of the district. The beds of sand and gravel claimed by the plaintiff either form part of the pebble bed formation of the Bunter series or, as regards the sand, are glacial deposits, and together they form the common surface rock of the district. In my judgment EVE, J., was right in holding that this sand and gravel was not excepted out of the conveyance to the defendant and these appeals should be dismissed with costs.

Appeals dismissed.

Solicitors: *Sparks, Russell, Isard & Co.; Sharpe, Pritchard & Co., for Crockford & Sons, Birmingham.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

SKINNER v. GEARY

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), July 15, 16, 1931]

[Reported [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675;
95 J.P. 194; 47 T.L.R. 597; 29 L.G.R. 599]

Rent Restriction—Possession—Tenant not in personal occupation of premises—Relative of tenant residing there—Licensee or sub-tenant at will—No evidence of tenant's intention to return—Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5 (1), as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32).

A tenant of premises which he never occupies is not protected by the Rent and Mortgage Interest (Restrictions) Acts, 1920–25.

The tenant of a dwelling-house within the scope of the Rent Restriction Acts ceased to reside there and for ten years lived elsewhere with his wife, permitting, first, relatives of his wife, and, then, his sister, to reside in the dwelling-house. On a claim for possession by the landlord,

Held: (i) by SCRUTTON and SLESSOR, L.JJ.: the Rent Restriction Acts operated to protect a tenant who was in residence, whose home the house was, and who, if he were away, desired to return there, as in the case of a person whose occupation took him away from home for, perhaps, long periods, and, therefore, the tenant in the present case was not protected by the Acts and the landlord was entitled to possession.

(ii) by GREER, L.J.: the findings of the county court judge involved a finding that the whole dwelling-house had been sublet, and, therefore, the landlord was entitled to possession under s. 5 (1) (h) of the Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923.

Haskins v. Lewis (1), [1931] 2 K.B. 1, followed, and opinion of SWIFT, J., in *Hicks v. Scarsdale Brewery Co.* (2), [1924] W.N. 189, approved.

Collis v. Flower (3), [1921] 1 K.B. 409, and *Kreitman v. Vidofsky* (4), (1927), 43 T.L.R. 335, overruled.

Notes. Considered: *Sutton v. Dorf*, [1932] All E.R.Rep. 70. Applied: *Reidy v. Walker*, [1933] All E.R.Rep. 182; *Hiller v. United Dairies (London), Ltd.*, [1933] All E.R.Rep. 667; *Lawrance v. Hartwell*, [1946] 2 All E.R. 257; *Murgatroyd v. Tresarden*, [1946] 2 All E.R. 733; *E. Moss, Ltd. v. Brown*, [1946] 2 All E.R. 557; *Mount v. Childs* (1948), 64 T.L.R. 559; *Harrison v. Hopkins*, [1949] 2 All E.R. 597. Distinguished: *Wigley v. Leigh*, [1950] 1 All E.R. 73. Referred to: *Robson v. Headland* (1948), 64 T.L.R. 596; *Langford Property Co. v. Athanasoglou*, [1948] 2 All E.R. 722; *Langford Property Co. v. Tureman*, [1949] 1 K.B. 29; *Berkeley v. Papadoyannis*, [1954] 2 All E.R. 409; *Cove v. Flick*, [1954] 2 All E.R. 441; *S. L. Dando, Ltd. v. Hitchcock*, [1954] 2 All E.R. 335.

As to the position of a statutory tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 809, 810; and for cases see 31 DIGEST (Repl.) 658 et seq. For the Rent Restriction Acts, 1920 and 1923, see 13 HALSBURY'S STATUTES (2nd Edn.) 981 and 1033 respectively.

Cases referred to:

- (1) *Haskins v. Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; 47 T.L.R. 195; 29 L.G.R. 199, C.A.; Digest Supp.
- (2) *Hicks v. Scarsdale Brewery Co.*, [1924] W.N. 189, D.C.; 31 Digest (Repl.) 658, 7605.
- (3) *Collis v. Flower*, [1921] 1 K.B. 409; 90 L.J.K.B. 282; 124 L.T. 510; 19 L.G.R. 193, D.C.; 31 Digest (Repl.) 662, 7627.
- (4) *Kreitman v. Vidofsky* (1927), 43 T.L.R. 335, D.C.; Digest Supp.

- A (5) *Campbell v. Lill* (1926), 135 L.T. 26; 42 T.L.R. 397; 70 Sol. Jo. 621, D.C.; 31 Digest (Repl.) 693, 7846.
- (6) *Fordree v. Barrell*, [1931] 2 K.B. 257; 100 L.J.K.B. 515; 145 L.T. 219; 95 J.P. 141; 47 T.L.R. 404; 29 L.G.R. 440, C.A.; on appeal, [1932] A.C. 676; 101 L.J.K.B. 529; 147 L.T. 206; 96 J.P. 278; 48 T.L.R. 482; 30 L.G.R. 271, H.L.; Digest Supp.
- B (7) *King v. York* (1919), 88 L.J.K.B. 839; 35 T.L.R. 256; [1919] W.N. 59; 31 Digest (Repl.) 634, 7427.
- (8) *Martin Estates Co., Ltd. v. Watt and Hunter*, [1925] N.I. 79; 31 Digest (Repl.) 646, *2525.
- (9) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.
- C (10) *Drury v. Johnston*, [1928] N.I. 25; Digest Supp.
- (11) *John Lovibond & Sons, Ltd. v. Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; 45 T.L.R. 883; 73 Sol. Jo. 252; 27 L.G.R. 471, C.A.; Digest Supp.
- D (12) *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, 7865.
- (13) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 44 T.L.R. 278; 26 L.G.R. 145, C.A.; Digest Supp.
- (14) *Remon v. City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P.Jo. 349, C.A.; 31 Digest (Repl.) 638, 7455.
- E (15) *Mellows v. Low*, [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 39 T.L.R. 190; 67 Sol. Jo. 261; 21 L.G.R. 180, D.C.; 31 Digest (Repl.) 480, 6059.
- (16) *Re Cuno*, *Mansfield v. Mansfield* (1889), 43 Ch.D. 12; 62 L.T. 15, C.A.; 27 Digest (Repl.) 116, 856.
- F (17) *Cruise v. Terrell*, [1922] 1 K.B. 664; 91 L.J.K.B. 499; 126 L.T. 750; 38 T.L.R. 379; 66 Sol. Jo. 365; 20 L.G.R. 418, C.A.; 31 Digest (Repl.) 698, 7891.

Appeal from a Divisional Court of the King's Bench Division (TALBOT and FINLAY, JJ.).

- G The plaintiff was the owner of a dwelling-house and premises known as 26, Oxford Road, Upper Norwood, London. The defendant was a weekly tenant of the said premises at a rental of 10s. a week. The plaintiff claimed possession. It was admitted that the premises came within the scope of the Rent and Mortgage (Restrictions) Acts and that a proper notice to quit had been served on the defendant on May 6, 1930. The defendant pleaded the protection of the Acts on the
- H ground that he was a statutory tenant. It was proved before the county court judge that for many years prior to 1919 the defendant had been tenant and occupier of the premises, that in that year he went to live in a house at Tatsfield, Surrey, of which his wife was tenant, and that thereafter a married sister of the defendant's wife and her husband lived at 26, Oxford Road until June, 1930. A sister of the defendant then occupied the premises and was in occupation when proceedings
- I were commenced in the county court. The learned judge held that the defendant was not in actual possession of the premises at the time the notice to quit was given, the material time, and that he did not retain possession within the meaning of the Acts by the occupation of his own or his wife's relatives, as, on the evidence, that occupation was not for the purpose of preserving the house for his own residence. He, therefore, made an order for possession and against this the defendant appealed on the ground that the learned judge was wrong in law. The Divisional Court held that the fundamental principle of the Rent Restriction Acts was to protect a resident in a house, and, therefore, they dismissed the appeal.

The defendant (the tenant) appealed.

Safford for the tenant.

Frank J. Powell and *Norman Parkes* for the landlord.

The following cases were cited in the argument besides those mentioned in the judgments in the Court of Appeal: *Campbell v. Lill* (5), *Fordree v. Barrell* (6), *King v. York* (7), *Martin Estates Co., Ltd. v. Watt and Hunter* (8), *Prout v. Hunter* (9).

SCRUTTON, L.J.—This case under the Rent Restriction Acts raises a question which in part, I think, has already been decided by this court; but in part, perhaps, has not been so decided. The facts now are comparatively simple, although there was a great conflict of evidence as to them in the county court. The claim was to recover possession of a certain house from the tenant, the defendant. The county court judge found that for the last ten years he and his wife have been living somewhere else, and that he is not a tenant in actual possession of the house, the subject of this action; but it appears that during this time he, living somewhere else, has been paying rent to the landlord for this house, and, first of all, two relations of his wife lived there, presumably with his consent. It does not appear whether they have been paying him rent while he has been paying the landlord rent, or whether he has been charitable to his wife's relations, and let them reside there without paying rent. It may be that they are his tenants at will, and when they left, apparently the tenant's sister came to live in the house. Again, it does not appear whether she paid him any rent, or whether she was a kind of tenant at will in the house. The finding of the learned county court judge is that for ten years the tenant and his wife have been residing at another house ten miles away, and that he is not in actual possession. He is a tenant who was not in occupation, and the occupation, the county court judge has found, of the wife's relatives and then of his sister was not for the purpose of preserving the house as a residence for him. The way in which the judges of the Divisional Court have put it, and the basis on which the county court judge proceeds, is that he has found that it was not the tenant's residence during the whole of that period, i.e., for some ten years. It seems also that there is no reason to think that at any definite time, or, indeed, at any time, did the tenant contemplate returning there to reside.

We have decided in this court, the third member of the court not saying anything about the matter, but the two other members of the court agreeing, that, if you get a house originally let to a tenant and you find that that tenant is not living in the house, but that a business is being carried on on two floors of the house, not proved to be the tenant's business, and that the tenant has sublet the other two floors of the house and is not residing there himself, such a tenant cannot claim the protection of the Act—as to the two floors let for business premises because they are let for business premises which are not within the Act, and as to the two other floors, because the tenant is not himself occupying them for residence, and has sublet the part of the house which is not used for business premises. That is the decision of this court in *Haskins v. Lewis* (1). The difference in the facts of this case is that there is here no question of business premises. It has been found that the tenant is not an occupying tenant, that his home is elsewhere, and that he has no intention to return to this house as his home. Thus the question is raised, which can be stated quite simply: Do the Rent Restriction Acts apply to a non-occupying tenant—not to a person who occupies from time to time, a person who comes down some week-ends to a country cottage, or to take one of the best illustrations, to a sea captain who is away for long periods, but returns to the house between his voyages, while his wife and family stay in the house while he is away—but to a non-occupying tenant? This is the case where the tenant does not occupy at all, but merely pays rent. He does not sublet; he merely pays rent, and he does not himself, or by his family, by which I mean his wife and children, occupy the house, he returning from time to time.

- A The history of the decisions under the Rent Restriction Acts may be described as a very gradual feeling of the way towards the principles upon which the Act is to be worked. When the first Act was passed in 1915, and further Acts were passed in 1919, 1920, and 1923, there is no evidence that Parliament, or the draftsmen, ever thought out exactly what right they were giving to the tenant. There is no evidence that they considered originally whether it was a property that they were
- B giving the tenant, a property that he could assign, a property that he could leave by will, a property which would pass to his legal personal representatives, if he died intestate, a property which might, or might not, pass to his trustee in bankruptcy if he became bankrupt. There is nothing in the Acts to show that Parliament ever thought about that sort of question. Consequently, the courts have had slowly to feel their way, generally out of extra caution, not deciding anything more than
- C they could help in the particular case, but frequently indicating that they saw that there were questions coming which they would have to decide when the facts raised them. It is curious, indeed, that it was not until 1928, thirteen years after the first Act was passed, before the court was faced by the question whether a statutory tenant could leave his property by will: see *Drury v. Johnston* (10) and *Lovibond & Sons v. Vincent* (11). Other questions were dealt with as they arose. For
- D instance, in 1923, before the 1923 Act came into force, the question was raised whether a statutory tenant could assign his whole interest for value, and the court in *Keeves v. Dean* (12) decided that he could not. Parliament, in 1923, before *Keeves v. Dean* (12) was decided, supported that view without any knowledge of what was going to happen in *Keeves v. Dean* (12) by providing that the assignment of the whole interest in the premises should be a ground on which the county court
- E judge could turn the tenant out. That left the very difficult question whether the Act contemplated assignments of part of the tenancy, i.e., subletting, and in *Roe v. Russell* (13), in 1928, the court had to face that question. They decided there, having regard to a number of expressions in the Act, that so long as the tenant resided in part of the dwelling-house he might sublet other parts. If he ceased to reside, and assigned the whole, then he lost the right to be considered as tenant.
- F Lastly, in *Lovibond & Sons v. Vincent* (11), in 1929, the court had to face the question whether the tenant could leave his interest in the house by will, and they decided that he could not.

Throughout this series of decisions the court had been gradually working to the view that the right was not a right of property, unless provided by the Act. For instance, there is a section about intestacy, a very difficult section to work, and one which has never yet come before this court to consider how it is to be worked, which does give the intestate a kind of right of property which is to descend to persons to be settled by a referendum of the family. It is a very odd clause, but throughout all these cases there have been, from time to time, expressions which show that the court has been gradually working towards a general principle that the Act extends, and relates, to a tenant in residence, a tenant whose home the

H house in question is, a tenant who desires to live there, or, if he is away, desires to return there. For instance, BANKES, L.J., in *Keeves v. Dean* (12) ([1924] 1 K.B. at p. 690):

"His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

J That is the principle towards which the courts have, in my opinion, been working for some time. In *Haskins v. Lewis* (1), to which I have referred, two members of the court expressly stated such a principle. I said ([1931] 2 K.B. at p. 13):

"One thing is quite certain, the original tenant is not residing in those floors; his sub-tenants are residing there. The consequence is that you have this position, that the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act; he is not occupying the ground floor and the first floor as a residence, he

is occupying them for business purposes; he is not occupying the attic and the basement as a residence, those portions of the house are being occupied by the subtenants, he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by subletting it. That, I understand, is the principle which SWIFT, J., intended to lay down in *Hicks v. Scarsdale Brewery Co.* (2)."

My brother GREER did not express any opinion either for or against that view, but he dealt with another point. ROMER, L.J., said ([1931] 2 K.B. at p. 18):

"It has frequently been pointed out in the courts, and it has been pointed out once more by SCRUTTON, L.J., in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without subletting the premises or whether he has sublet the premises as a whole."

It is quite true that in that case the facts were that part of the premises had been taken out of the scope of the Acts by being used as business premises, and in the rest the tenant was not residing, but had sublet the whole of the residential premises. Counsel for the tenant, in addressing us, said on behalf of his argument:

"The court has not yet decided what is the position if there is no subletting, but the facts are merely that the tenant is not in the premises." Probably, strictly speaking, that is accurate; although the principle applicable has been stated in such wide terms that it would be very difficult to distinguish this case from the previous cases with any precision that is both intelligible and logical.

In my view, from the start, now that one looks back on the series of cases, this underlying principle has been treated as governing the Acts. The first Act was passed in war-time, when, owing to the scarcity of houses, for various reasons into which one need not go, very high rents were being claimed from tenants by landlords. Parliament stepped in to say: "We will fix the rent at which alone you can let to a tenant, and we will fix it by the rate it was on a date before the war. If you continue paying that rent, although the landlord wants to get rid of you, and although he has terminated your contractual tenancy, you shall stay in." It dealt with a tenant who was in, and who was not to be turned out. It did not deal, in my opinion, and it was never intended to deal, with a tenant who was not in, but who wanted to say: "I am out. I am living elsewhere, but I claim the right, so long as I pay the contract rent, to keep my tenancy of those premises, although I am leaving the house empty." If it had been suggested to Parliament, in a time of great scarcity, that they were providing that a man might keep a house empty so long as he paid the rent, such a suggestion would have been received with contempt. That was not the purpose for which the Act was being passed; but, as I have said, the Act was passed in a hurry. Most of these Rent Acts seem to have been passed in a hurry, and the language used was very vague, and it has always been possible for counsel to say that they could not find very clear words in the Acts dealing with the case before the court. That was the argument which was presented in one of the first cases in which this court had to consider the general position of the Act. I am referring to *Remon v. City of London Real Property Co., Ltd.* (14). What had happened there was that there was a tenancy which, contractually, and at common law, expired on a given date. Two hours after it had expired the landlord got into the premises. The tenant was not there. The landlord said: "I am exercising my right of re-entry. Where do you find anything in the Rent Restriction Acts turning me out? I am in. It is not a question of the tenant not having possession. Here am I, the landlord, in the

A premises." Counsel argued with his usual force and vigour that there were no words in the Act which provided for such a case, and consequently he, the landlord, was entitled to stay in. As I put it:

B "Mr. Romer argued very forcibly to us that though the policy were clear yet the courts ought not to give effect to it unless they could find words apt in their ordinary meaning to justify them in so doing, and that the case of a landlord getting into possession of premises which under the agreement of tenancy he had a right to enter had not been dealt with by Parliament"

C ([1921] 1 K.B. at p. 58). The argument here of counsel for the tenant has been a twin brother of that argument, only he has put it the other way. He says: "Section 5 of the 1920 Act, now s. 4 of the 1923 Act, provides that an order for possession shall not be made except in certain circumstances. Where do you find in s. 5 or s. 4 any words dealing with the case of a tenant who is not in possession of the premises at all, who is living elsewhere, and who merely claims the contract right because he pays rent?" I agree entirely with him that s. 5 and s. 4 have not said so for the reason, in my view, that it was never contemplated that the Act applied to the case of a tenant living somewhere else, and not living in the premises, who said: "I am not in, but do not turn me out." A non-occupying tenant, in my view, was never within the precincts of the Act at all. The Act dealt with occupying tenants who were to have a right to stay in, a right not to be turned out. But the case of the non-occupying tenant was not a case that Parliament ever thought came within the Act, and so Parliament did not provide for him in s. 5 or in s. 4.

E In my view, this case must be decided on the principle that the Rent Restriction Acts do not apply to a tenant who is not occupying the premises in question. I exclude the cases of temporary absence. The best illustration of that case is as I have said once already, that of a ship's captain. He may be away from the premises for the greater part of the year, but he has the tenancy of them. He intends to return to them; he is there when he is in England, and his wife and family occupy the premises while he is away. I am dealing in this case with that of a man who does not intend to live in the premises, who has not lived in the premises for the last ten years, and who, as the Divisional Court say, has shown no evidence of ever intending to return to the premises because he is quite comfortable where he is, where he has lived for the last ten years. The Divisional Court, quite properly, felt themselves a little handicapped by certain previous decisions, some of which, I agree, are not consistent with the principle that I am now laying down, but they came to the conclusion that the principle laid down in *Haskins v. Lewis* (1) applied to this case, as well as to the facts of *Haskins v. Lewis* (1). TALBOT, J., who gave the leading judgment, and one of the very careful judgments that TALBOT, J., does give, said in conclusion:

H "Conscious as I am that this view involves a departure from the decisions in *Collis v. Flower* (3), *Mellows v. Low* (15), and the conclusion that *Kreitman v. Vidofsky* (4) cannot be reconciled with what the lord justices have said in *Haskins v. Lewis* (1), and although I feel embarrassed to some extent by the fact that, from the report I have seen—it is not a very full report—none of those authorities was brought to the notice of the Court of Appeal in *Haskins v. Lewis* (1), and is certainly not dealt with in any way by the lords justices, as I think would have been the case if they had been cited to them, it seems to be our duty to follow what the judges in the Court of Appeal have said. I think if we decided differently we should be saying we did not agree with what they deliberately laid down as a general principle in the construction of these Acts. If we have misunderstood the Acts or the decisions and this case goes to the Court of Appeal, I hope that the court will tell us what we ought to have done."

I That court is now trying to do so. The learned judge himself had not cited to him, as I gather, a case which would show that the court had in its mind the doubts

which arise from some of the earlier cases, because the learned judge had not cited to him *John Lovibond & Sons, Ltd. v. Vincent* (11), the will case, in which I said ([1929] 1 K.B. at p. 693):

"We can only construe these Acts as we find them, and my view, as the result of the authorities, is that the right conferred upon the statutory tenant—in the absence of any express provision altering it in any particular case—is a purely personal right with which he cannot deal. Possibly this view may render it necessary some day to re-consider previous decisions as to the position of executors, administrators and trustees in bankruptcy of statutory tenants; it is unnecessary, however, to do so now."

Two of the decisions to which the learned judge below referred were decisions as to the position of executors, and the position as to the relation of administrators. The decision as to executors to which the learned judge refers is that of *Collis v. Flower* (3). It will be noted from that date that this case was heard at a very early stage of the development of the court's view on the meaning of the Act. It is in the same year, and in the same volume as *Remon's Case* (14) which was one of the first cases which forced upon the attention of the court some of the implications of the Act. In *Collis v. Flower* (3) there was a tenant of a dwelling-house who died, a common law tenant, and by her will she appointed an executor, and another person who had lived in the house with her was the residuary legatee. The residuary legatee continued to reside in the house as she had done when the tenant was alive. The landlord served notice to terminate the common law tenancy upon the executor who, of course, by law was the person entitled to the common law tenancy. Then, having given notice to terminate the common law tenancy, he brought an action for possession against both people, the executor and the person who was then in the house continuing her actual living there. The county court judge held that the residuary legatee was not a tenant, for there had been no consent by the executor for her to remain which would make a tenancy between her and the executor, and that as the executor was not in possession of the house he could not claim the protection of the Act. That decision was reversed by the Divisional Court holding that the executor as executor was tenant of the house, and was entitled to the protection of the Acts, although he was not in occupation of the house. In my view, that decision was wrong, for the reasons that I have stated. The common law tenancy had terminated. The executor had a common law tenancy, and it was terminated by notice to quit. He did not remain in occupation of the house, and, in my view, the original tenant having no right, as we have now decided, to dispose of the property by will, had no right to give any statutory right to the executor, and the executor who had not lived in the house could not claim to be a statutory tenant. In my view, therefore, *Collis v. Flower* (3) is no longer an authority.

The case of an administrator stands on a different footing, for one has to examine the facts in all these cases. In *Mellows v. Low* (15) the facts were different. The original tenant was a weekly tenant. It was a common law tenancy, and during her tenancy she died intestate. Consequently, whatever rights she had in her common law tenancy remained to her representatives on an intestacy. No notice to quit was ever given, and, therefore, the common law tenancy remained. The landlord claimed that on the death of the tenant intestate, with no member of her family residing in the house, the tenancy lapsed. It was held that the administratrix was a person who derived title under the original tenant, and, consequently, that the landlord could not be granted possession. The point of that case which renders it a right decision is that no notice to quit the common law tenancy had ever been given. The common law tenancy, therefore, remained, and it remained in the person who at common law was entitled to it, and his tenancy had never been terminated. Consequently, the decision of *Mellows v. Low* (15), on the facts, is right, but if notice to terminate the common law tenancy had been given the court could not, in my opinion, have said (unless the matter could be

A brought within the very curious clause about intestacy to which I have referred) that such an administratrix, not being in possession, is entitled to be protected by the Act. The learned judges in the Divisional Court referred to the view of SWIFT, J., in *Hicks v. Scarsdale Brewery Co.* (2) which, in my opinion, was right, the view to the contrary expressed by ACTON, J., in my opinion, being wrong. They referred also to the case of *Kreitman v. Vidofsky* (4) in 1927, which as they said, was practically the same case as this one. I do not go into the facts. I agree that it was practically the same as this, and I think that it was wrongly decided.

For the reasons that I have stated, therefore, in my view, the Rent Restriction Acts do not apply to a tenant who is not in occupation in the sense that it is his home in which he lives, and to which he intends to return, although he may be absent at the time of the claim for possession. Such a house is not within the protection of the Rent Restriction Acts. If it were otherwise all manner of odd consequences would arise. This tenant has contented himself with living in one house, and renting another, in which he does not live. Supposing that he rents four or five, living in none of them, in all of them is his tenancy subject to the protection of the Rent Restriction Acts? One object of this Act was to provide that there should be enough houses for people wanting them at a moderate rent. D A man who does not live in a house and rents it, and never intends to live in the house, is defeating the object of the Act, for he is withdrawing from circulation, so to speak, a house which is wanted by other tenants. In my view, to treat a man in the position of this defendant as a person entitled to be protected under the Rent Restriction Acts, is completely to misunderstand the policy and object of the Rent Restriction Acts. For these reasons, in my view, the appeal should be dismissed with costs. E

GREER, L.J.—I have also come to the conclusion that this appeal should be dismissed. I cannot put it upon the same ground as that put by my Lord. I think that the decision of the county court judge cannot be disturbed because he made no mistake of law in the decision to which he came with reference to the premises with which we are concerned. F

It is not unworthy of notice that until May 19, 1930, the tenant of these premises had a legal estate in the premises, although it was only a weekly tenancy, and that he was, up to that date, a contractual tenant, who was entitled either to occupy the premises himself or to let any person that he chose occupy those premises. His landlord could not have disturbed him before that date. On that date the term of a notice to quit given by his landlord expired, and his common law tenancy came to an end. Then on May 30, rather more than a week afterwards and less than a fortnight, a plaint was issued in the county court asking for possession. The position then was that those persons who had been residing in the premises were still in residence. The tenant had no intention of disturbing them, and he did not desire to reside in the premises himself. The learned county court judge, in dealing with the facts of this case, stated his findings as follows: G

“The defendant was a tenant who was not in occupation, and, in my opinion, he did not obtain [I think that he must have meant ‘retain’] possession by the occupation of Mr. and Mrs. Leaman, who were relatives of his wife, or of any other persons who may have been occupying the house in the period which is the subject of these proceedings. The purpose of the occupation of those persons was not to preserve the house as a residence for the defendant, and in these circumstances I am of opinion that the plaintiff is entitled to an order for possession.” H

I It appears to me that that finding involves a finding by the learned county court judge that there was a sub-tenancy of these premises and that the occupying tenant was the sub-tenant. If that is so, the case is brought within the terms of sub-s. (h), which was added to s. 5 of the Act of 1920 by the Act of 1923, as a ground for enabling the judge to make an order for possession, notwithstanding the substantive provisions of s. 5, i.e., where

"the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet."

If that is right, it is not necessary to consider any other question in this case, but as the case has been argued and as other questions have been dealt with, I think it right to express my doubts whether the mere fact of non-residence is sufficient to enable an order to be made for possession under the provisions of the Act of 1920 as modified by the Act of 1923. To add to the subsections of s. 5 non-residence as a ground which will take the case out of the substantive provisions of s. 5 seems to me to be legislation and not a decision as to the meaning of the Act of Parliament. Every case that comes before this court under the Rent Restriction Acts is a case in which we have to consider, and to consider only, what is the meaning of the words used by the legislature. Section 5 of the Act of 1920 is in these terms:

"(1) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . ."

the facts that are stated in the sub-clauses distinguished by letters of the alphabet are established. In my judgment, the court is restrained from making an order or judgment for the recovery of possession in every case except the cases mentioned in the sub-clauses. I agree that s. 5 is only dealing with claims for possession by an ex-landlord against an ex-tenant, that is to say, by a landlord who has let his premises on a contractual tenancy when that contractual tenancy has come to an end. It does not seem to me that mere non-residence, however long it may take place, would be sufficient to justify the court in making an order for possession. It has not been so provided for by the statute. In addition to that, in my judgment, the tenant may remain in occupation, remain in possession in law, even although he is not physically upon the premises, if he is occupying the premises by a licensee. If I had thought that these facts necessarily involved that the learned judge in the county court had found that these people, who were living on the premises, were mere licensees and had no tenancy whatever, I should have thought that the order for possession ought not to be made. It is quite true, as my Lord has pointed out, that language has been used in some of the cases which would seem to indicate the larger view upon which my Lord has based his judgment. I refer especially to the words used by the majority of judges in the Court of Appeal in *Haskins v. Lewis* (1). SCRUTTON, L.J., in that case used these words ([1931] 2 K.B. at p. 14):

"That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by subletting it."

That proposition as a whole does not apply to the present case, because there was no evidence that the tenant was making money by subletting the house. If by that it had been intended to say that non-residence is a sufficient justification for making an order for possession, it does not seem to me that it is necessarily binding upon this court because of the qualification which my Lord put, which refers to a sub-tenancy, by the words "but is making money by subletting." I agree that the words used by ROMER, L.J., are somewhat wider, but they also were not necessary for the decision of that case.

We have had cited to us two cases, one with regard to the position of an executor and the other with regard to the position and rights of administrators. In *Collis v. Flower* (3) the court were dealing with the case of an executor. The position was that the executor had a common law tenancy, that is to say, he had a right to occupy the premises and to be the tenant of the premises until he received notice to quit. The residuary legatee was in possession of the house and the executor did not disturb him. Notice to quit was given both to the residuary legatee and

- A to the executor. The county court judge held that there was no assent by the executor to the legatee taking the tenancy in part satisfaction of her rights as a residuary legatee, and that she was not the tenant of the house. A legacy does not take effect until the executor assents to the legacy, and if the executor had assented to the legacy before the notice to quit, then the legatee would have become the common law tenant of those premises, because there was no reason why the tenant
- B should not leave by will her property to the legatee, but, the judge having found that there had been no such assent, it could not be held that the legatee was the common law tenant of the premises, and, therefore, the common law tenant of the premises, whose tenancy had come to an end, was the executor. The question whether the executor could be deprived of his right to possession is one of very great difficulty. I have some difficulty in reconciling *Collis v. Flower* (3) with
- C *Lovibond & Sons v. Vincent* (11), because the appointment of an executor depends upon the will, and by appointment of an executor the testator is assigning by will his property to the executors. He can do that so long as the common law tenancy is in existence, and it seems to me that that may afford a distinction between *Collis v. Flower* (3) and *Lovibond's Case* (11). *Collis v. Flower* (3) may be deemed to be rightly decided, because, although the executor did not reside on the premises,
- D and although he was not physically in possession of the premises, he had the right to possession and he was the only person who had the right to possession. Be that as it may, I do not think that *Collis v. Flower* (3), or the grounds of the decision in *Collis v. Flower* (3), touch the present case. The facts in *Mellows v. Low* (15), the case of an administratrix, do not raise any point as to the rights of a statutory tenant.
- E The result of the way in which this Act has been framed and altered from time to time is extraordinary. According to the decision of the majority of the court in *Haskins v. Lewis* (1), which I, of course, readily accept as a decision which is binding upon this court, an action for possession may be used, not for the purposes of obtaining possession by the plaintiff, but merely for the purpose of putting to an end the rights of his tenant, although his tenant is not in possession at all. It
- F seems to me an anomalous state of things, because one would have thought, as I thought all through, until I was told otherwise by the Court of Appeal, that an action for possession was an action for possession, and not for a declaration of title or a declaration that the title of an intermediate tenant had disappeared. However that may be, the court took that view. I agree that in this case there can be a judgment for possession as against the defendant, although the defendant is not
- G in occupation of the premises and although he is not in possession of the premises but somebody else is in possession of the premises who, until his tenancy at will determined, was entitled to remain there. For the reasons which I have given, I agree that the judgment in the court below was right, and ought not to be disturbed.

SLESSER, L.J.—I agree that this appeal should be dismissed, and for the sake of clarity I would say at the beginning of my judgment that I have come to that conclusion upon grounds similar to those stated by SCRUTTON, L.J. The language of my Lord in his judgment in *Haskins v. Lewis* (1) seems to me exactly to cover this case. There his Lordship, speaking of those parts of the premises in which the persons were still residing, namely, the attic and the basement, said ([1931] 2 K.B. at p. 14):

- I “He [the tenant] appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house.”

ROMER, L.J., expresses the same view without any qualification ([1931] 2 K.B. at p. 18). It has been pointed out by counsel for the tenant in the present case that my Lord has added to the words which I have quoted, these words: “But is making money by subletting it.” As I read that case, however, the majority of the Court of Appeal would have laid down the same principle, even if the tenant

had not been making money by subletting, but had parted with the occupation, as in the present case, so that the tenant no longer was in actual possession of the premises either from considerations of charity or of kinship, or of whatever other motive might move the tenant other than the motive of remuneration. For myself I should have come to the conclusion that we were bound in the present case by the decision in *Haskins v. Lewis* (1) so stated. I note that my Lord in *Haskins v. Lewis* (1), having made the observation which I have just quoted, said ([1931] 2 K.B. at p. 14): "That, I understand, is the principle which SWIFT, J., intended to lay down in *Hicks v. Scarsdale Brewery Co.* (2)." When I refer to the judgment of SWIFT, J., in that case, to which my Lord gave approval in *Haskins v. Lewis* (1), I see that he said ([1924] W.N. at p. 190): "The question depended on the meaning of the word 'possession' in s. 5 (1) of the Act of 1920"—now, I think, s. 4 of the Act of 1923, slightly amended, but not upon this point.

"The true meaning was actual possession. The conditions in the section upon which an order for possession might be made were all applicable to a tenant in occupation, and could not have been drafted to meet the case of a tenant in reversion who was in fact the landlord of the tenant in occupation."

The right given was a personal one, so that SCRUTTON, L.J., in *Haskins v. Lewis* (1), in approving that principle, appears to me to approve it irrespective of whether the tenant who has parted with the actual possession is, or is not, receiving financial reward as a consideration for giving up the actual possession. But even if *Haskins v. Lewis* (1) were not binding upon me—and it is true to say that the facts in that case, as, indeed, those in *Hicks v. Scarsdale Brewery Co.* (2), show that money was paid as a consideration for giving up actual possession—I think that in general principle I should have come to the same conclusion.

It must not be forgotten, and it is apt to be forgotten, as this statute has been in force for some considerable time, that the original Act invaded the common law rights of owners to regain possession of their premises at the end of their tenancy. The whole of the Rent Restriction Acts, whether particular sections do or do not lay down conditions, must be regarded from that point of view as creating rights in persons who are not called statutory tenants, or ex-tenants, a designation which they would not possess by reason of their original tenancy. In *Re Cuno, Mansfield v. Mansfield* (16) that great judge, LORD BOWEN, said (43 Ch.D. at p. 17):

"In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

I do not find in the language of s. 4 of the Act of 1923 (s. 5 of the Act of 1920) such plain words as to show that the legislature intended that no order should be made for the recovery of possession of any dwelling-house, or for the ejection of a tenant therefrom when the tenant was not in actual possession of the premises in the circumstances stated and found by the county court judge in the present case. It is too late, in my opinion, to argue that the Rent Restriction Acts must not be looked upon as a whole and are not to be construed as a whole, but by the consideration of particular parts. BANKES, L.J., dealing in a sense with the converse of this case in *Remon v. City of London Real Property Co., Ltd.* (14), because there the object was rather to fetter than to increase the powers of the landlord, who claimed certain rights at common law which he said made it necessary for him to have recourse to the Act to recover possession of his premises, seeing that he was by his own physical act in occupation, said this ([1921] 1 K.B. at p. 55):

"If each of these sections is to be treated separately, there is much force in [counsel's] contentions as to the literal construction to be placed upon the language used in them. They cannot, however, be so treated. They form part of the statute, and they must not only be read together, but as forming part of an entire whole. However much the draftsmanship of the Act may be

A open to criticism, the court must endeavour to place a reasonable interpretation upon the statute, if the language used admits of such an interpretation."

B I think, having regard to the mischief to which my Lord referred with which this Act deals, and the invasion of the immemorial rights of landlords at common law, that it would not be to place a reasonable interpretation upon the statute to say that a tenant who had acquired a legal tenancy, and who chose to remain in legal, but not in actual, occupation or possession of any number of houses is protected, for in principle if he is to be protected when he is not in actual possession of one house, there is no reason why he should not be protected if he did not remain in actual possession of 100 houses. Therefore, first because I think that *Haskins v. Lewis* (1) has already decided this point, and is binding upon the court, and secondly, if that be not so, because, as appears from *Remon v. City of London Real Property Co., Ltd.* (14) and *Cruise v. Terrell* (17), we must look at the reasonable interpretation of the statute by considering the mischief to which the statute is directed, and considering the fact that it is in its nature the invasion of rights which obtain otherwise by contract, or at common law, I have come to the conclusion that the restriction on the right to recover possession in s. 4 of the Act of 1923 is confined to persons who are in residence, tenants in residence in the premises, meaning by "residence" not residence in the narrow sense, but persons who cannot properly be said to be out of actual possession. I agree with my Lord that in the case of persons who have an intention to return who are away for a limited period for purposes of business convenience it may fairly be found in a particular case that they are still in actual possession, and, therefore, protected.

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E The learned county court judge found as a fact that this tenant was not in actual possession, that the purpose of the occupation of the persons who were in the house was not to preserve the house as a residence for him, and that he did not intend to return there and to re-occupy the house. For these reasons I agree that this appeal must be dismissed.

Appeal dismissed.

F Solicitors: *Heald, Johnson & Co.; Burton, Yeates, & Hart.*

[*Reported by C. G. MORAN, ESQ., Barrister-at-Law.*]

W. T. LAMB & SONS v. GORING BRICK CO.

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), December 17, 1931]

[Reported [1932] 1 K.B. 710; 101 L.J.K.B. 214; 146 L.T. 318;
48 T.L.R. 160; 37 Com. Cas. 73]*Agent—Essentials of contract—Party described as “selling agent”—Contract in substance one of sale for re-sale.**Contract—Appointment of merchants as “sole selling agents”—Principal’s right to sell goods himself—Certainty—Sale of goods—Price not ascertained, but materials for ascertainment provided by contract.*

On April 27, 1927, manufacturers of bricks and other materials contracted with a firm described in the agreement as “merchants” as follows: (i) “The manufacturers hereby appoint the merchants sole selling agents of all bricks and other materials manufactured at their works. (ii) The price which the merchants shall pay the manufacturers for the said bricks and other materials shall be mutually agreed from time to time and shall be based on a figure which shall show the merchants not less than 10 per cent. on the current market price to builders. (iii) The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery. (iv) This agreement to be for three years and afterwards continuous, subject to twelve months’ notice by either party.” By a letter dated Sept. 25, 1929, the manufacturers stated that they intended in future to sell all the goods they manufactured themselves, without the intervention of an agent.

Held: (i) despite the description of the merchants as “selling agents” the contract was not one of agency, it being in substance a contract of sale for re-sale.

(ii) on its true construction the contract placed on the manufacturers an obligation to sell the goods manufactured by them to the merchants for re-sale by them, and it deprived the manufacturers of the right to sell the goods themselves, except to the merchants, so long as the contract was operative; the letter of Sept. 25, 1929, was a repudiation and a breach of the contract; and the merchants were entitled to damages.

Per GREER, L.J.: Where, in a contract of sale, the price of the goods is not ascertained, but the materials for its ascertainment are provided by the contract, the contract is valid and enforceable, for that which can be made certain is just as good for the purpose of a contract as that which is made certain by the words of the contract themselves.

Notes. As to what constitutes a contract of agency, see 1 HALSBURY’S LAWS (3rd Edn.) 145–147; and as to the need of certainty in a valid contract, see *ibid.*, vol. 8, 83, 84. For cases see 1 DIGEST 267–272, and 12 DIGEST (Repl.) 22–24, and cases cited at 8 HALSBURY’S LAWS (3rd Edn.) 83, 84.

Cases referred to:

- (1) *Bentall, Horsley, and Baldry v. Vicary*, [1931] 1 K.B. 253; 100 L.J.K.B. 201; 144 L.T. 365; 47 T.L.R. 99; 74 Sol. Jo. 862; Digest Supp.
- (2) *Snelgrove v. Ellringham Colliery Co.* (1881), 45 J.P. 408; 1 Digest 560, 2082.
- (3) *Cant v. Miller* (1913), 13 S.R. (N.S.W.) 505; 30 N.S.W.W.N. 143; 1 Digest 559, 2081 ii.

Appeal from an order of WRIGHT, J.

By an agreement, dated April 21, 1927, the defendant company appointed the plaintiffs their sole selling agents for all materials manufactured by the company. The agreement was worded as follows:

“An agreement made this 21st day of April 1927, between the Goring Brick Co., Ltd., Goring, Sussex (hereinafter called the ‘manufacturers’) of the one

A part and W. T. Lamb and Sons, of 43, Shoe Lane, London, E.C.4 (hereinafter called the 'merchants') of the other part. Whereby it is mutually agreed as follows: (i) The manufacturers hereby appoint the merchants sole selling agents of all bricks and other materials manufactured at their works. (ii) The price which the merchants shall pay the manufacturers for the said bricks and other materials shall be mutually agreed from time to time and shall be based on a figure which shall show the merchants not less than 10 per cent. on the current market price to builders. (iii) The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery. (iv) This agreement to be for three years and afterwards continuous, subject to twelve months' notice by either party."

B On Sept. 25, 1929, the defendants' auditors wrote to the plaintiffs a letter, the material portion of which was as follows:

C "As Mr. Brackley intends to sell all bricks manufactured in the future without the intervention of an agent, the returns you referred to will not be of value to you. . . . You will appreciate that the company does not lose its right to sell its own bricks locally by the agreement entered into with you on April 21, 1927, provided they are not sold through some other agent."

D The plaintiffs brought the present action claiming damages for breach of the contract of agency. The defendants did not deny the agreement, but contended that it did not deprive them of the right to sell by themselves. They further contended that the letter of Sept. 25 was not a repudiation of the contract.

E WRIGHT, J., in giving judgment, said that by its express terms the letter of Sept. 25, 1929, amounted to a statement that the functions of the plaintiffs as selling agents would be entirely abrogated, because it was a clear expression of intention on the part of the defendant company to sell all their bricks in future without any intervention on the part of the plaintiffs. That was not consistent with the terms of cl. 1 of the agreement of April 21, 1927. The fair construction of cl. 1 was that the intention was that, the manufacturing part of the business being in the hands of the defendant company, the merchanting or selling part of the business was to be entrusted to the plaintiffs. The words in the contract "appoint the merchants sole selling agents of all bricks manufactured" meant that the plaintiffs were to have the sole right of selling all the bricks manufactured by the defendant company at their works. The letter of Sept. 25, 1929, was a repudiation and a breach of the agreement of April 21, 1927, and the plaintiffs were entitled to succeed. The defendants appealed.

G *Van den Berg, K.C.*, and *Blain* for the defendants.

Serjeant Sullivan, K.C., *Maurice Healy K.C.*, and *R. T. Sharpe*, for the plaintiffs, were not called upon.

H **SCRUTTON, L.J.**—This is an appeal from a decision of WRIGHT, J., who has, without going into any question of amount, made an order that the plaintiffs are entitled to damages for breach of a contract entered into between the parties. The contract is short, and if one looks at it knowing nothing whatever about the facts, undoubtedly questions of some difficulty are raised as to what exactly it means. The parties to it, however, originally found no difficulty in deciding what it meant, and for two-and-a-half years they worked under it—until some third person, who had not up to that time been concerned in the matter, obtained the majority of the shares in the defendant company. He, apparently, took a different view of what the contract meant from that taken by the gentlemen who had been working it for two-and-a-half years. He acted upon that view, and hence this action.

I The contract was made between a company who manufactured bricks and a firm who are described in the agreement as "the merchants" and who, by the agreement, are to be the "sole selling agents of all bricks and other materials manufactured at their works." Anyone with experience of commercial matters knows that in certain trades the word "agent" is used without any reference to its meaning at law. The most obvious illustration is afforded in the motor trade.

Persons in the motor trade who are described as "agents" are often not agents, but purchasers from the manufacturers selling independently, and cases have come before the courts where difficulties have arisen from the fact that a purchaser, possibly a purchaser on certain terms, has been described as an agent. By this particular contract the manufacturers, who made the bricks, appointed the merchants, the parties to sell the bricks, "sole selling agents of all bricks and other materials manufactured at their works," and the contract continues:

"The price which the merchants shall pay the manufacturers for the said bricks and other materials shall be mutually agreed from time to time and shall be based upon a figure which shall show the merchants not less than 10 per cent. on the current market price to builders."

Before this court counsel for the manufacturers took a point that had not been taken in the court below. He contended that the phrase

"shall be mutually agreed from time to time and shall be based upon a figure which shall show the merchants not less than 10 per cent. on the current market price to builders,"

meant merely an agreement to make an agreement, and so was not enforceable, and consequently, not being an effective contract in the sense that it could be worked, there could be no possible claim for damages under it. We are of opinion that this point cannot be raised in this court or on any subsequent inquiry as to damages. If it had been raised in the court below, in our view it would have been necessary to have gone into evidence called to show how the parties had in fact worked the agreement. Some documents were handed up to us—I am bound to say in face of vigorous protest by counsel for the manufacturers—and these documents showed that the manufacturers themselves sent in their accounts to the merchants as sellers, mentioning the price at which the goods were sold, which, presumably, was the current market price to builders deducting 10 per cent.; and there seems to have been no difficulty whatever in working this agreement on those lines for two-and-a-half years. If the point had been taken below, the court of first instance would, I think, have wanted to know how the business had in fact been carried on by the parties before deciding this question. In our opinion, this point cannot be raised in this court or on any subsequent inquiry into damages.

The question before this court then is: What does this agreement mean? It continues:

"The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery. This agreement to be for three years and afterwards continuous, subject to twelve months' notice by either party."

It seems to me quite clear that this is not the same sort of agreement as that by which the owner of property says to an agent: "Sell this one property for me once and for all; if you introduce a purchaser, I will pay you commission, but you are the sole agent." An example of that class of case was in *Bentall, Horsley, and Baldry v. Vicary* (1) on the words of the contract in that case where McCARDIE, J.—though, as he says and as I say emphatically, you cannot lay down any general rule—held that it was open to the owner of the property to sell it himself—to say to the agent: "You have not introduced a purchaser, and there is no term in the agreement which prevents my selling the property myself." But the case is very different where there is an arrangement to continue for three years or longer between a manufacturer and a merchant, dividing the business, the manufacturer to make the goods to be sold for three years, the merchant to keep on selling them for three years and paying the price to the manufacturer monthly. That is quite a different class of contract, and one the effect of which, it appears to me, having regard to the language used, "sole selling agents"—the word "agents" being used in the commercial sense and meaning nothing in particular, but the words "sole selling" having a distinct meaning—is that the manufacturer is not to sell except to the merchant. He sells to the merchant who pays him the price fixed; the

A merchant sells—the sole person who is to sell—to the various builders who want the bricks.

I take that view of this case, and, in my opinion, the decision of McCARDIE, J., has nothing to do with a case of this class—and, indeed, he has not said it has anything to do with it, except in an indirect way. There is the earlier decision of *Snelgrove v. Ellringham Colliery Co.* (2), a decision of one of the most experienced judges in commercial matters who ever sat in this court, MATHEW, J. He was dealing with a case of manufacturers of fireclay goods who had appointed the plaintiff their sole agent for the sale of their goods in London and a district south of York. The person to whom this monopoly of selling had been given found that one of the partners in the firm of manufacturers was selling their goods in this area. He said: “You are interfering with the right which you have given me as sole agent to sell these goods,” and brought an action against the defendants for an account of sales by them in these districts and for commission on such sales. MATHEW, J., said: “

“I am of opinion that this gentleman was to be the agent for the defendants, who, I assume, are ordinary partners, and that they were not entitled to appoint any other agent in his district.”

D McCARDIE, J., in *Bentall, Horsley, and Baldry v. Vicary* (1), and the judge in New South Wales in *Cant v. Miller* (3), described as the Chief Judge in Equity, stopped there in their reading of the judgment of MATHEW, J., and did not pay any attention to his subsequent words. They say that what was meant by MATHEW, J., was that the agreement prevented the manufacturers appointing another agent; it did not prevent the manufacturers from selling themselves. But it appeared from the facts of *Snelgrove v. Ellringham Colliery Co.* (2) that there was a sale by one of the three partners. Three partners do not usually effect a sale; the one partner who is carrying out the transaction of sale is, of course, acting for the others. Similarly, in the case of a limited liability company, the company never sells, but the agent for it, the managing director, a director, or a salesman sent out by the company. It may be said that the company is selling by an agent because they cannot sell themselves. But the judgment of MATHEW, J., in *Snelgrove v. Ellringham Colliery Co.* (2) continues:

“Nor were they entitled to effect any sales nor transact any business connected with their firm in his district, except by means of his agency.”

G In this case the district here is unrestricted; there is no limitation to London or a district south of York. The words used in this contract are “sole selling agents,” and, in my view, when this company either treating itself as the salesman or selling by its managing director or by whoever writes its letters or negotiates its business, sells these goods, it is breaking the contract that it has made with the persons described as the merchants that they shall have the sole right to sell.

H I appreciate that questions may arise as to who is to settle the amount of remuneration. When they arise, they can be dealt with. They have not arisen yet, because those who have worked this contract for two-and-a-half years knew what was meant; and it was not, as I have said, until someone strange to the agreement came in and controlled the company that this idea occurred to anyone that the company might sell these goods itself—irrespective of the fact that it had given the sole selling agency to persons described as merchants, who themselves I invoiced to the customer and were in direct contractual relations with the customer. The view taken by WRIGHT, J., was that there had been a repudiation and a breach of the contract between the parties, and it follows the view expressed by MATHEW, J., as he then was, in *Snelgrove v. Ellringham Colliery Co.* (2). I agree with it. I do not think that this view in this class of case in any way conflicts with the view taken on another agreement expressed in different terms by McCARDIE, J., but I can see no justification whatever for McCARDIE, J., treating the sentence that I read from the judgment of MATHEW, J., in *Snelgrove's Case* (2) as obiter. It is the explanation of his decision, and as much a part of his decision

as his earlier words. For these reasons, in my view, WRIGHT, J., came to a correct conclusion, and the appeal must be dismissed with costs. A

GREER, L.J.—I am of the same opinion. This appeal involves the construction of a document, dated April 27, 1927, which, on the facts of this case, must be treated as the statement in writing of the contract between the parties. It is not quite clear how the contract arose. The document is signed and sealed on behalf of the parties described as the manufacturers; it is not either signed or sealed by the parties described as the merchants. But it seems to me that we must treat it as the contract between the parties, either because it was sent forward by the merchants to the manufacturers with a request for their signature, or because it was, after being signed, received by the merchants and acted on by both parties for two-and-a-half years. B

Notwithstanding the terms contained in this document, the manufacturers are saying: "We are now entitled to say that we will not supply you with any of the bricks or other materials manufactured at our works. We will exercise our discretion from time to time as to whether we will give you any of the bricks or other materials manufactured at our works, and we do not recognise your right to have supplied to you any of those bricks and other materials. We desire to use them just as it suits us in business." In my judgment, that was a clear repudiation of this contract. It is a somewhat remarkable fact that, notwithstanding the numerous commercial and other cases in which the distinction between the position of a buyer and that of an agent for sale has been stated and interpreted, there are still innumerable people engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, and they use the two terms as if they were equivalent, the one to the other. I can only read this contract as meaning that the manufacturers are undertaking to supply goods to the persons whom they call agents for sale, and, as consideration for that supply, to take the price which is mentioned in para. (ii) of the contract. The words in para. (i) are these: C D E

"The manufacturers hereby appoint the merchants sole selling agents of all bricks and other materials manufactured at their works."

Paragraph (iii) reads: F

"The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery,"

and para. (ii) is the paragraph which fixes the price which is to be paid by the merchants to the manufacturers. I can only read that document as a contract by which the manufacturers are sellers, and the firm called the agents for sale are to be the buyers, over a period of three years, of the goods described in para. (i), that is to say, of "all bricks and other materials manufactured at their works." There is a difficulty pointed out by counsel for the defendants with regard to the fixing of the price. In my judgment, it is not a real difficulty, because I take para. (ii) to mean that the seller is agreeing that the price to the buyer is, unless otherwise agreed, to be 10 per cent. below the current market price to builders, that is, a price not ascertained at the date of the contract, but the materials for the ascertainment of which are provided by the contract, and that which can be made certain, is just as good for the purposes of a contract as that which is made certain by the words of the contract. That being the case, it is not, in my judgment, necessary to go into questions as to how this contract was in fact worked out in practice. But if there had been an ambiguity and that point had been raised at the trial, I think either party would have been entitled to say that, though there was an uncertainty in the contract as drawn up, from time to time the parties had to deal with the situation that arose, and there was thereby an implied agreement between them as to what was to be treated as the meaning of the contract between them. But the point was not raised, and I agree with my Lord that it is not open to counsel for the defendants to raise it now in this court, or afterwards on any inquiry as to the amount of damages. G H I

A Two authorities cited to us seem to me possibly to be in conflict. *Snelgrove v. Ellringham Colliery Co.* (2), tried before MATHEW, J., was a case where an "agent" in the legal sense of that word had been appointed who was not to pay any price to the appointing principals, but was to earn a commission just as the agent in *Bentall, Horsley, and Baldry v. Vicary* (1), the case tried before McCARDIE, J., was an agent for commission, and not a buyer. It may very well be that, having regard to the exigencies of business and the surrounding circumstances that exist in the case of a commercial contract such as that in *Snelgrove v. Ellringham Colliery Co.* (2), a result might be arrived at differing from that in the case of the appointment of an agent to sell a particular property. But, be that as it may, it seems to me that neither of these cases really affords any authority for our judgment, one way or the other. I decide this case upon the construction of this contract between the parties. For these reasons, I think the appeal should be dismissed.

D SLESSER, L.J.—I agree that this appeal should be dismissed. In my view, the whole decision must depend upon the proper interpretation of the contract of April 21, 1927. I agree with my Lords that that contract, when it is properly considered, is not a contract of agency at all. It is a contract of a peculiar kind, but in so far as it is not a contract of agency, the interesting problem which arises as to what is the legal position when a principal agrees that a certain person shall be his sole agent does not here arise. For myself, I should prefer to express no opinion on *Snelgrove v. Ellringham Colliery Co.* (2), or on that of *Bentall, Horsley, and Baldry v. Vicary* (1), because, although as SCRUTTON, L.J., has pointed out, there are observations of importance made by MATHEW, J., in the first case as to what ought to be the view taken where you have a contract of sole agency, as I read those cases they deal with contracts of agency and do not deal with a contract between buyer and seller.

E The contract in the present case is a little difficult to understand, because in the same document the plaintiffs are described as merchants and as "sole selling agents." I think the description of the plaintiffs as "merchants" is the correct description, and that the description of them as "agents" is incorrect. The defendants are under obligation, as I read this contract, to sell their goods to the merchants for the purpose of re-sale by those merchants, and I think that they have parted with the right themselves to sell their own products, except to the plaintiffs, so long as the contract is operative. It may well be that the merchants can release them in some particular case from the obligation to sell to them, and in such a case it may well be that the right of the manufacturer to sell in that case to some other purchaser would arise. But primarily the merchants have been appointed sole sellers, which means, I think, sole purchasers from the manufacturers, in order that they may have the sole right in the first instance to sell these goods to third parties. If that be a correct view of this contract, the manufacturers have clearly broken it, because, against the wish of the merchants and without their agreement that they should do so, they have sold and are attempting to sell to persons other than the merchants. It is for that reason on my construction of the contract, and in my view of the obligation, that I think the appeal fails. I am not quite clear whether WRIGHT, J., has decided that point exactly on this principle or whether he has to some extent based his decision on the view that there is here something in the nature of an agency. For myself, I say nothing of that, and I am simply content to say that the manufacturers have restricted their right to sell otherwise than through these merchants, and that they have asserted a right from which they are deprived through entering into this contract.

Appeal dismissed.

Solicitors: *Burton, Yeates, & Hart* for Charles Malcolm & Wilson, Worthing; *A. M. Longhurst & Butler.*

[Reported by C. G. MORAN, ESQ., Barrister-at-Law.]

BERNARDI v. NATIONAL SALES CORPORATION, LTD.

[KING'S BENCH DIVISION (Wright, J.), March 17, 30, 1931]

[Reported [1931] 2 K.B. 188; 100 L.J.K.B. 386; 145 L.T. 48;
47 T.L.R. 380; 36 Com. Cas. 270]

Bill of Exchange—Surety—Endorsement of drawers below that of surety—Enforcement against surety.

Bills of exchange were drawn by the defendants on A.C.M., Ltd., accepted by the drawees, and endorsed by one B., as surety, and by the defendants, the endorsements of the defendants being written below those of B.

Held: it could not be doubted that the defendants, in endorsing, intended to do what was necessary to complete the bills; to hold that their rights were defeated by a mere blunder would falsify the intention of the parties; and, therefore, the position of the signatures was immaterial and the bills were enforceable against B. just as if he had endorsed them after the endorsements of the defendants in time and below them in space.

Notes. Applied: *McCall Bros., Ltd. v. Hargreaves* (1932), 48 T.L.R. 450.

As to the liability of the endorser of a bill, see 3 HALSBURY'S LAWS (3rd Edn.) 215-217; and for cases see 6 DIGEST 308-312.

Cases referred to:

- (1) *Gerald McDonald & Co. v. Nash & Co.*, [1924] A.C. 625; 93 L.J.K.B. 610; 131 L.T. 428; 40 T.L.R. 530; 68 Sol. Jo. 594; 29 Com. Cas. 313, H.L.; Digest Supp.
- (2) *Penny v. Innes* (1834), 1 Cr.M. & R. 439; 5 Tyr. 107; 4 L.J.Ex. 12; 149 E.R. 1152; 6 Digest 309, 2066.
- (3) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733; 52 L.J.P.C. 70; 49 L.T. 446; 32 W.R. 730, P.C.; 6 Digest 308, 2060.
- (4) *Jenkins & Sons v. Coomber*, [1898] 2 Q.B. 168; 67 L.J.Q.B. 780; 78 L.T. 752; 47 W.R. 48; 14 T.L.R. 425; 6 Digest 314, 2095.
- (5) *Glenie v. Smith*, [1907] 2 K.B. 507; 76 L.J.K.B. 874; 97 L.T. 434; 23 T.L.R. 596; affirmed, [1908] 1 K.B. 263; 77 L.J.K.B. 193; 98 L.T. 515; 24 T.L.R. 177, C.A.; 6 Digest 203, 1250.
- (6) *Shaw v. Holland*, [1913] 2 K.B. 15; 82 L.J.K.B. 592; 108 L.T. 543; 18 Com. Cas. 153; 29 T.L.R. 341, C.A.
- (7) *Re Gooch, Ex parte Judd*, [1921] 2 K.B. 593; 90 L.J.K.B. 932; 125 L.T. 583; [1921] B. & C.R. 100, C.A.; 26 Digest 45, 310.

Action tried by WRIGHT, J., without a jury.

The plaintiff, G. Bernardi, claimed against the defendants, National Sales Corp'n., Ltd., a declaration that three bills of exchange were void as against him. The corporation counter-claimed for the amount of these bills. The chief contention urged on behalf of the defendant was that, as the corporation, as drawers, had endorsed the bills below instead of above his signature, as surety, they were not enforceable against him.

R. P. Croom-Johnson, K.C., and *M. R. Hoare* for the plaintiff.

Sir Thomas Inskip, K.C., and *Kenelm Preedy* for the corporation.

Cur. adv. vult.

March 30. **WRIGHT, J.**, read the following judgment.—There were two consolidated actions. In the first the National Sales Corp'n., Ltd. (hereinafter called "the corporation"), were plaintiffs, and G. Bernardi (hereinafter called "Bernardi") was defendant; in the second Bernardi is plaintiff and the corporation are defendants. In the first the claim was on three specified bills of exchange, but at the hearing the corporation admitted they could not recover by reason of failure to give notice of dishonour. In the second Bernardi claimed a declaration that three specified

A bills of exchange were void as against him, and should be delivered up, while the corporation counter-claimed for the amount of these three bills, which were drawn by the corporation to their own order on Allday's Commercial Motors, Ltd., accepted by the drawees, and endorsed by Bernardi and by the corporation, the endorsement of the corporation being written below that of Bernardi. Each of the bills bore date Dec. 12, 1929, and was for £52 10s., and they were payable respectively four, five, and six months after date. It was agreed that presentation and notice of dishonour should be deemed to have been waived.

The facts concerned with the making and signing of the bills were, as I find, as follows. Allday's Commercial Motors, Ltd., were liable to the corporation for £478. It was agreed that the corporation should give time to Allday's on the terms that they gave a cheque for £178, and for the balance gave six bills of exchange to C be drawn by the corporation on Allday's, and accepted by them, while Bernardi, who was associated with Allday's, agreed to "back" (that is, to endorse) them in consideration of time being given, and so as to render himself liable to pay if Allday's did not. The bills were to be dated when the corporation made certain payments amounting to £478 to a third party, that being the money which Allday's were liable to reimburse to the corporation. This was arranged as between all D parties at a meeting on Nov. 21, 1929, at which the corporation and Allday's were represented, and Bernardi was present. At that meeting the six bills were prepared, signed by the corporation as drawers, and by Allday's as acceptors, and endorsed by Bernardi, who put his signature on the back of the bills close to the top. It was arranged that the bills should only become effective, that is, be deemed to be delivered, and the corporation should only give time to Allday's, if the latter E sent a cheque for £178. That cheque was sent, and, in my judgment, was accepted by the corporation, and time thereupon given, so that the bills there and then became effective and were notionally delivered as between all parties, though the cheque, in fact, was not honoured. The bills were duly dated in accordance with the authority given, namely, as on Dec. 12, 1929, on which day the corporation paid the third parties £478. The findings of fact, which I have stated above, dispose F of certain defences raised by Bernardi, and I also find that there is no foundation for the allegation that there was any agreement that Bernardi's liability on the bills was conditional on payment by one Bishop of certain moneys to Allday's in order that Allday's should pay the same to the corporation. In fact, also, Bishop did not owe the moneys alleged. I further find that the bills became effective and are to be treated as delivered between all parties when the corporation accepted G Allday's cheque. I find that Bernardi intended, by endorsing the bills, to render himself liable to the corporation if the acceptors failed to pay, he having an interest in Allday's in consideration of time being given.

The defence principally relied on was that, notwithstanding all these facts, the bills were not enforceable against Bernardi, because, when the corporation endorsed them, which they did after receiving them from Allday's and Bernardi, they did so H below instead of above Bernardi's signatures. It was not suggested that the endorsements by the corporation were not made in a reasonable time, or that these endorsements were not made with the intention of completing the bills and rendering them enforceable, if necessity arose, against Bernardi and thus giving effect to the intention that he should be liable in the event of default by Allday's. This default, in fact, happened, because Allday's had gone into liquidation and could I not pay.

On the facts as I have found them the case would be precisely covered by *Gerald McDonald & Co. v. Nash & Co.* (1), but for the relative positions of the signatures on the back. The House of Lords held in that case that a bill to the drawer's order, endorsed by a third party before any endorsement by the drawer, was a bill of exchange, though an incomplete bill, and could be completed by the drawer afterwards endorsing his name, which, in fact, he had done above that of the third party; as the third party had endorsed the bill in order to make himself liable to the drawer, he had impliedly authorised the drawer to give effect to that purpose

by adding his own endorsement, that is, to "fill up the omission" as is provided by s. 20 (1) of the Bills of Exchange Act, 1882. There is an omission in such a case, because, before the third party endorsed the bill there should have first appeared on it the endorsement of the drawer, who was also payee (since a bill to drawer's order is payable to the drawer), which would operate as an endorsement from the payee to the third party, even though the third party only held the bill in the act of endorsing it, and never had any property or rights in it. LORD DUNEDIN in that case thus sums up the position ([1924] A.C. at p. 636):

"Now, on the hypothesis that Nash intended to become liable, which we have found is a fact, then it seems to me that the second part of sub-s. (1) of s. 20 precisely applies; for ex hypothesi the material particular that is wanting is that very endorsement which was afterwards filled in, and this is done as conditioned by sub-s. (2) of s. 20 in accordance with the authority given."

LORD SUMNER says ([1924] A.C. at p. 648) that the bill in such a case is incomplete till it is filled up, and when filled up, though not before, becomes retrospectively enforceable as if it had been complete throughout. Thus a holder who takes a bill not complete and regular on its face, can turn himself retrospectively into a holder in due course by virtue of s. 20, if he fulfils the conditions of the section.

In the present case it cannot be doubted that the corporation, in endorsing, intended to do what was necessary to complete the bill, which, till then, was lacking in their endorsement, and it would be curious if their rights were defeated by a mere blunder committed in putting their name in the wrong place on the back. Such a result would falsify the intention of the parties, and would not readily be upheld by any court unless compelled so to do by principle or authority; and on general principles, evidence, in my judgment, is admissible to explain the intention with which a signature is added to a bill, since the order of the endorsements as they physically appear on the back is not conclusive. It was so held in *Penny v. Innes* (2), and the same principle was recognised in *Macdonald v. Whitfield* (3). In my judgment, effect can here be given to the necessary inference that the corporation endorsed the bills to complete them by adding the necessary endorsement between themselves as drawers and Bernardi as endorser, and on that basis the position of the signatures is immaterial, and the result is just as if the endorsement by Bernardi had been added to the endorsement of the corporation, after in time, and below in space.

But counsel for Bernardi has contended that I am debarred from so holding by authority. The question of what is the rule where in such cases the drawer's endorsement is out of place was involved in *Jenkins & Sons v. Coomber* (4), in *Glenie v. Smith* (5), in *Shaw v. Holland* (6), and in *Re Gooch, Ex parte Judd* (7). It is curious that until the last of these cases, the point was only once the subject of express discussion in the judgments; the decisions turn in the main on other considerations. The exception is in the judgment of LAWRENCE, J., in *Glenie v. Smith* (5), where he expressly treats the mere position as immaterial. In *Jenkins & Sons v. Coomber* (4) and in *Shaw v. Holland* (6) the judgments seem to turn mainly, if not entirely, on the question whether s. 20 of the Bills of Exchange Act, 1882, can apply to an instrument in which the only or principal omission was the absence of the drawer's endorsement. It seems clear that both these cases were decided on the view, which has now been decisively rejected by the House of Lords in *McDonald v. Nash* (1), that s. 20 of the Act could only be relied on in cases where the endorsement was on a blank piece of stamped paper, which was the case in *Glenie v. Smith* (5), or, at least, could not be relied on where the omission was in regard to the endorsement. In *Jenkins & Sons v. Coomber* (4) s. 20 was not mentioned either in the arguments or in the judgments, nor was the fact that the drawer's endorsement came below that of the endorser; the sole ratio decidendi was that the latter endorsement was inoperative, because, when it was added, the bill was not a complete and perfect instrument, for want of the drawer's endorsement, the bill being to drawer's order.

A In *Shaw v. Holland* (6) HAMILTON, J., seems to treat the case as covered by *Jenkins & Sons v. Coomber* (4); and in the Court of Appeal it was argued for the plaintiffs that s. 20 did apply, and that the bill, being wanting in a material particular, namely, the drawer's order, when endorsed by the third party, the drawers had *primâ facie* authority under the section to complete it by their endorsement (which argument was held to be correct by the House of Lords in *McDonald v. Nash* (1)), and that it could not matter in what order the signatures stood on the back. VAUGHAN WILLIAMS, L.J., says ([1913] 2 K.B. at p. 27):

C "It may be that the plaintiffs might have made the order contemplated by the bill of exchange within a reasonable time after the so-called endorsement by the defendants. I have not to decide any such question, because no such order was effected before action brought. This bill was never really negotiated. This is not a case of a bill in which endorsements appear to be simply in wrong order; it is a case in which the bill was never negotiated."

D He seems to treat the case as one in which the third-party's endorsement could only be binding if made after an open endorsement by the drawers. It may be that as a further ground in that case it was held that, if the drawer had authority to supply his missing endorsement afterwards, it was only an authority to write the signature above that of the endorser. *Glenie v. Smith* (5) was distinguished in the last-mentioned case as being a case within s. 20. In that case, on one of the two bills in question there, the endorsements were in the wrong order, but LAWRENCE, J., held that to be immaterial; he said it was to be read with the other as though endorsed to the defendant by the drawer and re-endorsed for value. In the Court of Appeal the point was not mentioned, and the case was decided without distinguishing the two bills, simply on the terms of s. 20. The third party in that case had endorsed two blank stamped pieces of paper.

E Finally came *Re Gooch* (7), when for the first time this point was fully discussed. The bill in that case had been, after the endorsements, discounted with a bank who, after the bill was dishonoured, returned it to the creditor and debited his account. F The case, accordingly, differed from others in that the bill had been negotiated and had come back to the drawer, and on that ground the Court of Appeal were able to distinguish *Shaw v. Holland* (6). But I think that all the members of the Court of Appeal approved of the judgment of LAWRENCE, J., in regard to the bill which was endorsed in the wrong order; indeed, his words, which I have quoted on that point, are cited with approval by LORD STERNDALE. SCRUTTON, L.J., also gives a further reason. He says ([1921] 2 K.B. at p. 606):

G "If there had been negotiation in *Shaw v. Holland* (6), apparently VAUGHAN WILLIAMS, L.J., would have dealt with the wrong order of the endorsements in the same way as LAWRENCE, J., did in *Glenie v. Smith* (5)."

He also relies on the estoppel in s. 55 (2) (c) of the Act in favour of a "holder." He thus sums up the position:

H "Now in my view the debtor clearly intended and contracted to make himself liable as endorser for good consideration moving from Judd. He did so not merely as surety for Cardbox, Ltd., but as a person interested in that company, giving consideration for time given to that company and himself as a person interested in it. Judd's signature, which would make the debtor liable as endorser, is on the bill, though in the wrong place, and I think there is every reason to enforce the statutory estoppel against the debtor denying to Judd, I a subsequent endorsee, that it was a good bill which he endorsed to him. For that is what the debtor wants to say, namely, that the bill he endorsed was a bad bill at the time he endorsed it and obtained time to pay by so doing."

If, as I think in this case, this statement is one *ratio decidendi* adopted by the lord justice, it does not depend on the fact that the bill had been discounted with the bank and re-endorsed, and the language used seems to apply exactly to the present case.

I think counsel for the defendants was right in his submission that, even if the precise decision in *Re Gooch* (7) does not cover this case, the reasoning does, and justifies a conclusion in favour of the corporation, and, further, that *Glenie v. Smith* (5) is a direct authority to the same effect. I may add that in *McDonald v. Nash* (1) the House of Lords treat the decision in *Shaw v. Holland* (6) as depending on the absence in that case of the appropriate authority, which they treat as present in *Glenie v. Smith* (5) and *Re Gooch* (7), both of which cases are approved and applied by the House. It is true that in *McDonald v. Nash* (1) no point was expressly considered as to the order of the signatures on the back, but I think that the House must, in approving these cases, have been conscious that the point of the order of the endorsements was involved, and hence, on the authorities I have cited, in such a case as the present, and on such facts as I have found, the mere order of these endorsements should be held not to nullify the intention of the parties, but to be a mere inadvertence, not changing the rights of the parties, and I hold that the corporation are entitled to recover.

Judgment accordingly.

Solicitors: *Owen White & Co.; Brundrett, Randall & Co.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

Re UNITED CITIZENS' INVESTMENT TRUST, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.J.J.), November 5, 6, 9, 30, 1931]

[Reported [1932] 1 Ch. 395; 101 L.J.Ch. 17; 146 L.T. 213;
48 T.L.R. 124; 75 Sol. Jo. 869]

Industrial and Provident Societies—Withdrawal of shares—Expiration of notice before winding-up, but after notice of meeting to wind-up—Determination of right to withdraw—Industrial and Provident Societies Act, 1893 (56 & 57 Vict., c. 39), s. 60 (e).

By s. 60 (e) of the Industrial and Provident Societies Act, 1893, a person ceases to be a member of a society in respect of any withdrawable share withdrawn from the date of the notice or application for withdrawal. "Withdrawn" in para. (e) means "repaid" or "whose notice of withdrawal has matured," and, therefore, in the absence of a provision in the rules showing a contrary intention, the right to withdraw was determined when, before the expiration of the notice of withdrawal, a notice was sent to members of a society calling an extraordinary general meeting of the members to consider resolutions for the voluntary winding-up of the society because of its financial position.

Re Ambition Investment Building Society (1), [1896] 1 Ch. 89, approved and applied.

Notes. As to withdrawal of shares from a society, see 21 HALSBURY'S LAWS (3rd Edn.) 22, 64, 65, and cases there cited. For Industrial and Provident Societies Act, 1893, see 12 HALSBURY'S STATUTES (2nd Edn.) 876.

Cases referred to:

- (1) *Re Ambition Investment Building Society*, [1896] 1 Ch. 89; 65 L.J.Ch. 113; 73 L.T. 508; 44 W.R. 141; 2 Mans. 607; 7 Digest 467, 84.
- (2) *Carrick v. North British Building Society*, 1885, 22 Sc.L.R. 833.

- A (3) *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615; 40 L.T. 694; 27 W.R. 649, H.L.; 9 Digest (Repl.) 266, 1683.
- (4) *Re Counties Conservative Permanent Benefit Building Society, Davis v. Norton*, [1900] 2 Ch. 819; 69 L.J.Ch. 798; 49 W.R. 71; 44 Sol. Jo. 699; 7 Digest 468, 85.
- B (5) *Re Blackburn and District Benefit Building Society* (1883), 24 Ch.D. 421; 52 L.J.Ch. 894; 49 L.T. 730; 32 W.R. 159, C.A.; on appeal, sub nom. *Walton v. Edge* (1884), 10 App. Cas. 33; 54 L.J.Ch. 362; 52 L.T. 666; 49 J.P. 468; 33 W.R. 417; 1 T.L.R. 96, H.L.; 7 Digest 514, 365.
- (6) *Re Sunderland 36th Universal Building Society* (1890), 24 Q.B.D. 394; 59 L.J.Q.B. 217; 62 L.T. 293; 38 W.R. 509; 6 T.L.R. 199; sub nom. *King v. Rawlings*, 54 J.P. 613, D.C.; 7 Digest 468, 86.
- C (7) *Brownlie v. Russell* (1883), 8 App. Cas. 235; 48 L.T. 881; 47 J.P. 757, H.L.; 7 Digest 454, 1.
- (8) *Barnard v. Tomson*, [1894] 1 Ch. 374; 63 L.J.Ch. 488; 70 L.T. 306; 8 R. 585; 7 Digest 458, 23.
- (9) *Sixth West Kent Mutual Building Society v. Shove* (1895), [1899] 2 Ch. 64, n.; 68 L.J.Ch. 482, n.; 81 L.T. 87, n.; 39 Sol. Jo. 601; 7 Digest 456, 15.

D **Appeal from an order of MAUGHAM, J.**

By r. 3 (2) of the United Citizens Investment Trust, Ltd., a society registered under the Industrial and Provident Societies Act, 1893, the holder of withdrawable shares was entitled to obtain their withdrawal by giving the society six months' notice. On Oct. 18, 1929, a shareholder, the United Women's Homes Association, Ltd., gave notice to withdraw 30,000 shares. On April 8, 1930, notice was sent to the members of the society of an extraordinary general meeting on April 30 to consider resolutions voluntarily to wind-up the society. On April 30 a resolution to wind-up was passed. The liquidator took out a summons to determine, inter alia, whether the notice of withdrawal was effectual, it not having expired before April 8, the date of the notice calling the meeting. MAUGHAM, J., decided that it was not, and the association appealed.

- F *Macaskie, K.C., and Harold Christie* for the association.
C. E. E. Jenkins, K.C., Wynne Parry and F. R. Evershed for the society.
Wilfrid M. Hunt for the liquidator.

Cur. adv. vult.

Nov. 30. The following judgments were read.

- G **LORD HANWORTH, M.R.**—This is an appeal from an order made by MAUGHAM, J., on July 14, 1931, upon a summons taken out in this action, whereby he determined that notices of withdrawal which had been given in respect of withdrawable shares in the trust company and had not expired at the date of the notice and circular of April 8, 1930, hereinafter more particularly referred to, were not effectual.

- H The appellants are the United Women's Homes Association, Ltd., who were holders of 69,000 withdrawable shares in the capital of the United Citizens' Investment Trust, Ltd.—hereinafter referred to as the society—a company registered in the year 1927 under the Industrial and Provident Societies Act, 1893. In consequence of the difficulties in which the society found itself, a report upon its general condition and the possibility of reconstruction was prepared for the consideration of its directors by Sir W. H. Peat early in the year 1930. That report showed that without reconstruction it was not possible for the society to carry on its business; and at the same time it was found that for reasons, both legal and practical, it would not be possible for such a scheme to be carried out. On March 18, 1930, the report of Sir W. H. Peat was carefully considered by the board of directors of the society, and it was resolved

“that in the opinion of the directors the interests of shareholders could best be served by winding-up the trust and that the necessary arrangements be made to put such recommendations before the shareholders without delay.”

On April 8 a notice was sent out calling an extraordinary general meeting of the society, to be held on April 30 for the purpose of considering resolutions to wind-up the society voluntarily. That notice was accompanied by a circular which informed the members that the true position of the society was such "that it would be unfair to shareholders in general to continue the trust on its present basis." The alternative of reconstruction was demonstrated to be impracticable, and the conclusion was indicated that the only wise course was to pass the resolutions for winding-up contained in the notice calling the meeting. The meeting was held on April 30, and the resolutions to wind-up voluntarily and appointing Sir W. H. Peat liquidator were duly passed. The association had given notice to the society of withdrawal of 30,000 shares on Oct. 18, 1929, and a later notice of withdrawal of 32,000 shares. By the rules of the society such a notice matured at the expiration of six months from the date on which it was given. It will thus be seen that the first notice as to the withdrawal of 30,000 shares matured on April 18, 1930—that is, between the date of the circular and the passing of the resolution to wind-up. The second notice did not expire till after the resolution for winding-up had been passed.

MAUGHAM, J., decided that the notice of withdrawal which had been given in respect of the withdrawable shares, and which had not expired at the date of the notice and circular of April 8, was not effectual. The appellants appeal from that decision to this court. They claim that as the notice of the withdrawal of the 30,000 shares matured before the resolution to wind-up, it should be treated as effective. They have not appealed from his decision as to the 32,000 shares. MAUGHAM, J., held the notice which matured on April 18 ineffective, because before that date it was recognised that a stoppage of the business of the society was inevitable. He held that the notice could not run its course towards the goal of maturity after recognition that the society was no longer a going concern in the sense that it was still in a position to carry out the objects for which it had been formed; it was not necessary to wait for the date at which the legal machinery to wind-up the society was put into operation. He thus decided that all notices which matured after the date of the notice of April 8, 1930, were inoperative. There is authority in support of this view to be found in two cases upon which MAUGHAM, J., relied.

The first was *Re Ambition Investment Building Society* (1), where VAUGHAN WILLIAMS, J., held that the stoppage of business or anything equivalent to it—not the insolvency of the society—is what sterilises the notice to withdraw. Insolvency is difficult to determine, especially in a business that is able to carry on its purpose; but when the stoppage has become inevitable, that fact must make itself plain to all. It must be remembered that what is involved in the matter now before us is the question of the rights of the members, inter se, whose mutual rights are regulated by the rules. It seems unfair that one member should be able to secure an advantage in priority to his fellow members when there has supervened a recognition that the business in which the members are all of them engaged cannot be continued and must be brought to an end. This case of *Re Ambition Investment Building Society* (1) appears to cover the point now before us, but its authority and relevance is questioned by the appellants. VAUGHAN WILLIAMS, J., in coming to his decision, relied upon the cases referred to in his judgment, and in particular upon *Carrick v. North British Building Society* (2), where LORD SHAND had said, in his judgment, referring to *Tennent v. City of Glasgow Bank* (3), that the principle to which effect was given in that case was that the rules applicable only to a going business could no longer receive effect when it has become apparent to the directors of the society that from its losses the business of the society could no longer be carried on. His words were:

"The rules applicable only to a going business could no longer receive effect, and it seems clearly to follow that the liability of the parties to share losses must be fixed as at that time, and could not be affected by notices of withdrawal which were only suitable to a going business, and had become quite unsuitable after every member had of necessity been compelled to withdraw."

A I desire to agree with the observations made by MAUGHAM, J., as to the judgment of STIRLING, J., in the second case, *Re Counties Conservative Permanent Benefit Building Society, Davis v. Norton* (4) ([1900] 2 Ch. at p. 825). It is clear that the learned judge intended to fix as crucial the date of the notice on June 26, 1895, issued for the purpose of summoning a special general meeting to consider on July 10 the advisability of dissolving the society. I have sent for and read the B affidavits which were before the learned judge. The assets were stated to be only £3,665, and in a paragraph of the affidavit of the trustee, appointed for the purpose of the dissolution, it is stated that 151 members had given notices of withdrawal which had matured before June 26, 1895, for sums which totalled £8,809. These figures justified the statement that the whole funds of the society would be exhausted by the notices given before the date of the resolution for winding-up, C and also before the date of the notice calling the meeting, and STIRLING, J., clearly adhered in his order to the latter date as fixing the rights of those members in priority to those whose notices matured later.

Counsel for the association argued that, as under the rules members can withdraw at any time, a member by giving notice secures priority over his fellow members who do not give a notice, if the notice in fact is given on a date antecedent to the winding-up. And, secondly, that the test whether the notice is effectual is to be found by an inquiry whether the giver of the notice at the time he gave it had any information that the company was going to be wound-up. Two cases are cited in support of these propositions: *Re Blackburn and District Benefit Building Society* (5) and *Walton v. Edge* (5). The former of these cases does not appear to me to govern the present case. The point that was decided was that in the winding-up members who had given notices which had matured before the winding-up were entitled to priority as against those members who had not given notice of withdrawal; but those rights of the members, inter se, were postponed to the rights of outside creditors. The members who had given effective notices of withdrawal were not to be treated as outside creditors, but still as members. It is clear from the question propounded by BRETT, M.R., and BOWEN, L.J. (24 Ch.D. F at pp. 428 and 436 respectively), that the above is the question determined, and not any question whether a notice, which remained current when the business of the society could not be carried on, enured to stabilise the rights of a member who had given it. This decision of the Court of Appeal was affirmed under the name of *Walton v. Edge* (5). LORD SELBORNE (10 App. Cas. at p. 36) definitely says that the House was considering the rights of a withdrawing member,

G "who gave notice not only before there was any winding-up, but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern."

H In 1890 the point was again considered in *Re Sunderland 36th Universal Building Society* (6), and the judgment of LORD SHAND already quoted was taken as the guide to the court in determining during what length of time the option of withdrawal was available to members of a building society. MATHEW, J., in delivering the judgment of the court, said that it is not the order to wind-up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case puts an end to the right to withdraw. It was, therefore, definitely I decided that the notice given by one, Oliver, was ineffective. The relevant dates were: notice given on Oct. 8, 1886, maturing on April 8, 1887. The impossibility of continuance of the society's work was revealed on Feb. 17, 1887, and, thereafter, no new members were admitted, no new shares taken out, no money was borrowed, no money was advanced to any members on mortgage, nor was any withdrawing member repaid. On June 17, 1887, resolutions were passed for voluntary winding-up.

Careful consideration of these cases confirms the opinion that MAUGHAM, J., has applied the right test and reached the right conclusion. There is not found in them

any justification for the test suggested that the knowledge of the giver of the notice decides whether his notice was good or not. Such a test seems opposed to the basic principles which underlie the structure of a mutual society. It is argued, however, that these cases relate to building societies, and that industrial and provident societies, of which the Citizens' Investment Trust is one, are not governed by the same or analogous rules—in particular, because of the terms of s. 60 of the Industrial and Provident Societies Act, 1893, which provides that, in winding-up, the liability of members and the adjustment of the rights of contributors among themselves shall be qualified as follows:

“(e) An individual, society, or company shall be taken to have ceased to be a member in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal.”

Examination of this s. 60 as a whole shows that it has no bearing upon the question before us. It purports to deal with the liability of members in winding-up. It provides—para. (a)—that no one who has ceased to be a member for one year or upwards prior to the commencement of the winding-up shall be liable to contribute, and it adds consequential provisions. Paragraph (e) does not alter the general principle laid down in the above cases. It determines the date at which the cessation of membership is to be calculated for the purpose of the other limbs of the section, and the lapse of the one year specified in para. (a). It contains the important word “withdrawn”—which connotes effective withdrawal and the right to repayment. It may be argued that it means actual repayment; though my present view is that the right to repayment on withdrawal, whether actually carried into effect or not, is sufficient. It is not necessary now to decide between those two views. It is sufficient to say that para. (e) does not make the date of the notice of the application to withdraw the crucial date in the case of industrial and provident societies for all purposes. If s. 60 then does not make this suggested difference, the analogy of the building societies' cases seems complete. No doubt the rules of individual societies must be considered and adhered to, but those in the present case do not provide any distinction from the principle laid down by LORD SHAND in *Carrick v. North British Building Society* (2), and in *Re Sunderland* (6) and other cases referred to, and applied in them in accordance with the rules respectively applicable to the members of the societies according to the dates and facts relevant to their withdrawals. For these reasons, in addition to those stated by MAUGHAM, J., in my judgment the appeal fails and must be dismissed with costs.

LAWRENCE, L.J.—In my opinion, MAUGHAM, J., was right in holding that the principle laid down in the relevant building societies cases is applicable to the present case, and I agree with him in the conclusion which he has reached based on that principle. Counsel for the association contended before us that there was an essential difference between the constitution and activities of building societies and provident societies, and that the principle referred to ought, therefore, not to be applied to the latter. No doubt, in many respects these societies differ essentially from one another, but they have in common that shareholders are permitted to withdraw their shares, and in this respect they both differ fundamentally from companies incorporated under the Companies Acts. So far as regards this common attribute, however, I see no reason why a different principle should be applied to the construction of the rules concerning the withdrawable shares of a building society and to the construction of similar rules of a provident society.

The most formidable objection to the application of the principle laid down in the building society cases to the ascertainment of the rights of withdrawing shareholders in the winding-up of a provident society is based on the provision contained in para. (e) of s. 60 of the Industrial and Provident Societies Act, 1893, which provides that

“an individual society or company shall be taken to have ceased to be a member in respect of any withdrawable share withdrawn from the date of the notice or application for withdrawal.”

- A No similar provision is to be found in the statutes regulating the affairs of building societies, and at first sight this provision, when divorced from its context, would seem to be capable of the construction that a member of a provident society who had given a valid notice of withdrawal at any time before the commencement of the winding-up had, as from the date of the notice, ceased to be a member and become a creditor. In my opinion, however, this is not the true effect of the
- B provision in question. Section 60, in which it is contained, is concerned with the qualification of the liability of present and past members to contribute to the assets of the society in a winding-up. The section, which is obviously taken from s. 38 of the Companies Act, 1862 [now replaced by s. 212 of the Companies Act, 1948], serves as a guide to the liquidator in settling the A and B lists of contributors in the winding-up, but does not purport to alter the contractual rights of the share-
- C holders inter se. Holders of fully paid-up shares, whether present or past, are not under any liability to contribute to the assets for any of the purposes mentioned in the section, and consequently the section has no application to the appellants whose shares were all fully paid-up. In my opinion, it is plain that para. (e) was enacted for the purpose of enabling the liquidator to ascertain whether a holder of partly paid-up shares, who had given an effectual notice of withdrawal and in pursuance
- D of that notice had "withdrawn" his shares before the winding-up, ought to be placed on the B list or not, and for no other purpose. The expression "withdrawn" in that paragraph, in my opinion, means "repaid," or at most "whose notice of withdrawal has matured." Further, it is to be noted that under r. 16 of the society's rules a member only ceases to be a member when his shares have been repaid. This rule, in my opinion, does not conflict with or contradict, but explains
- E r. 3 (2), from which some words are obviously omitted.

The only other contention of the appellants to which I need refer is that the cases upon which the learned judge has based his judgment are not binding on this court, and were wrongly decided. The last of those cases, namely, *Re Ambition Investment Building Society* (1), was decided over thirty-five years ago and has never been questioned. It must have been acted upon in the winding-up of many building

F societies. Even if I thought it had been wrongly decided, which I do not, I am of opinion that it would not be right to overrule it.

The principle clearly laid down by the relevant cases is that rules as to the withdrawal of shares, such as exist in the present case, contemplate a going concern, and although mere insolvency or information on the part of the shareholder of the

G likelihood of stoppage is not sufficient to stop their operation yet they cease to be operative when there is either an actual stoppage of the business or anything equivalent to it, or a recognition of the fact that a stoppage is inevitable. *Re Sunderland 36th Universal Building Society* (6) clearly shows that the principle applies not only where a member has given notice of withdrawal after a stoppage of the business or after the recognition of the inevitability of such a stoppage, but also where a member has given notice before either of these events, but whose

H notice has not matured when either of these events happened. In the *Re Sunderland Case* (6) Oliver had given a notice of withdrawal on Oct. 8, 1886, maturing on April 8, 1887; on Feb. 17, 1887, the society was known to be insolvent; and, although a winding-up order was not made until July 2, 1887, it was held by the Divisional Court that Oliver was not entitled to priority, but must rank with other members of the society. The facts in that case are indistinguishable from the facts

I in the present case. Here the appellants gave their notice of withdrawal on Oct. 18, 1929, maturing on April 18, 1930; on April 8, 1930, the notice and circular of that date were sent to all the members. It was hardly disputed, and cannot be denied, that this notice and circular contained a clear intimation to every shareholder that a stoppage of the society's business was inevitable and that the only practical course to adopt was to wind-up the society.

The learned judge in his judgment alluded to the apparent discrepancy between the date mentioned in the judgment of STIRLING, J., in *Re Counties Conservative Permanent Benefit Building Society, Davis v. Norton* (4) and in the order as drawn

up. From the affidavits in that case, which we have inspected, it is plain that nothing turned on the difference between June 26, 1895 (the date of the notice convening the meeting to consider the advisability of dissolving the society), and Aug. 8, 1895, the date of the winding-up resolutions. Under the rules, members who had given notice of withdrawal were entitled to payment according to the receipt of the notice by the society. The amount due to members whose notices had matured before June 26, 1895, was far more than sufficient to exhaust the whole of the available fund, and, therefore, it was immaterial to consider the rights of members whose notices had matured between that date and Aug. 8, 1895, and no argument was addressed to the court on this subject. The main question debated and decided in that case was as to the effect of the resolution of March 23, 1893, putting in force r. 68. It is plain that the learned judge did not intend to express any dissent from the principles laid down in *Re Sunderland* (6) and *Re Ambition* (1) which were not mentioned by him nor cited by counsel. In the result, for the reasons stated, I agree that this appeal fails and should be dismissed with costs.

ROMER, L.J.—The question to be determined on this appeal is whether, by reason of the notice of withdrawal given by the United Women's Homes Association, Ltd., which expired before the commencement of the voluntary winding-up, but which had not expired at the date of the notice and circular of April 8, 1930, the association has obtained a right to receive back the sum paid upon the shares comprised in the notice in priority to shareholders who had either given no notice of withdrawal or whose notices expired after the commencement of the winding-up.

Questions of a like nature have often arisen in cases of building societies, and the law applicable to those cases is not, in my opinion, open at the present time to dispute or doubt. The first case to which reference need be made is that of *Brownlie v. Russell* (7), not, indeed, because the question decided there resembles the question that has to be decided on this appeal, but because of the observations made by LORD SELBORNE and LORD WATSON as to the effect of a winding-up upon the right of withdrawal. LORD SELBORNE said (8 App. Cas. at p. 254):

"It takes away the option which otherwise, if the concern had been a going one, would have belonged to each member—it, by a vis major . . . puts a close to the whole concern—it terminates, at that date, the account of each shareholder."

LORD WATSON said (8 App. Cas. at p. 256):

"I think, with your Lordship, that from the moment when the decree of liquidation was pronounced he became disabled from taking advantage of r. 12 and withdrawing himself from the society."

These observations clearly indicate that if a winding-up takes place before a member has become entitled under the rules as to withdrawal to receive back from the society the money paid by him in respect of his shares, the option of withdrawal has come to an end, and since that date I am not aware that anyone has ever contended the contrary. But these observations did not cover the case of the member who has given a notice of withdrawal expiring before the beginning of the winding-up, but who has not at that time been actually paid by reason of the right of withdrawal under the rules being qualified by the words "provided the funds permit." Such a case came before the Court of Appeal in *Re Blackburn and District Benefit Building Society* (5), and that court decided that the member's right to be paid out of available funds in the winding-up had not been defeated. The case is not relevant to the decision of the present one except for this circumstance. When the case came before the House of Lords (sub nom. *Walton v. Edge* (5)), the appellant's counsel observed that, if the respondent's contention was sound, the moment a building society was suspected to be in difficulties, there would be a rush of members to give notice and secure priority. It was no doubt

A with reference to this argument that LORD SELBORNE, in moving that the appeal should be dismissed, said (10 App. Cas. at p. 36):

B "The question is what right accrued to the withdrawing member who gave notice not only before there was any winding-up but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern."

C To the warning so given by LORD SELBORNE to persons seeking to withdraw from a building society on the event of liquidation practical effect was given by a Divisional Court in *Re Sunderland 36th Universal Building Society* (6). In that case it was held that two members whose notice of withdrawal was given at a time when the society was known to be insolvent were not entitled to be repaid their subscriptions. But it was further held that a member whose notice was given before, but expired after, that time was equally debarred from being repaid. In delivering the judgment of the court, MATHEW, J., after reading the rule as to withdrawal, said this:

D "We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement.

E The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to show that before the times at which two of the notices were given, and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shown from the scheme of reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists."

F

G Then, after stating that the view which they took was in accordance with the judgment of LORD SHAND in *Carrick v. North British Building Society* (2), he added:

"It is not the order to wind-up, but the state of things which to the knowledge of all concerned renders liquidation inevitable that in such a case as this puts an end to the right to withdraw."

H In *Barnard v. Tomson* (8) NORTH, J., treated that decision as laying down the principle to be applied to the case before him, though, on the facts, he decided in favour of the withdrawing member. It was also followed by STIRLING, J., in *Sixth West Kent Mutual Building Society v. Shove* (9).

I These authorities, or some of them, were considered by VAUGHAN WILLIAMS, J., in *Re Ambition Investment Building Society* (1), and he summed up the effect of them as follows:

"The relations of these persons [i.e., the shareholders] must be borne in mind. They have in common put their capital into an adventure or concern which it was hoped would yield a profit. There is a proviso enabling capital to be withdrawn. How long is the right to withdraw capital to continue? It must continue as long as the adventure continues or its continuance is contemplated; but as soon as the adventure comes to an end, or the adventurers or their officers recognise that it must come to an end, from that moment every principle of justice requires that all who have joined in the common adventure

shall in common bear the loss—and from that time the rule as to withdrawal ceases to operate, and there ought to be no applications for withdrawal.” A

It is clear, however, reading his judgment as a whole, that in his view not only would the right to give notice of withdrawal cease in the event contemplated, but that, in the case of a notice already given but not then matured, the right to be repaid would also come to an end.

In view of these authorities, which have never been questioned, it must, in my opinion, be taken as settled law that in the case of a building society, unless the rules clearly indicate a contrary intention, the power of withdrawing shares is determined so soon as the society or its officers recognise that the business of the society can no longer be carried on. I entirely agree with MAUGHAM, J., when he says that the effectiveness of notices of withdrawal must not be judged by considerations personal to a particular holder of shares. When the time arrives at which the society or its officers recognise that the stoppage of its business is inevitable, no member who has failed to give a notice of withdrawal that has already matured is entitled to withdraw his subscriptions, whatever may be the state of his own knowledge in relation to the affairs of the society. It is, however, said that this principle is only applicable to building societies and not to societies formed under the Industrial and Provident Societies Act, 1893. That the authorities to which I have referred were all concerned with building societies is true, but the principle is founded upon grounds that are in no way concerned with the particular kind of business that the society may be carrying on. The principle applies to all societies whose rules provide for members withdrawing their shares, and is based upon the presumed intention of persons embarking upon a common adventure, whatever the precise nature of that adventure may be. Reliance was placed by the appellants upon s. 60 (e) of the Industrial and Provident Societies Act, 1893, as excluding such societies from the application of the principle. It was contended that, by virtue of that section, a member who has given a notice of withdrawal that is valid at the time it is given, ceases thereupon to be a member, whatever may be the position of the society at the date of its maturity. I am unable to take this view. The provision in question is only applicable to a share that is “withdrawn,” and that, in my opinion, means a share which a member has under the rules obtained an indefeasible right to have repaid. If before the date of maturity of the notice of withdrawal a state of affairs has arisen that would prevent the shareholder obtaining such a right by reason of the principle to which I have referred, the share cannot be treated as “withdrawn” within the meaning of the section. The section is indeed merely dealing with the liabilities in a winding-up of the past and present holders of partly-paid shares, and the object of para. (e) is to ensure that, if the holder of such a share has given an effective notice of withdrawal more than twelve months before the liquidation, he is not to be placed upon the B list of contributories, even though his notice should mature within that time. B C D E F G

It only remains to apply the principle of law in question to the facts of the present case, for there is nothing whatever in the rules that indicates any intention of the members of this society that so equitable a principle should be excluded. Applying that principle the claim of the appellants must fail. For although the notice of April 8 in terms necessarily left it to the members to decide whether there should or should not be a winding-up, it is in my judgment quite plain from the accompanying circular that in truth there was no option in the matter, and that as from the issue of that circular the society recognised, as assuredly did its directors, that a winding-up was inevitable. For these reasons I agree that this appeal should be dismissed. H I

Appeal dismissed.

Solicitors: *Sole, Sawbridge & Co.; Bower, Cotton, & Bower; Johnson, Jecks, & Colclough; Linklaters & Paines.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

A

ROBINSON v. STATE OF SOUTH AUSTRALIA (No. 2)

[PRIVY COUNCIL (Lord Blanesburgh, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Russell), January 26, 27, 29, 30, May 19, 1931]

B

[Reported [1931] A.C. 704; 100 L.J.P.C. 183; 145 L.T. 408; 47 T.L.R. 454; 75 Sol. Jo. 458]

Discovery—Privilege—Production of document—Public policy—Claim by government department—Extent of privilege—Power of court—Document relating to State trading—Form of claim of privilege—Rules of Court (South Australia), Order 31, r. 14 (2).

C

The privilege claimed by a government department which excuses the department from discovery of documents on the ground that their production would be contrary to the public interest is a narrow one and is to be exercised most sparingly. The court can always enquire into the nature of the document for which protection is sought and require some indication of the nature of the injury to the State which would follow its production, and the court must see that the scope of the privilege is not extended further than the public interest requires. That a document is confidential or official is, in itself, no reason for its non-production, and, particularly, it must be remembered that the fact that the production of the document might in the particular litigation prejudice the Crown's case or assist that of the other side does not justify any claim of privilege. The fact that a document, if produced, might have any such effect on the fortunes of the litigation is of itself a compelling reason for its production which is only to be overborne by the gravest considerations of State policy or security.

D

E

Privilege can be claimed in respect of documents relating to the commercial activities of the State where some plain, overriding principle of public interest exists, but the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed.

F

The court is entitled in any case to prescribe the manner in which a claim of privilege shall be made. Generally, where the State is a party to the proceeding the privilege should normally be claimed under the sanction of an oath.

G

The plaintiff brought an action against the State of South Australia in which he sought to establish a liability against the State in respect of the alleged negligence of its servants and agents in the execution of their duties under the Wheat Harvest Acts, 1915-17, and, on his application, an order for discovery was made. In a minute issued by the Minister of Wheat the Minister claimed privilege in respect of a large number of documents, stating that their disclosure would be contrary to public policy and the interests of the State.

H

Held: the Minister's minute was inadequate as a claim to the protection sought, which should have been claimed on oath, but the privilege had not been lost by the insufficiency of the form in which it was claimed; the matter was a proper one for the court to exercise its powers under Order 31, r. 14 (2), of the South Australian Rules of Court to inspect the documents for which privilege was claimed in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense; and for this purpose the case would be remitted to the Supreme Court of South Australia with a direction to that effect.

I

Notes. Order 31, r. 14 (2) of the South Australian Rules of Court is in the same terms as the English R.S.C., Ord. 31, r. 19A (2). The present case must be read in the light of the opinions expressed in *Duncan v. Cammell, Laird & Co.*, [1942] 1 All E.R. 587.

As to privilege from discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 18 DIGEST 59-61, 120 et seq.

Cases referred to :

- (1) *Griffin v. State of South Australia* (1925), 36 C.L.R. 378; Digest Supp.
- (2) *Welden v. Smith*, [1924] A.C. 484; 131 L.T. 37; 11 Digest (Repl.) 595, *170.
- (3) *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1897] 2 Q.B. 384; 66 L.J.Q.B. 593; 77 L.T. 203, C.A.; 18 Digest 59, 162.
- (4) *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.*, [1916] 1 K.B. 822; 85 L.J.K.B. 1075; 114 L.T. 645; 32 T.L.R. 367; 60 Sol. Jo. 417, C.A.; 18 Digest 166, 1202.
- (5) *Smith v. East India Co.* (1841), 1 Ph. 50; 11 L.J.Ch. 71; 6 Jur. 1; 41 E.R. 550, L.C.; 18 Digest 169, 1218.
- (6) *Wadeer v. East India Co.* (1856), 8 De G.M. & G. 182; 2 Jur.N.S. 407; 4 W.R. 421; sub nom. *Coorg (Rajah) v. East India Co.*, 25 L.J.Ch. 345; sub nom. *Veer Rajundur Wadeer (ex-Rajah of Coorg) v. East India Co.*, 27 L.T.O.S. 30, L.J.J.; 18 Digest 168, 1213.
- (7) *Esquimalt and Nanaimo Rail. Co. v. Wilson*, [1920] A.C. 358; 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 40, P.C.; 11 Digest (Repl.) 601, 342.
- (8) *Pawlett v. A.-G.* (1667), Hard. 465; 145 E.R. 550; 11 Digest (Repl.) 592, 309.
- (9) *Marconi's Wireless Telegraph Co., Ltd. v. The Commonwealth* (1913), 16 C.L.R. 178; 22 Digest (Repl.) 181, *980.
- (10) *Beatson v. Skene* (1860), 5 H. & N. 838; 29 L.J.Ex. 430; 2 L.T. 378; 6 Jur.N.S. 780; 8 W.R. 544; 22 Digest (Repl.) 386, 4148.
- (11) *Admiralty Lords Comrs. v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1909 S.C. 335; 22 Digest (Repl.) 89, *517.
- (12) *Henderson v. M'Gown*, 1916 S.C. 821; 2 S.L.T. 316; 2 Digest (Repl.) 567, *759.
- (13) *Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347; 69 L.J.Ch. 183; 82 L.T. 132; 48 W.R. 241; 16 T.L.R. 155; 44 Sol. Jo. 210; 7 Mans. 354; 4 Tax Cas. 173, C.A.; 10 Digest (Repl.) 941, 6461.
- (14) *Hennessy v. Wright* (1888), 21 Q.B.D. 509; 57 L.J.Q.B. 530; 59 L.T. 323; 53 J.P. 52; 4 T.L.R. 597, D.C.; 18 Digest 168, 1210.
- (15) *Kain v. Farrer* (1877), 37 L.T. 469, D.C.; 18 Digest 83, 372.
- (16) *Ehrmann v. Ehrmann*, [1896] 2 Ch. 826; 65 L.J.Ch. 889; 75 L.T. 243; 36 Digest (Repl.) 566, 1239.
- (17) *Food Controller v. Cork*, [1923] A.C. 647; 92 L.J.Ch. 587; 39 T.L.R. 699; 67 Sol. Jo. 788; 130 L.T. 1; [1923] B. & C.R. 114, H.L.; 10 Digest (Repl.) 992, 6329.
- (18) *Queensland Pine Co., Ltd. v. Commonwealth of Australia*, [1920] Q.S.R. 121.

Appeal by the plaintiff by special leave from an order of the Full Court of the Supreme Court of South Australia.

The action was instituted by the appellant by writ dated Feb. 3, 1927, to recover damages for negligence, as he alleged, on the part of the respondent State, its servants and agents, in handling, storing and selling wheat delivered to the respondent State pursuant to the South Australian Wheat Harvest Acts, 1915 and 1916. It was determined on the trial of a preliminary point of law in the present action ([1929] A.C. 469) that the appellant was entitled to maintain such an action against the respondent State as an assignee of the rights of divers wheat growers under the wheat marketing schemes. On July 29, 1929, an order was made for discovery of documents. An affidavit in pursuance of such order was made by William Lyle Shegog, the official having charge, on behalf of the responsible Minister, of various documents, but no reports of inspectors employed under the Act, or of correspondence with them, was disclosed. Privilege was claimed for 1,892 documents tied up in bundles on the ground that they were State documents and consisted of communications relating to a department of the government. A minute of the Minister stated that he had considered the documents, and that he had directed Shegog to object to produce them on the ground that their disclosure was contrary to public

A policy, and that the interests of the State and of the public service and the public interest would be prejudiced by their production. The Minister further stated that the above direction was not based in any way upon the pecuniary or commercial interests of the department or of the State, or upon any desire to defeat the plaintiff's claim, but solely upon and in the interests of the public welfare and the public service. The South Australian Rules of Court provide by Order 31, r. 14 (2), that
B where on an application for an order for discovery privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege. The application was referred to the Full Court, by which it was heard on Nov. 26, 1929. The court, following the decision of the High Court of Australia in *Griffin v. State of South Australia* (1), dismissed the application. The plaintiff appealed.

C *Spens, K.C.*, and *J. H. Stamp* for the appellant.
Sir Boyd Merriman, K.C., and *Sir Robert Aske* for the respondents.

May 19. LORD BLANESBURGH.—There is now in Australia a concourse of claimants seeking to establish against the State of South Australia a liability to them individually for the alleged negligence of its servants and agents in the execution of the duties of government under the Wheat Harvest Acts, 1915–17. Under these Acts a wheat marketing scheme was established, the substance of which was that all growers in South Australia had to deliver their wheat to the government, which assumed the duty of accepting and marketing it and distributing the net proceeds among the growers or their assigns in proportion to the quantities of wheat delivered. In *Welden v. Smith* (2) it was contended by the State that the Wheat
E Harvest Acts involved on behalf of government political rather than trading operations and responsibilities, but that contention was not accepted by this Board, which adopted the view that the State was, under these Acts, in effect carrying on the business of marketing and selling the wheat of those who supplied it, and that the government, at the suit of wheat growers who delivered wheat under the scheme, could be held liable for proved negligence in the performance of the duties
F so assumed by it. It has also been determined by this board, on the hearing of a preliminary point of law in the present action ([1929] A.C. 469), that that liability extends to a claimant with a derivative title only; that is to say, to one like the present plaintiff-appellant, who is merely an assignee of the rights of divers wheat growers under the scheme. In this action the appellant's claim in that character
G is to establish the liability of the respondent State for loss of wheat of the 1916–17 harvest by exposure to water and to the ravages of mice while in its custody or that of its agents for the purposes of the Wheat Marketing Scheme, all on the footing that such loss was attributable to negligence on the part of such agents. The preliminary question having been decided in his favour it remains for the appellant to quantify his loss and to establish, if he can, as a matter of fact, that such loss was due to negligence for which the respondent State is responsible. The
H action is one of a large number now pending, claiming similar relief against the State, all being alike dependent for success upon the establishment of the same facts. In no action, however, has any attempt yet been made to establish these facts. The two earlier actions—*Welden v. Smith* (2) and *Griffin v. State of South Australia* (1)—have both been discontinued. The present appellant gives the
I reason. The facts are mainly in possession of the respondent State actually responsible for the working of the scheme. Without the assistance, unobtained in either action, of complete discovery from the State, the establishment of the necessary facts by either plaintiff was not practicable. The appellant, indeed, as the result of this experience now avows that no action brought to establish the liability of the State in this matter stands any real chance of success unless, like any other litigant under alleged liability in respect of trading operations, the State can be required to make full discovery of all documents in its possession or power relative to the matters in controversy. Full discovery by the State has, in other words, now become the immediately vital issue between the parties. The recognition by both

sides of its importance is a more than sufficient explanation of the persistent attempts on the part of the different plaintiffs to obtain such discovery and for the equally determined resolve on the part of the State to withhold it. A

In relation to this question of discovery some account of the two earlier actions will not, here, be out of place. In *Welden v. Smith* (2), commenced in 1921, the defendant was a nominee of the respondent State, sued on its behalf in its Supreme Court, pursuant to Ordinance No. 6 of 1853. The preliminary judgment of the Board therein has already been referred to. At a later stage of the action the plaintiff accepted the position that in a suit so framed no discovery at all was obtainable from the defendant, and, as none was offered by government, the plaintiff, for lack of sufficient evidence of his own to support it, eventually discontinued the action altogether. In 1924 the second action—*Griffin v. State of South Australia* (1)—was commenced, this time in the High Court of Australia. It was brought against the respondent State in its own name pursuant to ss. 58 and 64 of the Judiciary Act. In that action the State, the actual defendant, raised the contention that there again it could not be ordered to make any discovery to the plaintiff, but that contention was rejected by the High Court of Australia, and the respondent State was directed to make discovery, by an order special in form and in terms identical with that now under review. In compliance with that order the State filed an affidavit by which privilege was claimed for certain of the documents scheduled to it, and on an application by the plaintiff for production of these documents the State's claim of privilege in respect of them was upheld by a majority of the High Court, and was given effect to by its order of Oct. 29, 1925. The documents for which privilege was thus successfully set up included, as the then plaintiff believed, documents vital to the establishment of his case. These withheld, proof of the necessary facts again became impracticable, and Griffin's action, like *Welden v. Smith* (2), was discontinued before trial. B C D E

The plaintiff Welden, and the plaintiff Griffin, were each of them original owners of wheat. It was desired on behalf of the general body of the claimants to test the question, whether the State's liability to owners, already established in *Welden v. Smith* (2), extended to, and could be enforced by, a plaintiff with a derivative title only. Hence the present action, commenced on Feb. 2, 1927, in the Supreme Court of South Australia, in which, as already stated, the liability of the respondent State to the appellant suing under such a title has been established. But the action was brought for the further purpose of having it determined therein by the final decision of His Majesty in Council whether the claim of privilege upheld in Griffin's action was really justifiable, and such is the question involved in the present appeal, which, while in effect an appeal from the majority decision of the High Court of Australia in Griffin's action, is, in form, an appeal from an order of the Supreme Court of South Australia, made in this suit on Nov. 26, 1929, by which, in terms identical with the order in Griffin's action, that court, without argument, has again sustained the respondent's claim of privilege. The claim, thus twice upheld, is made in respect of a large number of documents, said to be State documents, the disclosure of which, it is alleged, would be contrary to public policy and the interests of the State. The real question now to be settled is whether this claim, without any qualification whatever, is one which in all the circumstances of this case ought to have been, as it has been, accepted. F G H

The vital importance to the plaintiff of the question has already been made apparent. It will be found to be hardly less important to those who, whether in South Australia or elsewhere, find themselves engaged in litigation with governments in respect of what, as between individuals, would be ordinary mercantile transactions. That State documents are frequently absolutely privileged from production was, of course, not disputed by the appellant, nor was the supreme duty of the court to protect the privilege where it exists in any way canvassed. The effort of learned counsel for the appellant was to define the limits of the protection and to show that it did not, at least in hoc statu, extend completely to shield the documents now in question. It will be found convenient as an introduction to a I

A closer examination of the facts and circumstances of the present case to make some inquiry as to the character and quality of the privilege itself, and as to the attitude of the court with reference to it when its possible existence in relation to documents comes under judicial notice.

First of all, it is, their Lordships think, now recognised that the privilege is a narrow one, most sparingly to be exercised. TAYLOR points out in his work on
B EVIDENCE, s. 939:

"The principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

It is, perhaps, matter for surprise that the cases illustrating the limitations upon a rule so circumscribed are not more numerous. But their Lordships cannot doubt
C that the explanation is to be found in the judgment of RIGBY, L.J., in *A.-G. v. Newcastle-upon-Tyne Corpn.* (3), where, himself an ex-law officer, he says ([1897] 2 Q.B. at p. 395):

"I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest
D concerned which cannot be disregarded."

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot
E be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: see *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.* (4) ([1916] 1 K.B. at pp. 829, 830); *Smith v. East India Co.* (5). A contrast, very apposite in the present case, between State documents which are readily within the rule and other documents of the same State which, presumably, are outside it, is drawn in *Wadeer v. East India Co.* (6), so frequently cited from another angle. TURNER, L.J., in
F the course of his judgment there, says (8 De G.M. & G. at p. 189):

"My learned brother has already read . . . the passages contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say, that they are stated . . . to be political communications, which, in fulfilment of the public political duties of the East
G India Co. and of their several governments in India, have passed between them and their governments respectively, solely with a view to the good government of India and to the performance of a public duty. The question which has been suggested in the argument as to contracts between the East India Co. and any railway subscribers with reference to the formation of a railway has nothing to do with a question relating to the public government of India and
H the performance of the public duty of the company. To such a question it is unnecessary to refer, because it is perfectly distinguishable from that before the court."

It must not be assumed from these observations of the lord justice that documents relating to the trading, commercial, or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable
I that even in connection with the production of such documents there may be "some plain overriding principle of public interest concerned which cannot be disregarded." But the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed, and the distinction drawn by the lord justice remains instructive and illuminating. In view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, his observations stand on record to remind the courts that, while they must duly safeguard genuine public interests they must see to it that

the scope of the admitted privilege is not, in such litigation, extended. Particularly must it be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain overriding principle of public interest" as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security. As was pointed out by LORD BUCKMASTER in delivering the judgment of this board in *Esquimalt and Nanaimo Rail. Co. v. Wilson* (7) ([1920] A.C. at p. 366), BARON ATKYNS's often cited observations in *Pawlett v. A.-G.* (8) are based upon general principles, where he said:

"The party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him."

The power of the court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument. The result of the discussion has been, as their Lordships think, to confirm the view of GRIFFITHS, C.J., in *Marconi's Wireless Telegraph Co., Ltd. v. The Commonwealth* (9), where, in effect, he concludes that the court has in these cases always had in reserve the power to inquire into the nature of the document for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against. In the time of *Beatson v. Skene* (10), any examination of a document would, apparently, have had to take place in public, and the mischief resulting from such publicity is the reason given by the Chief Baron for his acceptance there of the Minister's word without making it. The conclusive result of the Minister's statement is, however, emphasised by LORD DUNEDIN in *Admiralty Lords Comrs. v. Aberdeen Steam Trawling and Fishing Co., Ltd.* (11). The existence of the power, nevertheless, is affirmed and its exercise encouraged in the later Scotch case of *Henderson v. M'Gown* (12), and is confirmed, not only by judicial pronouncement, but by widespread practice, and, may it not be added, by the reason of the thing? LINDLEY, M.R., for example, in *Re Joseph Hargreaves, Ltd.* (13), was not prepared to set any limit to the power of the court to call for production of a document for which this privilege is claimed. The propriety of FIELD, J.'s own practice in the matter, as described by him in *Hennessy v. Wright* (14), has, pace the observations upon it of ISAACS, J., in *Griffin's Case* (1), not been challenged, and, hitherto, it has usually been in cases where the State was not itself a party litigant that the difficulty has been suggested. Where, as in the present case, the State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little, if any, reason why the court, in relation to this privileged class of its documents, should have any less power than it has to inspect any other privileged class of its documents, provided, of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist. But to this matter their Lordships will return at a later stage of this judgment.

Upon one further general question the result of the authorities is, their Lordships think, not doubtful. The court is entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be

A allowed. It may, in one case, if thus advised, accept the unsworn statement of a responsible Minister. It may, in another case where the circumstances seem so to require, call for an affidavit from him. The court did so in *Kain v. Farrer* (15), holding that it was not enough there to state in a mere formal affidavit that discovery was objected to on the ground of public policy, but that it ought to appear that the mind of a responsible Minister had been brought to bear on the question

B of the expediency in the public interest of giving or refusing the information asked for, and LORD COLERIDGE insisted on an affidavit being produced from the President of the Board of Trade himself. In the present case their Lordships are not required to make upon this subject any pronouncement as to the proper practice in cases in which the Crown is not a party litigant and not liable to give discovery. The board is concerned now only with a case where the State is party litigant and

C bound to give discovery. In such a case it seems to their Lordships clear that this particular privilege should normally, like any other, be claimed under the sanction of an oath, the oath being that of a responsible Minister of State whose mind has been directed to the question. Their Lordships, in saying this, do not, of course, mean to suggest that this requirement has come to be called for as a protection against imposition. Nothing of the sort. But it is required as a guarantee that

D the statement and opinion of the Minister, which the court is asked to accept, is one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published.

E Their Lordships, with these general considerations in mind, may now proceed to a consideration of the claim of privilege actually set up here, reviewing at the same time the circumstances in which it has been put forward.

The order for discovery in the action was made on July 29, 1929. It required the respondent State to discover on oath the documents which were, or had been, in its possession or power relating to any matters in question in the action, limited,

F however, to documents falling within sixteen particular descriptions specified. The order, which in its terms is identical with that in *Griffin's* action, has the appearance of being, and doubtless was, an arranged one made upon the footing that documents of the sixteen specified descriptions were, or had been, in the possession of the State, and limiting the discovery to them so as to relieve the State of the impossible burden in transactions so vast of an order for discovery in the usual comprehensive form.

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Six of the sixteen sets of documents so particularised are the following :

(1) Reports of inspectors employed by the defendant relating to the wheat of the 1916-17 harvest.

(2) Correspondence between the defendant, including the Wheat Scheme and Wheat Harvest Board, and such inspectors in respect of the said wheat.

H (7) Minutes of the Wheat Advisory Committee.

(12) Correspondence between the manager of the Wheat Scheme and W. W. Hutton.

(13) Letters from Clarence Goode, then Minister of Agriculture, to Messrs. F. A. Verco, E. A. Badcock, W. M. Alford, C. J. Smith, and G. G. Nicholls, written in or about June, 1917.

I (15) Letters from one David Kelly to the manager of the Wheat Harvest Board, written in or about the month of February, 1917.

The affidavit of documents in obedience to that order was sworn on Nov. 6, 1929, by one William Lyle Shegog, described as the civil servant in charge on behalf of the Minister administering the Wheat Harvest Acts, 1915-16, of the documents referred to in the order. The Wheat Harvest Board itself, as the affidavit states, had by that time been disbanded. The affidavit then discloses in the second part of its first schedule a vast collection of documents by descriptions corresponding

with the remaining ten classes specified in the order for discovery, but making no reference whatever to any of the six classes just particularised. These documents are accounted for in the affidavit only, if at all, by documents included and referred to in the first part of the schedule as follows:

"Documents tied up in three bundles, the first marked A and numbered 1-440 inclusive; the second marked B (1) and numbered 1-1,041 inclusive; and the third marked B (2) and numbered 1-411 inclusive. A letter marked C. Minutes contained in a book marked G."

No description of these documents is, it will be seen, there given, but Mr. Shegog, in the body of the affidavit, states, with reference to them, that they are

"State documents and consist of communications relating to a department of the government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State, and made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said department. I have caused the said documents to be submitted to the Honourable Herman Homburg, the Minister in charge of the said department, and he has directed me to object to produce the same,"

by a minute which Mr. Shegog exhibits to his affidavit. That minute, a document of the first importance in the case, is in the following terms:

"*Re Robinson v. State of South Australia*, Supreme Court, Action No. 50 of 1927.—I have considered the documents in your custody relating to the affairs of the South Australian Wheat Harvest Board, such documents being the documents tied up in three bundles, the first marked A and numbered 1 to 440 inclusive, the second marked B (1) and numbered 1 to 1,041 inclusive, and the third marked B (2) and numbered 1 to 411 inclusive; a letter marked C; and minutes contained in a book marked G. The said documents are State documents and are communications relating to a department of the government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State and made by officers of State to other officers of State in the course of their official duty. I direct you that the disclosure of the said documents (including the said minute book) is contrary to public policy, and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents, and I direct you not to produce or disclose the said documents or the said minute book to any person or persons. The above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff, or upon any desire to defeat the plaintiff's claim in the said action, but solely upon and in the interests of the public welfare and the public service. Dated the 25th day of October, 1929, H. HOMBURG, Attorney-General and Minister for Wheat."

With reference to this minute it must be noticed, first, that it is in terms almost identical, and in its effect quite identical, with the minute dated Aug. 1, 1925, made for the purpose of Griffin's action by the then Minister, Mr. W. J. Denny; that the documents described by each Minister in terms of the vaguest generality are no fewer than 1,894 in number; and that each Minister has "considered" them—a word which may mean anything or nothing in relation to such a mass of papers. The Minister, it will be seen, does not by the memorandum commit himself in terms to the statement that the grounds on which the direction is given by him represents his own conviction or belief, while the last paragraph indicates in no uncertain terms that, while the Minister's direction is not based upon any such grounds, the pecuniary and commercial interests of his department and the State of South Australia and of the plaintiff may be affected by the withholding of the documents, and the plaintiff's claim be thereby defeated. Their Lordships cannot refrain from expressing surprise that the complete insufficiency of this claim for

A protection, as so made, has not been matter of judicial observation, either in Griffin's action or in this. To their minds, as a claim for such protection this minute is entirely inadequate. If it may be assumed that it includes the documents particularised as above stated and not elsewhere referred to in the affidavit, it should have dealt with these documents specifically and not under a vague and, as applied, at all events, to some of them, a most inapt description. It should
B have appeared that the Minister had not merely "considered" this mass of documents, but that he had read and considered each of them. In view specially of the fact that the documents are primarily commercial documents, he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production. Above all, and especially in view of the last paragraph of the minute, the claim was one which
C should have been put forward under the sanction of an oath by some responsible Minister or State official. Their Lordships do not hesitate to say that both in Griffin's action and in this the claim of privilege as actually put forward should have been rejected as entirely inadequate.

But the privilege has not, in their Lordships' judgment, been lost merely by the insufficiency of the form in which it has been claimed. It is quite possible that
D there may be among the scheduled documents some, at least, to which the privilege genuinely attaches, and to throw open these documents to the inspection of the plaintiff, without more, would destroy the protection of the privilege. Therefore it would or might be contrary to the public interest to deprive the respondent State of a further opportunity of regularising its claim to protection, by producing as its next step an affidavit of the description already indicated.
E That the respondent State should now be given that opportunity would, on proper terms as to costs, have been their Lordships' advice had it not been that such a course would necessarily involve further serious delay without, it may be, advancing any further the final solution of the question at issue. There is, moreover, another course open which, in the circumstances, seems to their Lordships to be in every way preferable, namely, to remit the case to the Supreme Court of
F South Australia with a direction that it is a proper one for the exercise by that court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified. Their Lordships have already given reasons for their conclusion that the court is possessed of such a power. In the case of the Supreme Court, under the South Australian Rules of Court Order 31, r. 14 (2), the power is conferred in terms express. The order, which is in the same
G form as Order 31, r. 19A (2) of the Rules of the English Supreme Court, is to the effect that where on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim. Their Lordships see no reason why the particular privilege now in question should be excluded from the connotation of the word as there used. They see no reason why in South
H Australia any more than in England the word should be construed in a narrow sense—and, as to England, see *Ehrmann v. Ehrmann* (16). Documents in respect of which such privilege was claimed were inspected by SCRUTTON, J., in *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.* (4)—it has been suggested that the inspection was there made by consent, but their Lordships find no warrant in the report for that conclusion. There is a precedent for it in Queensland to which
I their Lordships will later refer, and with reference to the whole matter they are much impressed by the observations of STARKE, J., in his dissenting judgment in *Griffin's Case* (1), in the course of which he says, speaking of the papers now again in question (36 C.L.R. at p. 402):

"No one has suggested that the interests of the public are such that a judge ought not to see the documents."

The exercise of the power in the present case is especially appropriate seeing that the documents have come into existence with reference to the commercial activities

MINISTER OF HEALTH v. REDEM. Ex parte YAFFÉ

[House of Lords (Lord Dunedin, Lord Warrington, Lord Tomlin, Lord Thankerton and Lord Russell), February 16, 17, 19, 20, March 23, 1931]

[Reported [1931] A.C. 494; 100 L.J.K.B. 306; 47 T.L.R. 337; 75 Sol. Jo. 232; 145 L.T. 98; 95 J.P. 125; 29 L.G.R. 305]

Statute—Construction—Delegated legislation—Limited power conferred on Minister—Discretionary power—Right of court to consider validity of exercise of power.

The true principle of construction where Parliament has delegated its legislative function to a Minister, but has retained no specific control over the exercise of the function by the Minister, such as a condition that an order by the Minister should be laid before Parliament and might be annulled by a resolution of either House within a limited period, is that the delegation confers only a limited power on the Minister, and, unless Parliament expressly excludes the jurisdiction of the court, the court has the right and duty to decide whether the Minister has acted within the limits of his delegated power. Where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a court of law.

By s. 40 (5) of the Housing Act, 1925, an order made by the Minister of Health confirming an improvement scheme put forward by a local authority "shall have effect as if enacted in this Act."

Held: these words did not operate to render a defect in a scheme curable by confirmation of the scheme by the Minister, nor to exclude the jurisdiction of the court to inquire whether the scheme complied with the requirements of the Act.

Per LORD DUNEDIN: Where a scheme conflicts with the Act it must give way to the Act. Mere confirmation will not save it.

Chartered Institute of Patent Agents v. Lockwood (1), [1894] A.C. 347, distinguished.

Notes. The Housing Act, 1925, was repealed by the Housing Act, 1936, but this abbreviated report of the case is given because of their Lordships' observations on the subject of delegated legislation.

Considered: *R. v. Webster, Ex parte Marshall* (1931), 95 J.P. 226. Referred to: *R. v. L.C.C., Ex parte Entertainments Protection Association, Ltd.* (1931), 144 L.T. 464; *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] All E.R.Rep. 257; *R. v. Minister of Health, Ex parte Purfleet Urban District Council* (1934), 104 L.J.K.B. 18; *R. v. West Midland Traffic Area Licensing Authority, Ex parte Great Western Rail Co.*, [1935] 1 K.B. 449; *Robinson v. Minister of Town and Country Planning*, [1947] 1 All E.R. 851.

As to delegated legislation, see 31 HALSBURY'S STATUTES (2nd Edn.) 467-470; and for cases see 42 DIGEST 782-784.

Cases referred to:

- (1) *Chartered Institute of Patent Agents v. Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 74; 71 L.T. 205, H.L.
- (2) *R. v. Minister of Health, Ex parte Davis*, [1929] 1 K.B. 619; 98 L.J.K.B. 636; 141 L.T. 6; 93 J.P. 49; 45 T.L.R. 345; 27 L.G.R. 677, C.A.; Digest Supp.
- (3) *Glasgow Insurance Committee v. Scottish Insurance Comrs.*, 1915 S.C. 504; 52 Sc.L.R. 378; 1915 1 S.L.T. 217; 42 Digest 783, *2126, ii.
- (4) *R. v. Electricity Comrs., Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719, C.A.; Digest Supp.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, A L.J.J.).

By s. 40 (5) of the Housing Act, 1925 :

"The order of the Minister [confirming an improvement or reconstruction scheme] when made, shall have effect as if enacted in this act."

The Minister of Health by an order confirmed an improvement scheme affecting an area in which was included property belonging to the respondent, Abraham Yaffé, which scheme was said to have been made under the Act, but with substantial modifications. It was admitted that if the scheme had been originally drawn in the form in which it was confirmed, no complaint could have been made that it was not in accordance with the Act. It was also admitted that the scheme as sent to the Minister by a local authority for confirmation was then void and of no effect, as it contained a clause giving the local authority power to use or dispose of any land compulsorily acquired under the scheme and not used for the erection of working-class dwellings in any way that the local authority might think fit, and that, accordingly, a writ of prohibition might have issued in respect thereof before the confirmation of the scheme as modified by the Minister of Health: see *R. v. Minister of Health, Ex parte Davis* (2).

The Court of Appeal held, reversing the decision of the Divisional Court, that, as the order made by the Minister did not comply with the conditions prescribed by the Act, it was not an order which could have statutory effect within the meaning of s. 40 (5). The Minister appealed.

The Attorney-General (Sir William Jowitt, K.C.), the Solicitor-General (Sir Stafford Cripps, K.C.) and W. Bowstead for the Minister.

Sir Leslie Scott, K.C., H. A. Hill and T. Worthington Naylor for the respondent. Cyril Radcliffe for the Liverpool Corporation.

The House took time for consideration.

March 23. **LORD DUNEDIN.**—This is an appeal from a judgment of the Court of Appeal, which reversed a judgment of the Divisional Court and quashed in certiorari proceedings an order made by the Minister of Health, the appellant before your Lordships, confirming a scheme promulgated by the local authority of Liverpool under Part II of the Housing Act, 1925, for the improvement of a certain area in that city.

[His Lordship read s. 35 (1), s. 36 (1), s. 38 (1), s. 39, s. 40, and s. 46 (1) of the Act of 1925, and continued:] I will now briefly state the course of the case in the courts below. The certiorari proceedings were put in motion by one Abraham Yaffé, the proprietor of a house situate in the improvement area, which, in the plan embodied in the scheme, was coloured pink, which meant that the buildings were considered insanitary, and that he would be paid only for the site value. The ground of his complaint was, shortly, that there was not a scheme put forward in conformity with the requirements of the Act, and that consequently the Minister had nothing to confirm. Further, it was said that when he did confirm, with modifications, what was put before him there still was no scheme which conformed to the Act, so that the so-called confirmation of the Minister was ultra vires, null, and ought to be quashed. The answer which was made by the Minister and the local authority was two-fold. In the first place, they said that the scheme, such as it was, having been confirmed by the Minister, his order by virtue of s. 40 (5) had the position of an Act of Parliament and could not be inquired into by the judges in certiorari proceedings. In the second place, it was said, not originally in the first court, but in the Court of Appeal (a) that the scheme was good as put before the Minister, and (b) that, if there was any blot in it, that blot had been cured by the order of the Minister, so that the scheme, as it left his hands, was good and in conformity with the Act. Before the Divisional Court it was held by a majority that the first argument was good, that the order was protected as having the authority of an Act of Parliament. SWIFT, J., dissented. He did not need to

A go into the second point, because at that time the Attorney-General admitted that the scheme, as presented, was bad. When the case came before the Court of Appeal, the Attorney-General withdrew that admission, but of course still maintained his first point. On the first point the Court of Appeal reversed the judgment of the Divisional Court, and on the second point they held that the case was practically ruled by *R. v. Minister of Health, Ex parte Davis* (2), and held the scheme bad.

B The first question, and it is a very important and far-reaching one, is, therefore, as to the effect of s. 40 (5). Has it the effect of preventing any inquiry by way of certiorari proceedings as to an order made by the Minister? It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a

C scheme which said that all the proprietors in a scheduled area should make a per capita contribution of £5 to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched. Now, the high-water mark of inviolability of a confirmed order is to be found in a case in this House which necessarily binds your Lordships. It is

D *Chartered Institute of Patent Agents v. Lockwood* (1). That case arose under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict., c. 57). By that Act the Board of Trade was empowered to pass such general rules as they thought expedient for the purposes of the Act. Such rules were "subject as hereinafter mentioned [s. 101 (3)] to be of the same effect as if they were contained in the Act," and were to be judicially noticed. What was "hereinafter mentioned" was

E that the rules were to be laid before Parliament for forty days, and if, within forty days, either House disapproved of any rule, it was to be of no effect, s. 101 (4), (5). The Board of Trade made rules as to the register of patent agents, which were laid before Parliament for forty days and were not objected to. The rules provided that an annual subscription should be paid by all registered patent agents, and prescribed a penalty for anyone calling himself a patent agent who was not on the

F register. The respondent in the case, who was duly registered, refused to pay the subscription and was taken off the register. He continued to practise and call himself a patent agent. The Institute of Patent Agents raised an action for a declaration and an injunction. In defence, the respondent pleaded that the rule was ultra vires of the Board of Trade. The House of Lords held that the provision as to the rules being of like effect as if they had been enacted in the Act precluded

G inquiry whether the rules were ultra vires or not.

There is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed and could have annulled them if motion had been made to that effect, whereas here there is no Parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet, I do not think that that distinction, obvious as

H it is, would avail to prevent the sanction given from being an untouchable sanction. I think the real clue to the solution of the problem is to be found in the opinion of LORD HERSCHELL, L.C., who says this ([1894] A.C. at p. 360) :

"No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

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What that comes to is this. The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is

contained is the Act which provides for the framing of the scheme, not a subsequent Act. If, therefore, the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been per se embodied in a subsequent Act, for then the maxim to be applied would have been *posteriora derogant prioribus*. But, as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari. I doubt if prohibition will ever be found to be an appropriate remedy, but I will say more as to this subsequently. In the meantime, I wish only to say that I think the Court of Appeal was right in refusing to decide the case on the ground taken by the Divisional Court.

[His Lordship examined the form of the scheme and the objections made to it, and continued:] It is clearly my opinion that, if the Minister finds a good scheme disfigured by a blot upon it which would make it possible to call the legality of the scheme in question, he is absolutely entitled to remove that blot. That, upon the supposition that this clause was a blot, he has done.

This brings me to discuss what I have said I would revert to—the appropriateness of procedure by prohibition. I do not go the length of saying that prohibition can never be employed. I think in *Davis's Case* (2) it was rightly employed, because there was there no scheme at all, and the Minister can only confirm a scheme: he cannot make one. But in the present case prohibition would, in my view, have been quite inappropriate because, if successful, it would have prevented the Minister from doing what I have already said I think he could legitimately do. It is also worthy of notice that one reason often repeated by the learned judges in *Davis's Case* (2) for sanctioning prohibition was that, if prohibition was not granted, the matter became irremediable because the confirming order had the effect of an Act of Parliament, and, therefore, could not be attacked. In other words, proceedings by way of certiorari were impossible. But that, in the light of the former part of this judgment, in which I am aware that all your Lordships agree, is not the case.

On the whole matter I have, therefore, come to the conclusion that the scheme, as confirmed, is a good scheme, and that this appeal should be allowed, and that the judgment of the Divisional Court, although on very different grounds, should be restored. I confess that I am glad to be able to reach this result. I should have been very sorry had I felt it necessary to frustrate the scheme and allow the continuance of the insanitary area for a longer period upon what at most was no more than a technical objection. The appellant must have his costs, but I think only one set of costs in this House and in the Court of Appeal.

LORD WARRINGTON.—By an order of the Court of Appeal that court ordered that a writ of certiorari should issue directing the appellant to remove into the court to be quashed an order made by the appellant and dated Nov. 23, 1928, confirming a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme, 1928, as modified and set out in such order. The order of the Minister purported to be made under s. 40 of the Housing Act, 1925. That section provides—sub-s. (5)—that the order of the Minister, when made, shall have effect as if enacted in the Act. It was contended before the King's Bench Division, and the contention was accepted and acted on by the majority of the judges, that the validity of such an order, being equivalent to an Act of Parliament, could not be questioned in the court, even though, as was admitted in that court, the order was ultra vires of the Minister by reason of the non-fulfilment of certain statutory conditions precedent to the Minister's authority. In the Court of Appeal and in this House the Attorney-General withdrew the admission made by him in the King's Bench Division as to the invalidity of the scheme, and it was not seriously denied that, if the statutory conditions were not fulfilled, the Minister would have no authority to make the order and that the question as to the fulfilment of such conditions was open to inquiry in the court. I think it is quite clear that to this

A extent the validity of the order is open to question. On this point the case which gave some trouble to the courts below was *Chartered Institute of Patent Agents v. Lockwood* (1). In that case the Board of Trade had power to make "such general rules as are in the opinion of the Board required for giving effect to this section"—namely, a section providing for the registration of patent agents—and such rules were to be of the same effect as if they were contained in a previous Act relating to the registration of trade marks and to be judicially noticed. It was held that the validity of a rule imposing fees on registration could not be questioned. But this was on the footing that the rules were within the statutory authority as being rules which the Board of Trade thought reasonable and necessary for giving effect to the section in question: see per LORD HERSCHELL, L.C. ([1894] A.C. at p. 356). But the same learned Lord points out ([1894] A.C. at p. 360) that there is a difference

B between a rule and a statute inasmuch as

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"you may canvass a rule and determine whether or not it was within the power of those who made it; you cannot canvass in that way the provisions of an Act of Parliament."

D LORD WATSON also, while coming to the conclusion that the validity of the rules could not be questioned, did so on the assumption that they were made in pursuance of the section in question. So far, therefore, from being an authority against the proposition stated above, it is in favour of it; and I, therefore, proceed to consider whether the conditions giving authority to the Minister were in this case fulfilled.

[His Lordship referred to the scheme, and said that, in his opinion, there was submitted to the Minister a sufficient improvement scheme, and that the other conditions the fulfilment of which was necessary to give him authority to make the order were fulfilled, and, accordingly, that the validity of the scheme could not be questioned. The result was that the order of the Court of Appeal must be discharged and that of the Divisional Court restored. His Lordship added:] *R. v. Minister of Health, Ex parte Davis* (2) proceeded on the footing that no scheme within the Act had been presented to the Minister, and he, therefore, had no authority to make an order. In the present case there was, in my opinion, such a scheme, and consequently that case is not in point. That being so, I prefer to express no opinion on the question whether that case was rightly decided. The point has not been argued, and, so far as I am concerned, I prefer to leave it open.

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LORD TOMLIN.—The first question for consideration is whether by reason of s. 40 (5) of the Housing Act, 1925, your Lordships are precluded from inquiring into the validity of the order made by the appellant on Nov. 23, 1928. Upon this matter I entertain no doubt. The appellant's jurisdiction to make an order is under the Act strictly conditioned and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the subsection in question. When the legislature seeks to produce a broader result other language is employed, as is well illustrated by the phraseology of cl. 2 of Sched. III to the Act of 1925. This view does not deprive the subsection of effect. Without the subsection the legal operation of the Minister's order would remain undefined. Nor is there, in my judgment, anything in the decision of your Lordships' House in *Chartered Institute of Patent Agents v. Lockwood* (1) to preclude your Lordships from attributing to the subsection the meaning which I have indicated. It is, therefore, in my opinion, permissible and necessary to consider the following further

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questions, namely (i) whether the conditions founding the appellant's jurisdiction were fulfilled in the present case, and (ii) whether the order made by the appellant is in relation to its contents *intra vires*.

[His Lordship referred to the scheme and the Act of 1925 and continued:] There is no ground for supporting the contention that no improvement scheme within the meaning of the Act was presented to the appellant. In the court below the case appears to have been regarded, in relation to the point that I have just considered, as on all fours with the *Derby case, R. v. Minister of Health, Ex parte Davis* (2). In that case, so far as I understand the facts, there was no

proposal at all for the rearrangement and reconstruction of the streets and houses within the area or any of such streets or houses. Upon the view which I take of the facts of the present case, the position differs *toto cælo* from that in the Derby case, the consideration of which, therefore, is not called for here. There remains the question whether the scheme confirmed by the appellant, in view of its contents, is itself open to objection. The scheme confirmed is free of the objectionable clauses. It was but faintly argued by the respondent that the scheme as confirmed was in respect of its terms impeachable, and I am unable to find any ground for so holding. The appeal succeeds, the order of the Court of Appeal should be reversed, and the order of the King's Bench Division discharging the order nisi should be restored.

LORD THANKERTON.—In this case, as in similar cases that have come before the courts, Parliament has delegated its legislative function to a Minister of the Crown, but in this case Parliament has retained no specific control over the exercise of the function by the Minister, such as a condition that the order should be laid before Parliament and might be annulled by a resolution of either House within a limited period. In my opinion, the true principle of construction of such delegation by Parliament of its legislative function is that it confers only a limited power on the Minister, and that, unless Parliament expressly excludes the jurisdiction of the court, the court has the right and duty to decide whether the Minister has acted within the limits of his delegated power. An illustration of such an express exclusion of the jurisdiction of the court is found in the provisions for the compulsory acquisition of land for the purposes of Part III of the Act, which are contained in the third schedule. Paragraph 2 of that schedule is as follows :

"An order under this schedule shall be of no force unless and until it is confirmed by the Minister, and the Minister may confirm the order either without modification or subject to such modifications as he thinks fit, and an order when so confirmed shall, save as otherwise expressly provided by this schedule, become final and have effect as if enacted in this Act; and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

In the absence of such an express exclusion of the jurisdiction of the court it seems clear to me that the Minister is not entitled to exercise the legislative power of making a confirmation order under s. 40 unless and until both he and the local authority have complied with the procedure which the Act prescribes as preliminary to the making of such an order, and which includes the making of a scheme by the local authority, compliance by them with the provisions of ss. 35, 38, and 40 (1) and (2), and compliance by the Minister with the provisions of s. 40 (3) as to a local inquiry, and that the court is entitled to see that the statutory procedure has been complied with so as to entitle the Minister to make a confirmation order. The question, what are the minimum essentials of the scheme which the local authorities are directed to make by s. 35, is a matter of statutory construction, which is clearly within the province of the court. Where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a court of law. The power of modification conferred on the Minister in the present case is an example of such a discretionary power.

The expressions of judicial opinion in *Chartered Institute of Patent Agents v. Lockwood* (1) confirm the above principle. The decision in this House was that the action of declarator and interdict was incompetent, the only remedy being by way of summary prosecution and, as is pointed out by both LORD HERSHELL and LORD WATSON, the views expressed by them as to the validity of the Board of Trade rules and the right of the court to review the matter were not essential to the decision of the case. The power delegated to the Board of Trade was to make from time to time "such general rules as are in the opinion of the Board required for giving effect to this section": Patents, Designs and Trade Marks Act, 1888, s. 1 (2),

A and the dicta of LORD HERSCHELL and LORD WATSON as to the exclusion of the jurisdiction of the court by a clause similar to the present one are restricted to rules made in pursuance of the above power, which left the decision of what was expedient to the sole decision of the Board of Trade. LORD WATSON says ([1894] A.C. at p. 364):

B "Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses; and, of course, these regulations could have been annulled by an unfavourable resolution upon a motion made in either House. But what is to be the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses and rejected by both? The statute makes no difference between these cases. The views expressed by the learned judges in the court below, so far as I understand them, would in the latter case make it competent for the court to inquire at its own hand whether or not the Board had kept within the statute although the legislature had declined to interfere. But I think that all doubt upon that subject is entirely removed by the terms of s. 101 [of the Patents, Designs, and Trade Marks Act, 1883], which for all practical purposes is incorporated with s. 1 of the later Act. 'Any rules made in pursuance of this section,' in applying the earlier statute to the later, must be read as, 'Any rules made in pursuance of s. 1 (2) of the Act of 1888'; and assuming that the regulations before us were made by the Board of Trade in pursuance of s. 1 (2) of the Act of 1888, then in that case these words apply: 'shall be of the same effect as if they were contained in this Act, and shall be judicially noticed.' My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself."

F *Glasgow Insurance Committee v. Scottish Insurance Comrs.* (3) was the case of a discretionary power given to the statutory commissioners by the National Insurance Act, 1911, s. 65, to make regulations for the purpose of carrying into effect Part I of the Act. In that case, as also in *Lockwood's Case* (1), the statute provided that the regulations should at once have effect, but should be laid before G Parliament, and be liable to be annulled by an unfavourable resolution of either House, and the decision which followed the opinions in *Lockwood's Case* (1) was also partly based on this retention of Parliamentary control, which is not present in the present case. The Lord President (LORD STRATHCLYDE), after stating that the regulations, when issued, have exactly the same effect as if they had been passed by Parliament, adds (1915 S.C. at p. 510):

H "Obviously that would not be so if the regulations related to any other topic than the health insurance part of the National Insurance Act. If, for example, the regulations related to the unemployment part of the Act, then they would not have statutory force and we should have power at once to set them aside. But if they relate exclusively to the health insurance part of the Act, then they have statutory force, and we have no power to intervene."

I *R. v. Electricity Comrs.* (4) does not touch the present point, for it related to the statutory powers and duties of the Commissioners in preparing a scheme at a stage prior to confirmation by the Minister and, in that case, by Parliament also, and there was no provision giving statutory effect to the scheme as prepared by the Commissioners. In the Derby case—*R. v. Minister of Health, Ex parte Davis* (2)—the jurisdiction of the court was not challenged; the local authority had presented to the Minister for confirmation what purported to be a scheme under Part II of the Housing Act, 1925, and the Minister was prohibited from proceeding

to confirm it on the ground that it did not contain the statutory essentials of such a scheme. Some of the learned judges in the case expressed the view that certiorari could not have issued after confirmation by the Minister, but I agree with the opinion of SLESSER, L.J., in the present case when he says ([1930] 2 K.B. at p. 178):

"I find it difficult to understand how, if the Minister may be restrained from confirming the order on the ground that he has no power so to confirm, it can be said that certiorari will not lie where a confirmation, admittedly invalid, has been made. Such a proposition can only be supported by saying that the confirmation has made the order unchallengeably a part of an Act of Parliament and, for the reasons I have indicated, I cannot think that when a confirmation is a nullity it can be protected in this way."

I am, therefore, of opinion that the court has jurisdiction in the present case to consider and decide whether the statutory formalities have been complied with and whether the scheme contains the minimum statutory essentials.

LORD RUSSELL OF KILLOWEN held that no scheme within the meaning of the Act had been submitted to the Minister.

Appeal allowed.

Solicitors: *Solicitor to the Ministry of Health; Few & Co., for W. J. Shield, Liverpool; F. Venn & Co., for Town Clerk, Liverpool.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

CALICO PRINTERS' ASSOCIATION *v.* BARCLAYS BANK AND THE ANGLO-PALESTINE CO., LTD.

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), January 28, 29, 1931]

[Reported 145 L.T. 51; 36 Com. Cas. 197]

Contract—Exception clause—"Collection . . . undertaken . . . only on understanding that no liability whatever attaches"—Exclusion of liability for negligence.

Where there are words of exception in a contract which are not so clear as to make it certain that they include negligence the court will hold that their effect must be confined to some other obligation than the obligation to exercise reasonable care. If there is, as in the case of common carriers, a liability to which the exception can apply, it will not include exception from liability for negligence. Where there is nothing to which it can apply except the obligation to take reasonable care, effect must be given to the exception and liability must be excluded. Effect must be given to an exception just as much as to the body of a contract unless they are clearly contradictory of one another, in which case the probability is that the exception would be regarded as repugnant and struck out of the contract altogether.

The plaintiffs, who were financially interested in goods to be shipped to Beyrout, employed the defendants, B. Bank, who, in turn, employed sub-agents to collect the proceeds. The plaintiffs completed a form provided by the bank in which it was stated: "We beg to hand you herewith the under-mentioned bills for collection, subject to the deduction of commission and expenses and to the condition mentioned." That condition was: "Collections are undertaken at depositor's risk only on the understanding that no liability

whatever attaches to the bank in connection therewith or with the storage and insurance of the relative goods." In the margin of the document under the heading "Instructions" was the following: "Documents to be surrendered against payment; if goods are not taken up, please do your best on our behalf to warehouse and insure them against fire." This document was received by the bank, who passed the shipping documents to the sub-agents, merely saying: "If refused, warehouse and insure goods." Goods to which the bills related were destroyed by fire at the Customs House, Beyrout, when uninsured. In an action in which the plaintiffs alleged that the loss was due to negligence on the part of the bank and/or their sub-agents in omitting to insure the goods, contending that the exceptions clause must be disregarded as being repugnant to the contractual duty undertaken by the bank to do their best to warehouse and insure the goods against fire,

Held: in construing the exception clause, the court (i) must have regard to the document in its entirety, and (ii) must consider what would be the liability of the bank if there were no clause exempting them from liability; in the present case the obligation of the bank in the absence of an exceptions clause would have been to use due care regarding the storage and insurance of the goods; the words used in the exemption clause were wide enough to cover negligence arising from failure to fulfil that obligation; and, therefore, the bank were not liable.

Notes. Referred to: *Kahler v. Midland Bank, Ltd.*, [1948] 1 All E.R. 811.

As to conditions in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 194 et seq.; and for cases see 12 DIGEST (Repl.) 466 et seq.

Cases referred to:

- (1) *Ireland v. Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 1 Digest 309, 324.
- (2) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, 277.
- (3) *Joseph Travers & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, 278.
- (4) *Rosin and Turpentine Import Co. v. B. Jacob & Sons* (1910), 102 L.T. 81; 26 T.L.R. 259; 54 Sol. Jo. 268; 11 Asp.M.L.C. 363; 15 Com. Cas. 111, H.L.; 8 Digest (Repl.) 46, 279.
- (5) *Rose and Frank Co. v. J. R. Crompton & Bros., Ltd.*, [1925] A.C. 445; 94 L.J.K.B. 120; 132 L.T. 641; 30 Com. Cas. 163, H.L.; 12 Digest (Repl.) 22, 4.
- (6) *Reynolds v. Boston Deep Sea Fishing and Ice Co., Ltd.* (1922), 38 T.L.R. 429, C.A.; 3 Digest 9, 140b.
- (7) *The Cap Palos*, [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 37 T.L.R. 921; 15 Asp.M.L.C. 403, C.A.; 11 Digest (Repl.) 683, 5126.

Appeal from a decision of WRIGHT, J., in an action in the Commercial List.

The plaintiffs claimed damages against Barclays Bank, Ltd., and the Anglo-Palestine Bank, the first and second defendants respectively, or against either of them in the alternative, for damages for failure to insure certain goods, their property, which were destroyed by fire while in the Customs at Beyrout on May 23, 1927. The plaintiffs had dealt for some years with a merchant in Manchester called Ydlibi, trading as Namani and Ydlibi, who had an allied house or correspondent in Beyrout called Azaat Ydlibi, and was in the habit of consigning to that firm parcels of goods coming from the plaintiffs. Ydlibi was a customer of Barclays Bank at their Cross Street, Manchester, branch. Some years previously Ydlibi had received finance from the bank, who had made advances against shipping documents and collected the proceeds at Beyrout. Later, when the bank withdrew these facilities from Ydlibi, he obtained credit from the plaintiffs, who held the

documents and were financed by the bank as Ydlibi had been. During the relevant period the bank received the documents from the plaintiffs as agents for collection on the instructions of the plaintiffs, making no advances, but crediting the plaintiffs with the proceeds when remitted from Beyrout. In this way the shipments were financed by the plaintiffs, who remained owners of the goods till the buyers at Beyrout took delivery. Barclays Bank had no branch at Beyrout, but in the transactions in question they employed as the local bank at Beyrout the defendants, the Anglo-Palestine Bank. This bank was not their usual correspondent at Beyrout, but was specially nominated for the purpose of this business by the plaintiffs at the request of Ydlibi. Both the plaintiffs and Barclays had been satisfied before accepting the name of the Anglo-Palestine Bank as to the standing of that bank by inquiries made and reports obtained some time before.

The parcels in question in the present case were twenty-eight in number and had been received into the Customs House at Beyrout at various dates before the fire took place, the longest period being nine months, the shortest about five weeks, and the majority of the parcels having lain there for two or three months. For each parcel there was a set of documents identical in character. The usual shipping documents were prepared, a bill of lading to the order of the shipper, Ydlibi, a certificate of insurance, an invoice for Ydlibi to Azaat Ydlibi, and a sight draft for the proper amount drawn by Ydlibi on A. Ydlibi. Ydlibi filled up a printed form which was used by Barclays, signing it as "Namani and Ydlibi," and handed it to Barclays with the note: "To the order of Messrs. the C.P.A., Ltd."—that is, the plaintiffs. The plaintiffs filled up an identical form and signed it and handed it to Barclays with the documents; that latter form had on it a note by a rubber stamp, which indicated that the correspondent bank at Beyrout was to be the defendants, the Anglo-Palestine Bank, in accordance with the practice described. The form, when filled up and signed, constituted an instruction or request addressed to Barclays to collect the bills specified, setting out the name of the drawee, amount, tenor, and documents. It was accompanied by the usual shipping documents which have been enumerated. The tenor was as follows—a document dated June 29, 1926, being taken as a sample. It was addressed to Barclays Bank, Ltd., Cross Street, Manchester, and was as follows:

"Dear Sirs,—We beg to hand you herewith the undermentioned bills for collection, subject to the deduction of commission and expenses and to the condition mentioned."

The condition mentioned was at the foot of the page:

"Collections are undertaken at depositor's risk only on the understanding that no liability whatever attaches to the bank in connection therewith or with the storage and insurance of the relative goods."

In the margin under the heading "Instructions" there are, among other terms, these:

"Documents to be surrendered against payment; if goods are not taken up, please do your best on our behalf to warehouse and insure them against fire."

The foreign branch of Barclays passed the shipping documents to the Anglo-Palestine Bank at Beyrout, with a memorandum in the following terms, addressed to the Anglo-Palestine Co., Ltd., at Beyrout:

"Documentary drafts for collection and remittance of proceeds by sight drafts. Town, Beyrout; Tenor, sight; Amount, List of documents: two drafts, two invoices, two insurance certificates, two certificates of origin, two sets of bills of lading, surrender documents on payment. If refused, warehouse, and insure goods. If unpaid sans frais, advise by mail."

"Sans frais" means: "Do not incur any costs in connection with the dishonour."

All the parcels in question were so dealt with. In each case when the documents arrived at Beyrout, the Anglo-Palestine Bank sent a notice to the consignee requiring him to take up the document sans retard and received from him a simple

A acknowledgment. The drafts, though sight drafts, were not presented for payment. The goods remained at the Customs warehouse, uninsured, and so matters continued until the fire destroyed them. No notice was sent to Barclays Bank that the drafts had not been presented or paid, or that the goods remained uninsured, nor were the plaintiffs aware of these facts. Both the plaintiffs and Barclays rested on the assumption that the goods would be insured against fire as soon as the marine insurance had run out, and that proper instructions to that effect had been given and acted upon. When the fire was reported, Barclays cabled for information as to the goods destroyed, and whether insured, and the Anglo-Palestine Bank replied that the goods were not insured as they had no instructions to that effect. The defendants, Barclays, contested this view and referred to the documents. The plaintiffs notified the defendants, Barclays, that they would hold them responsible, and in due course brought this action, in the first place against Barclays alone. Later, they joined the defendants, the Anglo-Palestine Bank, in view of the contention by Barclays that they (Barclays) had fulfilled their obligation by passing instructions to insure to the defendants, the Anglo-Palestine Bank, and in that way establishing direct privity between the plaintiffs and the Anglo-Palestine Bank, who on that view became directly liable for their failure to insure to the plaintiffs. The Anglo-Palestine Bank resisted liability on the ground that there was no privity between them and the plaintiffs, and on the ground also that in the actual events they had no instructions to insure.

WRIGHT, J., held that the plaintiffs had not given Barclays any authority to constitute direct privity of contract between them and the Anglo-Palestine Bank, and that Barclays were protected from liability for negligence by the words "no liability whatever" in the exceptions clause in the document of June 29, 1926, and he gave judgment for both defendants with costs. The plaintiffs appealed against the decision in favour of the first defendants, Barclays Bank.

Cyril Atkinson, K.C., and W. Gorman for the plaintiffs.

Rayner Goddard, K.C., and D. B. Somervell for the defendants were not called upon.

SCRUTTON, L.J.—This case raises a short point which, I suppose, may be called a point of construction, on facts which require a little time to understand and involve a review of authorities which, in my opinion, have decided clearly the principle to be applied. The appeal is against part of a decision of WRIGHT, J.

One Ydlibi, trading under the name of Namani and Ydlibi, a firm of Syrian origin, carries on the business of selling goods to people in Beyrout, Syria; and, judging by the letters, there is another firm out there which is not concerned with this case, also of the name of Namani, whose dealing with goods sold to them has caused a great deal of trouble. Ydlibi desired to be financed in the business of selling their goods. Originally Barclays Bank did this, but, for reasons which do not appear, Barclays Bank ceased and the plaintiffs, the Calico Printers' Association, took up the work of financing the firm. The method adopted was that Barclays Bank had a form of application to be signed by vendors of goods abroad who wanted the bank to help them to receive the price in the country of sale, and in certain circumstances, providing for any risk of the sellers if the contract was not carried out by the buyers. Ydlibi signed a request to Barclays Bank on this form. The request was to collect—"I hand you the undermentioned bills for collection"—coupled with a column of "Instructions," a phrase which does not apply to all the matters appearing under it—"If goods are not taken up, please do your best on our behalf to warehouse and insure them against fire." The request which I have stated then continues:

"Collections are undertaken at depositors' risk only, on the understanding that no liability whatever attaches to the bank in connection therewith, or with the storage and insurance of the relative goods."

The plaintiffs filled in a similar form. Their counsel points out that, whereas

the so-called instructions say: "Please do your best on our behalf to ware- A
house and insure," the clause at the end speaks of "storage and insurance,"
and he suggests that some subtle difference has been introduced between
"warehouse and insure" and "storage and insurance." It appears that mer-
chants in Syria have a somewhat casual way of dealing with documents of
business, and they do not treat a sight bill as involving any liability on
them to pay at sight. In their view a sight bill means: "Pay as you please B
and pay when you like." The form of business adopted in Syria by the Syrian
banks is that when they get a bill at sight and the goods arrive, they send to the
person who ought to pay the bill at sight and who has bought the goods, a docu-
ment such as this: "We hold in our portfolio a bill of lading delivered to us which
we beg you to take up or withdraw without delay against payment of £424 8s."
To that document there is affixed a perforated slip somewhat similar to the slip C
which is used in England when a broker sends to his purchaser a statement: "I
have bought on your behalf," and requests the purchaser to sign the slip, tear it
off, and return it to him as a confirmation, to satisfy the provisions of the Sale of
Goods Act. This document I have just read has on it a perforated slip to be
signed, and the slip has on it: "I take note of your advice as identified by the
description." That, apparently, is treated as being an acceptance of the liability D
of the bill at sight—not a statement that "I have never bought any goods and I am
not liable to pay," but as meaning "I am not going to pay at once." The Syrian
banks or agents who receive goods on those terms never present the bill at sight,
but, having got the liability accepted, they leave the bill and the goods until the
person who bought them and who ought to pay the bill at sight thinks fit to come
along and tender payment for the goods at his own convenience. Obviously, that E
is a most inconvenient way of carrying on business; and fortunately it is not neces-
sary in this case to decide what are the various rights between vendor and pur-
chaser or of a vendor as against his agent, or of an agent in England as against a
sub-agent in Syria.

What happened in this case was that, that memorandum having been sent to
the drawees, the people who ought to pay at sight all signed a slip. They did not F
repudiate and say: "We have nothing to do with this bill and we have nothing to
do with these goods." They signed the slip and left the goods in the Customs
House, and the goods stayed in the Customs House for some time. Unfortunately,
before it occurred to the purchasers to come and take the goods and pay for them,
there was a fire at the Customs House and the goods were destroyed. Barclays
Bank were acting through a banking firm called the Anglo-Palestine Co., Ltd., in G
Beyrout who, I gather, had been nominated originally by Ydlibi or the Calico
Printers' Association (it does not matter which), and Barclays had sent out to the
Anglo-Palestine, who had received the bills of lading, an instruction "Surrender
documents on payment. If refused, warehouse and insure goods." When this
fire happened, and it was found the goods were not insured, Barclays Bank wrote
to the Anglo-Palestine: "Why did not you insure?" to which the Anglo-Palestine H
Co. replied:

"Under the system prevailing here payment was not refused, liability to pay
was admitted, but the time had not yet come when the payers were going to
pay. Payment was not refused, so we had not to insure."

Of course, as between Barclays Bank and the Anglo-Palestine, that raised a very I
pretty case. I do not know whether *Ireland v. Livingston* (1) applies to the courts
in Beyrout, or what will happen if it is cited in the courts in Beyrout, but that was
the difficulty as it arose between the agents, Barclays, and the sub-agent, the
Anglo-Palestine. The Calico Printers' Association did not concern themselves
much about that. They said to Barclays: "You have accepted a liability to insure
['please do your best to insure'] and you have not done it and you have been
careless in not doing it, so we claim damages from you," to which Barclays reply
in the language of the document sent to them: "We never accepted the liability to

A insure. We accepted your instructions on the terms that collection is undertaken at depositors' risk only and on the understanding that no liability whatever attaches to the bank in connection therewith, or with the storage and insurance of the relative goods."

The question is whether that clause frees Barclays Bank from liability, Barclays Bank saying: "All we have accepted is, not an obligation to insure simpliciter, but an obligation to insure on the terms stated in the document in which you instruct us: 'Please do your best to insure.' " At one stage of the history of the authorities in this class of case, it would have been very material to say: "But this exempting clause says nothing about negligence and you must mention negligence in express terms if you mean to protect yourself from it"; because in the language of the House of Lords in two cases, which every counsel cites when he gets into a difficulty, an ambiguous clause is no protection. If you are to free yourself from your negligence you must use clear language. The course of authorities as regards these business transactions has, I think, now made clear the line upon which the court should proceed. First of all, in my view, you do not take part of the document and consider it by itself; you are to construe the whole document. The parties have used a set of words to express their legal relations to each other and it is no good saying: "Here I find in sentence A clear words, so I need not trouble about sentence B, because sentence B, if it contradicts sentence A, I will reject as repugnant, and I will"—because this is the consequence of the argument—"assume that these parties used these words not meaning anything by them, and, therefore, I need not trouble about them because they do use clear language in sentence A." It is not necessary, in my view, in order to form a judgment in this case, to go back to authorities about churchwardens in 1840 or thereabouts, because since then in more businesslike transactions the courts have laid down the standard of construction. They gradually evolved that standard as the clause itself has evolved.

I think *Price & Co. v. Union Lighterage Co.* (2) was the first case that really raised the point. In that case the clause provided that the owner of a barge in which goods were loaded for carriage was under no liability "for any loss of or damage to goods which can be covered by insurance." The clause did not mention negligence. The Court of Appeal said: This is in general terms not expressly relating to negligence; the barge owner might be liable, apart from negligence, as a common carrier, and, consequently, we will not use this clause to exempt him from damage caused by the negligence of his servants. The next case in which the matter was considered was *Joseph Travers & Sons, Ltd. v. Cooper* (3), and there, warned by experience, the barge owners had adopted this language: "for any damage to goods however caused which can be covered by insurance." It was held in that case that the wording was sufficient to protect the barge owner, for he had said he was to be free from damage however caused.

There was a variety of clause also used by barge owners which gave rise to a great difference of opinion in the courts, and that was the clause which was investigated in the well-known case of *Rosin and Turpentine Import Co. v. B. Jacob & Sons* (4). The clause there was:

"The rates charged by B. Jacob & Sons, Ltd., are for conveyance only, and every reasonable precaution is taken for the safety of the goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance,"

I and then there is a clause about the wording of the insurance. BAILHACHE, J., decided that that clause was too ambiguous to be enforced. The Court of Appeal were divided, the Master of the Rolls thinking that it was too ambiguous to be enforced, FARWELL and KENNEDY, L.JJ., saying that it said clearly: We will not be liable for loss including negligence, and the fact that we say "every reasonable precaution will be taken" is merely an advertisement of our excellence as lightermen and is not intended to be contractual. On going to the House of Lords the majority of the House of Lords took that view, LORD COLLINS dissenting. The

other four judges thought that the last part of the clause contained clear words to the effect that the lightermen were free from liability, including negligence, and that the first part was only an advertisement of the excellence of the lightermen. A

Another case went much further. In the decision of the House of Lords in *Rose and Frank Co. v. J. R. Crompton & Bros., Ltd.* (5) the clause went very much further than any of the clauses that had up to that time been dealt with. After provisions which, if you looked at them alone, would appear to be contractual, the clause was: B

"This arrangement is not entered into nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation." C

The contention of one of the parties to that agreement, which was accepted by the House of Lords, was that the effect of that clause was that it was a gentleman's agreement on which there could be no proceedings in the law courts. What was said on the other side was the argument which counsel for the plaintiffs has used to-day—if you look at the first part of this clause and nothing else, it is contractual, and, consequently, when you come to words which say it is not contractual, you must treat them as repugnant and strike them out. As was pointed out in that case, the effect of that is that the parties used words which the courts say they will not construe, whereas the true view should be that the parties have used a number of words to express their legal relations to each other and you must construe the whole of those words and not construe a part and say the rest does not mean anything because it contradicts the first part. That is not construing the whole agreement; it is only construing a part of it. That decision, of course, goes considerably further than any of the previous cases. D E

Besides those cases, the principle evolved from them has been within the last ten years applied in four cases to which WRIGHT, J., refers. I think it is only necessary to refer to one of them, because it so happens that two of the members of the present court were concerned in it, and that was *Reynolds v. Boston Deep Sea Fishing and Ice Co., Ltd.* (6). In that case there was a steam trawler being taken on a slipway, and the clause adopted by the defendants, the owners of the slipway, which everybody who used that slipway had to sign, was: F

"All persons using the slipway must do so at their own risk and no liability whatever shall attach to the company for any accident or damage done to or by any vessel either in taking her to the slip or when on it, or when launching from it." G

The vessel was being put on the slipway by the defendants' servants when it fell over in circumstances which suggested very strongly that there was negligence on the part of the defendants. It came before GREER, J., in the first instance, and he approached the matter in this way. He said: What was the liability? If there were no contract of the owners of the slipway they were liable to use reasonable care in dealing with the vessel on the slipway, but then they say: "No liability whatever shall attach to the company for any accident on the slipway." What must they have been meaning to except? There was no absolute liability as in the case of common carriers, so you could not limit the clause to that. The only thing they were liable for was for negligence, and when they say: "No liability whatever shall attach to the company," they are referring to something for which the owners of the slipway would be liable—negligence. The case went to the Court of Appeal, where all three judges—I was the junior member of the court then—while expressing it in our own terms, adopted the judgment of my brother. H I

That is the state of the authorities as at present. First of all, you construe the

A whole words that are used and not a portion of them. Then you look to see what could be the suggested liability without the clause which purports to exempt from liability. What would be the liability here if there were no such clause? To accept goods on the terms: "Please do your best on my behalf to warehouse and insure" is not an absolute obligation; it is an obligation, if accepted, to use due care. That being the obligation which would lie upon the defendants if there was no clause, the plaintiffs say: "I ask you to do it on the terms of the memorandum at the end," which terms are "on the understanding that no liability whatever attaches to the bank in connection therewith, or with the storage and insurance of the relative goods." It seems to me quite clear that, interpreting that document as a whole, the bank is under no liability in respect of storage or insurance. I have heard counsel for the plaintiffs argue that storage is different from warehousing. I think he would astonish most of his Manchester clients if he were to put that argument before them as a commercial matter. It seems to me quite clear, upon this memorandum put forward in the request by the plaintiffs to the bank to do their best to warehouse and insure, that the bank, by taking the goods, are accepting them on the terms that they shall be under no liability whatever, which includes negligence, for the storage and insurance of the respective goods.

D I think WRIGHT, J., came to a correct conclusion and the appeal must be dismissed with costs.

GREER, L.J.—I agree. In order to express with such lucidity as I am capable of the disagreement of the court with the argument which has been put forward on behalf of the plaintiffs I think it is necessary to mention quite briefly the facts of this case as I understand them.

E The Calico Printers' Association, the plaintiffs in the action against Barclays Bank, were interested in certain goods which were to be shipped to the East by a firm we have called Ydlibi. In order to protect themselves and maintain control of the bills of exchange which were sent forward for payment of the goods, the bills of lading, and the goods to which they referred, they instructed Barclays Bank by means of a document dated June 29, 1926, to receive and deal with, not merely the bills of exchange, but also the bills of lading, and to undertake in some way or another to do something with reference to the goods when they arrived. Barclays Bank, being desirous, so far as they can in law, to limit their responsibility whenever they accept what I may call documental bills for collection, have a form of request to be signed by the person or firm delivering the bills for collection to them.

F The material words of that form are these. It begins by saying that the applicant who is handing the bills to the bank requests the bank to do something for him, and the request is in these terms:

G

"We beg to hand you herewith the undermentioned bills for collection, subject to the deduction of commission and expenses, and to the condition mentioned."

H That is the substance of the request which is the first thing to be considered. "Receive the bills for collection"; I read that as meaning: "Receive the documental bills, not only the bills of exchange, but the bills of lading, for collection subject to the condition mentioned hereunder." The condition mentioned hereunder is:

I "Collections are undertaken [that means the whole of the duties that they are requested to undertake are undertaken] at depositors' risk only, on the understanding that no liability whatever attaches to the bank in connection therewith or with the storage and insurance of the relative goods."

That cannot be understood without referring to the portion of the document which is in the column headed "instructions" and contains these words: "If goods are not taken up, please do your best on our behalf to warehouse and insure them against fire." It seems to me that that request, if you take the whole document together, means: We, the Calico Printers' Association, are not asking you to undertake any liability whatever in reference to the bills of exchange and the attached documents and the goods which we are handing to you, but we expect that in the

ordinary course of business, but without any legal liability on your part, you will do your best to see that the goods are insured against fire if they are not taken up on their arrival at their port of destination. A

The document was received by the bank and the bank acted upon it. I think there might have been some liability attached to them if, instead of acting upon the document and doing anything upon it, they had done something entirely different, which would make the case parallel to the cases of deviation that have been referred to—for example, if they had not sent the goods forward at all, but had kept them in their own bank for years and forgotten all about them. They would not then have been dealing with them at all for the purposes of the contract, and it may be that in those circumstances they would have been liable. But that is not what occurred. They passed them on from the head Manchester office to the Manchester Foreign Department, and in doing so they put in these words as their instructions: "Surrender documents on payment; if refused warehouse and insure goods. If unpaid sans frais, advise us by mail." That instruction was sent out to their sub-agents in the East. That was a negligent performance of the duty, if there were any duty undertaken by the contract, to do their best to see that the goods were insured if the goods were not taken up. The bank in Beyrout, the sub-agents, when the goods arrived, took the instructions they had received too literally. The bills, in their view, were not refused, the goods were not refused, but by reason of the forms which were used out there, the goods were understood by the bank to be accepted, and the intention of the receiver by the document he sent to the bank in Beyrout was regarded as meaning: "We are not refusing the goods; we are going to take them and we will pay for them at a time which is considered reasonable according to the practice in this part of the world." I am not at all sure that after that transaction the goods in the Customs were not at the risk of the consignee. Of course, it was desirable in the interests of the Calico Printers' Association that the goods should be insured, and I am not at all convinced that there was not some negligence on the part of the bank in Beyrout either in failing to insure in those circumstances or in failing to advise by mail as to the position that had in fact arisen by reason of the absence of immediate acceptance of the goods. But, be that as it may, it seems to me clear that any claim against Barclays Bank must be based upon an allegation of a negligent failure to carry out the duties imposed upon them by the alleged contract. B C D E F

What is the answer to that claim? It is alternative. It is said, first of all, that, if you look at the whole of the material document of June 29 and the acceptance by the bank of the undertaking of the collection on the terms of that contract, there was no contract to undertake any legal liability whatever and that case is parallel to *Rose and Frank Co. v. J. R. Crompton & Bros., Ltd.* (5); that is to say, the bank were requested to and did give an undertaking wherein both parties intended that the promise should not give rise to any legal obligation in the case of any failure of performance. I am inclined to think that the words of the request are wide enough to make the case comparable in its facts to *Rose and Frank Co. v. J. R. Crompton & Bros., Ltd.* (5). But the matter may be put in another way. It may be admitted that there is, by reason of the acceptance for collection of these goods, some legal obligation attached to the bank. For example, they were bound to receive the goods when the document had been signed and they were bound to make some kind of attempt to collect bills and deal with the bills of exchange; but they were only bound to do that subject to the express stipulations as to what was to be their responsibility, and, for my part, I cannot read the words of what is suggested to be an exception to a liability which would otherwise arise otherwise than as wide enough to cover responsibility for the negligence of their agents, either their agents in Manchester or their agents abroad. G H I

Counsel for the plaintiffs has attempted to distinguish this case from the cases that have been cited giving effect to exceptions of this kind by saying that what really happened was not that there was negligence in the course of performing the contract, but that this was a case where the defendants departed entirely from the

A contract and did something else. He compared the case with *The Cap Palos* (7), where certain observations were made by a very high authority, LORD STERNDALE, and with the cases of deviation. In my judgment, those cases, as I said in the course of the argument, have no bearing on what we have to decide here, because during the whole of the period up to the time the fire took place, the defendants were, by their sub-agents, carrying out this contract. The sub-agents were holding the bills of exchange. They were holding the bills of lading and they were intending at such time as is supposed to be suitable and proper in Beyrout to insist upon payment of those bills and the taking up of the goods. They were performing the contract, and either they or the Manchester house of the defendants by failure to give the right instructions were performing that contract negligently and were doing the very kind of thing that the defendants were, I think, successfully protecting themselves against by the wide words they had used in the conditions subject to which, and subject to which alone, they had accepted the goods for collection.

My Lord has referred to the authorities and I do not think it is necessary that I should refer to them in detail. The position is clear now, namely, that where there are words of exception in a contract which are not so clear as to make it certain that they include negligence, the court will hold that their effect must be confined to some other obligation than the obligation to exercise reasonable care. If there is, as in the case of ships and barges and other common carriers, a liability to which the exception can apply, it will not include exception from liability for negligence. But effect has to be given to every part of a contract; effect must be given to the exceptions just as much as to the body of the contract unless they are clearly contradictory of one another, in which case I agree with the argument that where, in the middle of the contractual document, a party says: "I will exercise reasonable care" to do so and so and then in the exception says: "But I will not be liable if I do not exercise reasonable care," the probability is that the exception would be regarded as repugnant and struck out of the contract altogether. If there is something to which the exception can apply other than negligence, it will be applied to those other obligations of the contract and not to the obligation to take due care. Where there is nothing it can apply to except the obligation to take reasonable care, effect must be given to the exception and liability must be excluded. That, I think, is the effect of the various decisions, and is, I think, clearly laid down in *Reynolds v. Boston Deep Sea Fishing and Ice Co., Ltd.* (6) to which my Lord has referred, and also in effect in *Rosin and Turpentine Import Co. v. B. Jacob & Sons* (4). I am inclined to think that, treating this as a contract with an exception, the words are wide enough to cover negligence as well as other breaches of the contract, and that they still leave the bank liable if, instead of doing anything in relation to the collection of the goods, they had done something else. I cannot think, for example, that the bank would have been excused by this clause, assuming it is not a contract giving complete freedom in all circumstances, if, instead of sending the documents out to Beyrout, they had sent them out to New York, and they had all been lost on the way. I think they would have had very great difficulty in saying that they were protected by the condition assuming for the purposes of this part of the argument, as I do, that the contract is a contract which imposes some form of legal liability; but in the circumstances of this case, it seems to me quite clear that the bank are protected because they have used words which are wide enough to cover the events which, in fact, happened in the present case.

I For these reasons I agree that the appeal should be dismissed with costs.

SLESSER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Boote, Edgar & Rylands*, Manchester; *Gregory, Rowcliffe & Co.*, for *Brett & Co.*, Manchester; *Albert M. Oppenheimer*.

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

ORPEN v. HAYMARKET CAPITOL, LTD., AND OTHERS

[KING'S BENCH DIVISION (Rowlatt, J.), July 15, 17, 1931]

[Reported 145 L.T. 614; 95 J.P. 199; 47 T.L.R. 575; 75 Sol. Jo. 589;
29 L.G.R. 615; 29 Cox, C.C. 348]

Criminal Law—Corporation—Criminal liability—Limited company—Offence under Sunday Observance Act—Liability of directors—Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 1.

A limited company can be guilty of an offence under the Sunday Observance Act, 1780, and liable to the penalties prescribed by that Act.

A common informer claimed penalties under the Sunday Observance Act, 1780, from a limited company, who were the proprietors of a cinematograph theatre, and from four directors of the company, in respect of cinematograph performances on certain Sundays on which the theatre had been opened.

Held: the informer was entitled to succeed in the action against the company, but failed in the claim against the directors, because there was no evidence that they appeared as having the management of the house as used in breach of the statute, or that they had ever been consulted about or were guilty in respect of any particular day.

Notes. The opening of cinematograph theatres on Sundays was permitted and regulated by the Sunday Entertainments Act, 1932. Actions by common informers under *inter alia* the Sunday Observance Act, 1780, were abolished by the Common Informers Act, 1951, s. 1 (1) and Schedule, but s. 1 (3) of that Act provided that where any person would, but for s. 1 (1) of the Act, have been liable to a forfeiture or penalty in an action by a common informer, he should be liable on summary conviction to a fine not exceeding £100, and, in addition, to any non-pecuniary forfeiture to which he would have been liable as aforesaid.

Considered: *Green v. Kursaal (Southend-on-Sea) Estates, Ltd.*, [1937] 1 All E.R. 732. Followed: *Houghton-le-Touzel v. Mecca, Ltd.*, [1950] 1 All E.R. 638.

As to the criminal liability of corporations, see 9 HALSBURY'S LAWS (3rd Edn.) 60-62, and *ibid.*, vol. 10, 281 et seq.; and for cases see 13 DIGEST 352, 353, 408-411.

Cases referred to:

- (1) *Reid v. Wilson and Ward, Reid v. Wilson and King*, [1895] 1 Q.B. 315; 64 L.J.M.C. 60; 71 L.T. 739; 59 J.P. 516; 43 W.R. 161; 11 T.L.R. 88; 39 Sol. Jo. 94; 18 Cox, C.C. 56; 14 R. 94, C.A.; 15 Digest (Repl.) 910, 8760.
- (2) *Hawke v. E. Hulton & Co., Ltd.*, [1909] 2 K.B. 93; 78 L.J.K.B. 633; 100 L.T. 905; 73 J.P. 295; 25 T.L.R. 474; 22 Cox, C.C. 122; 16 Mans. 164, D.C.; 25 Digest 457, 462.
- (3) *Pharmaceutical Society of Great Britain v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 13 Digest 351, 891.
- (4) *Jacobs v. Bryer* (1851), 17 L.T.O.S. 203; 15 Digest (Repl.) 909, 8750.
- (5) *Terry v. Brighton Aquarium Co.* (1875), L.R. 10 Q.B. 306; 44 L.J.M.C. 173; 32 L.T. 458; 39 J.P. 519; 15 Digest (Repl.) 909, 8756.
- (6) *Warner v. Brighton Aquarium Co.* (1875), L.R. 10 Exch. 291; 44 L.J.M.C. 175, n.; 15 Digest (Repl.) 909, 8757.
- (7) *Girdlestone v. Brighton Aquarium Co.* (1879), 4 Ex.D. 107; 48 L.J.Q.B. 373; 40 L.T. 473; 43 J.P. 428; 27 W.R. 523, C.A.; 15 Digest (Repl.) 911, 8766.
- (8) *Pearks, Gunston and Tee, Ltd. v. Ward, Hennen and Southern Counties Dairy Co.*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 20 Cox, C.C. 279; 14 Digest (Repl.) 48, 115.

Action tried before ROWLATT, J., without a jury.

The plaintiff, Miss Orpen, who sued as a common informer, claimed penalties

A under the Sunday Observance Act, 1780, from the defendants, Haymarket Capitol, Ltd., a limited company, the proprietors of the Capitol Cinema Theatre, Haymarket, London, and from four directors of the company. The action was brought in respect of cinematograph performances on Sundays between June 22 and Dec. 7, 1930. On those Sundays the theatre was open from 6 p.m. to 11 p.m., and was
 B payment of money or by tickets sold for money. The plaintiff contended that each defendant had forfeited £200 in respect of each Sunday performance, under s. 1 of the Act of 1780. The defendants pleaded "Not guilty by statute." By s. 1 of the Sunday Observance Act, 1780:

C "... any house, room, or other place which shall be opened or used for public entertainment or amusement [on Sunday] . . . and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of £200 for every day that such house, room, or place shall be opened or used as aforesaid on the Lord's Day . . . and the person managing or conducting such entertainment or amusement . . . shall
 D likewise for every such offence forfeit the sum of £100 to such person as will sue for the same . . ."

Sir Thomas Inskip, K.C., H. G. Garland and F. M. Landau for the plaintiff.

Sir Patrick Hastings, K.C. (Herbert Malone with him), for the defendant company, referred to Reid v. Wilson and Ward (1); Hawke v. Hulton & Co., Ltd. (2), and Pharmaceutical Society of Great Britain v. London and Provincial Supply Association (3).

Lionel Cohen, K.C. (Cyril Radcliffe with him), for the defendant directors, referred to Jacobs v. Bryer (4).

Sir Thomas Inskip, K.C., in reply, referred to Terry v. Brighton Aquarium Co. (5); Warner v. Brighton Aquarium Co. (6); Girdlestone v. Brighton Aquarium Co. (7).

Cur. adv. vult.

July 17. **ROWLATT, J.**—This is an action to recover penalties for breaches or alleged breaches of the Sunday Observance Act, 1780. It is what is called a penal action, a form of proceeding invented by Parliament for ensuring that laws should
 G not be a dead letter. In order to provide that laws should not become a dead letter by reason of the circumstance that no prosecutor, official or private, comes forward, Parliament has in these cases enlisted the motive of private greed to ensure that the offender shall be made to smart for his offence, by enabling any person to come forward and claim certain sums of money which, in many cases, as in this case, may be large. Such persons are called "common informers." In this class
 H of case it has been always held by the courts that the plaintiff, who comes without any commercial merits into court to recover money, must prove his case strictly, and the facts which he alleges to constitute an offence must be clearly within the Act of Parliament. No assistance is given to such a plaintiff by way of discovery or the like. A plaintiff must come into court and prove his case strictly and show clearly that the matters come within the Act of Parliament which gives rise to the
 I penalty. Subject to those observations, it is the duty of the court simply to enforce the Act of Parliament as it finds it and not to be perverse to find a way out of the Act of Parliament if such does not really exist, but simply to apply the Act, though applying it strictly.

In this particular case the plaintiff who sues for these penalties was a lady of the name of Oppenheim, and was clerk to a solicitor of the name of Cohen who carried on business under the name of Jacques, Asquith and Jacques. Two days before the issue of the writ she executed a deed poll changing her name to Orpen, under which designation, perhaps, she could more colourably come forward as a champion

of the English Sunday. I have nothing whatever to do with those circumstances. A
They were interesting only because it appeared to counsel for the company upon
the information before him that there was no such person as the plaintiff, and it
was only by her producing in the witness-box the deed poll from her pocket that
that contention was proved to have no foundation. Of course, no claim could
come before the court in less attractive circumstances, but, as I have said, I have
nothing whatever to do with that. I have simply to see what the state of facts is B
in relation to the words used in the Act of Parliament.

The claim is made against a limited company who own and manage a cinema
and open it on Sundays, and against four gentlemen who are directors of that com-
pany. It was ultimately agreed by counsel for the company, after he had legiti-
mately thrown every difficulty which he could in the way of the plaintiff proving
her case, that evidence had been produced that this hall was opened on Sunday C
for the exhibition of cinematograph films by the defendant company. The only
substantial point which he took was that the Act of Parliament does not impose
any penalties upon the company because the word "person" in the Act of Parlia-
ment does not in this connection include a company. Now everybody agrees that
prima facie the word "person" in an Act of Parliament includes that artificial kind
of person which is called a limited company, but there may be points in the par- D
ticular statute or in the subject-matter which show that in a particular case the
word "person" does not include a limited company. I do not think anybody doubts
that that is the general law under the Interpretation Act, 1889, and even apart from
it. The material sections are ss. 1 and 2 of the Sunday Observance Act, 1780.
Section 1, reading it shortly, after stating that any house, opened or used for
entertainment on Sunday, admission being by payment, shall be deemed a dis-
orderly house or place, provides that the keeper of such house shall be liable to
these penalties and the others punishable as the law directs in cases of disorderly
houses. The question is whether this company is within the word "keeper" or
within the words "person managing or conducting such entertainment," and so on.
In order to show that a company was not included counsel referred to an earlier
Act about disorderly houses, the Disorderly Houses Act, 1752, which is intitled: F
"An Act for the better preventing thefts and robberies, and for regulating places
of public entertainment." That Act by s. 1 introduces an enactment which is not
so unknown as some of these penal sections are. It prohibits, reading it shortly,
advertising for stolen property with an intimation that no questions will be asked,
and it enacts that "any person publicly advertising a reward with no questions
asked," and any person "printing or publishing such advertisement" shall be liable G
to penalties. That is not very near this case, but there is nothing in that section
to indicate that a public company advertising or printing should not be liable to
the penalties of that section. Section 2 deals with a matter nearer this case. After
a rather quaint recital about places of entertainment this section enacts, reading it
shortly, that "any . . . place kept for public . . . entertainment . . . without a
licence" of justices "shall be deemed a disorderly house or place . . . and every H
person keeping such houses . . . shall forfeit" a penalty, and "be otherwise punish-
able as the law directs in cases of disorderly houses." That is very similar to, and
quite on the same lines as, the section here.

So far it seems to me that there is nothing at all to prevent that section applying
to a company. It prohibits a thing which a company can quite well do, namely,
the keeping of a house, and it prohibits it under a condition which a company can
quite well perform, namely, the obtaining of a licence. Following the reasoning
of the learned Lords in *Pharmaceutical Society of Great Britain v. London*
and Provincial Supply Association (3), and what was said by CHANNELL, J.,
in *Pearks, Gunston and Tee, Ltd. v. Ward, Hennen and Southern Counties*
Dairy Co. (8), it would appear to me that a company under that section
can quite well be liable to the penalties and can quite well be liable to in-
dictment as the law directs in the case of disorderly houses. A company can
keep a house and a company can get a licence. The Act absolutely prohibits doing I

A that thing without a licence, and there is no reason at all that I can see why a company should not be indictable under that section, just as I think it is quite clear that a company can be sued for penalties under that section. But then there comes s. 5, which requires to be looked at rather carefully, because it is upon that that counsel's argument really hinged. Section 5 enacts that

B "In order to encourage prosecutions [on indictment] against persons keeping . . . disorderly houses, Be it enacted,"

and then it proceeds to say that any two inhabitants can, by applying to a magistrate and making certain depositions, cause a constable to be bound over for a bill of indictment and can insist upon the magistrate issuing a warrant to bring a person whom they allege keeps a bawdy house before him and have him committed to answer the indictment if it is found proved or bail taken, and so on. Of course, that proceeding cannot be applied to a company. But what is to be observed about this section is that it provides a collateral proceeding for encouraging prosecutions. It does not interpose this proceeding as a necessary incident or condition of a prosecution. There is nothing here to prevent any person preferring a bill of indictment before a grand jury for the offence against s. 2, although there has been D no application by two inhabitants or anything of the sort. It seems to me quite impossible to read s. 5 as qualifying in any way any provision in s. 2. It does not seem to me that any light at all is thrown upon the question whether a company is within s. 2, merely because this special auxiliary proceeding is not available if the person who is being accused happens to be a company.

Now we come to the Act of 1780, which is very much in *pari materia*. When E this Act says that the keeper of a house shall, besides being liable to a penalty, "be otherwise punishable as the law directs in cases of disorderly houses," I suppose it is contended that that brings in s. 5 of the Act of 1752, to which I have referred, so as to enable any person who keeps a house open on Sunday and keeps a disorderly house in that sense to be proceeded against by that auxiliary procedure. If it does, then, if I am right in the construction which I have given to the Act of F 1752, the matter is not carried any further. It does not have the effect of limiting the application to a company of any proceedings in which it is not necessary or desired to have recourse to s. 5. If, of course, s. 5 of the Act of 1752 is not made applicable to disorderly houses under the Act of 1780 the argument seems to me entirely to fall to the ground. Therefore, it seems to me that a company is liable under this Act and that the plaintiff is entitled to succeed against the company. G I should add that, as a matter of fact, in three cases the penalties under this section have been recovered against a company. These cases which were brought against the Brighton Aquarium when it was a limited company have been reported, and were cited by counsel for the plaintiff in argument, and the point was never taken although the defendants in those cases were represented by able counsel. The point not having been taken, the cases are not authority before me, but they certainly tend to confirm my view that there is nothing in the objection which is taken. H

As regards the directors, s. 2 of the Sunday Observance Act, 1780, provides that, as it may be difficult to say who the owner or keeper of the place is,

I "any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house . . . shall be deemed and taken to be the keeper thereof, and shall be liable to be . . . punished as such, notwithstanding he or she be not in fact the real owner or keeper thereof,"

and if the house is "kept by divers persons in partnership, as joint owners or joint keepers thereof, each . . . shall be liable," and so on. As regards the directors, it cannot be contended that they, merely because they are the directors or members of the board of the company which has committed this offence, are liable personally. The board as a board, it is true, manage and control the affairs of the company, but it is the company only that really keeps the house. The directors do it for the

company and the directors, therefore, are not keepers of the house as a board and certainly not as individuals, which, indeed, is the only capacity which is material for the present purposes. Nor, merely because they are directors, do they appear, act, or behave themselves as masters or mistresses, or as persons having the care or government or management of any such house. I do not know whether the proposition was really intended to be put in that way, but it seems to me that such a proposition in point of law, although it may loosely occur to somebody, is quite unarguable. The question is whether these four gentlemen, whether directors or not, in fact did

“appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, room, or place”

—that is to say, appear, not because their names are on a list, but appear in fact as individuals actually. That is what I have to try. I think when it is said that a person is liable if he appears, acts, and so on, as the person having the care, management, and so on, of any such house, one must look back to see what “such house” means; and, referring to s. 1, one finds that “such house” is a house “which shall be opened or used for public entertainment” on Sunday. When the statute, therefore, speaks of persons appearing and behaving, and so on, as having the management of such house, I think it must mean appearing as having the management of such house as so used. I do not think they are within the Act if they appear only as having the management of the same house as used innocently or as used not in breach of the Act, although for similar general purposes. I think it is quite inadmissible to give any wider interpretation to the Act than that, because it is a penal statute and it must not be extended to mean more than it actually and necessarily says. That is the interpretation I put upon it. The evidence given by Gallagher, who has been the manager of the house, was that he acted under the orders of the directors, and he mentioned that he had seen three, but only three, of the four directors who are now sued. That evidence, I must point out, was perfectly general. He was not asked whether any defendant had ever been seen there by him on any Sunday or had ever given him any orders as to any opening on Sunday at all. Therefore, it seems to me that it is impossible to say what he would have answered had he been asked that question. It is not a matter for speculation, but I think it is quite probable he would have said “No.” At any rate, he was not asked the question, and I have not got the evidence, and, therefore, I do not think the case on that ground is proved against any of these directors, certainly not against the fourth, and I do not think against any of them.

I think, too, that there is another difficulty about the proof. It sounds a little subtle at first, but I think it is very substantial. It cannot be pretended that there is a shred of evidence that the manager ever consulted them about any particular Sunday. These penalties are claimed in respect of Sundays over half a year, some five-and-twenty Sundays. The defendants may be liable for all of them or for any one or more of them, but I cannot give judgment against them in respect of any particular day or all the particular days unless I have evidence before me that they are guilty in respect of those particular days, one or all. It might be a matter of very great importance. For all I know there may be other Miss Orpens bringing actions in respect of these breaches of the Act, and they cannot succeed if Miss Orpen succeeds. They may succeed if she fails. I do not know whether there are or not, but it only shows the importance of being careful about these matters. Therefore, it is absolutely essential that, if there is to be any judgment for a plaintiff in a case of this kind, the judgment must go in respect of a particular day, if only to make the matter work as between her and other or subsequent plaintiffs. The matter is not fanciful or a matter of pleading or anything of that sort. It is a matter of substance.

For those two reasons, I think that the action has not been supported by sufficient proof as regards the directors. There will be judgment against the company for

A £5,000, and the action against the directors will be dismissed with costs. The plaintiff, who is entitled to costs against the company, must have the costs of her action.

Judgment accordingly.

Solicitors : *Jacques, Asquith & Jacques; Lawrence, Messer & Co.*

B [Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

C

GUILFOYLE v. PORT OF LONDON AUTHORITY

[KING'S BENCH DIVISION (Humphreys, J.), October 23, 1931]

D [Reported [1932] 1 K.B. 336; 101 L.J.K.B. 91; 146 L.T. 91; 95 J.P. 217; 48 T.L.R. 55; 75 Sol. Jo. 763; 29 L.G.R. 659]

Bridge—Non-repair—Injury to pedestrian—Liability of owners for nonfeasance—Port of London Authority (Consolidation) Act, 1920 (10 & 11 Geo. 5, c. 173), ss. 378, 380.

E The defendant authority were owners of a swing-bridge, which was partly a railway bridge and partly a footbridge, over a dock, and were under a statutory duty to maintain and repair it. Except when the bridge was required to be swung open for dock traffic, the public had an unrestricted right of access to it. The plaintiff, as a result of the non-repair of the bridge, fell while crossing it and sustained personal injuries.

F **Held:** the question to be determined was whether or not the statute which imposed the liability to repair the bridge indicated an intention that the defendant authority should be in the position of a surveyor of highways and so not liable for the result of their nonfeasance; on the facts, the bridge was not a highway; and the authority were not in a position analogous to that of a surveyor of highways and, therefore, not immune from an action for damage arising from nonfeasance on their part.

G **Notes.** Referred to: *Swain v. Southern Rail. Co.*, [1938] 3 All E.R. 705.

As to the liability of a highway authority for non-repair of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 149–153; and as to liability to repair bridges, see *ibid.* 457 et seq. For cases see 26 DIGEST 398 et seq., 587, 588.

Cases referred to:

- H (1) *Russell v. Men of Devon* (1788), 2 Term Rep. 667; 100 E.R. 359; 26 Digest 587, 2780.
- (2) *Rundle v. Hearle*, [1898] 2 Q.B. 83; 67 L.J.Q.B. 741; 78 L.T. 561; 46 W.R. 619; 14 T.L.R. 440, D.C.; 26 Digest 369, 951.
- (3) *Sydney Municipal Council v. Bourke*, [1895] A.C. 433; 64 L.J.P.C. 140; 72 L.T. 605; 59 J.P. 659; 11 T.L.R. 403; 11 R. 482, P.C.; 26 Digest 400, 1254.
- I (4) *Maguire v. Liverpool Corpn.*, [1905] 1 K.B. 767; 74 L.J.K.B. 369; 92 L.T. 374; 69 J.P. 153; 53 W.R. 449; 21 T.L.R. 278; 49 Sol. Jo. 296; 3 L.G.R. 485, C.A.; 26 Digest 400, 1255.
- (5) *Parkinson v. Garstang and Knott End Rail. Co.*, [1910] 1 K.B. 615; 79 L.J.K.B. 380; 102 L.T. 234; 74 J.P. 204; 26 T.L.R. 290, D.C.; 38 Digest 310, 334.
- (6) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 28 T.L.R. 150; 5 B.W.C.C. 217, H.L.; 34 Digest 218, 1809.
- (7) *Mersey Docks and Harbour Board Trustees v. Gibbs, Mersey Docks and Harbour Board Trustees v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas.

- 686; 35 L.J.Ex. 225; 14 L.T. 667; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. A
872; 2 Mar.L.O. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, 111.
- (8) *Blundy, Clark & Co. v. London and North-Eastern Rail. Co., Ltd.*, [1931]
2 K.B. 334; 100 L.J.K.B. 401; 145 L.T. 269; 20 Ry. & Can. Tr. Cas. 92,
C.A.; Digest Supp.
- (9) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T.
486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest 400, 1251. B
- (10) *Pictou Municipality v. Geldert*, [1893] A.C. 524; 63 L.J.P.C. 67; 69 L.T.
510; 42 W.R. 114; 9 T.L.R. 638; 1 R. 447, P.C.; 26 Digest 400, 1252.
- (11) *Hartnall v. Ryde Comrs.* (1863), 4 B. & S. 361; 2 New Rep. 424; 33 L.J.Q.B.
39; 8 L.T. 574; 27 J.P. 599; 10 Jur.N.S. 257; 11 W.R. 963; 122 E.R. 494;
26 Digest 399, 1242.

Further Consideration of action tried before HUMPHREYS, J., and a common jury. C

The plaintiff, Guilfoyle, claimed damages from the defendants, the Port of London Authority, for personal injuries sustained by him while crossing the Connaught Road Bridge, Silvertown. The defendants were owners of the bridge, and were under a statutory duty to maintain and repair it. The bridge was a swing-bridge built about 1875, in pursuance of s. 7 of the London and St. Katharine's Dock Co. Act, which required the dock company to construct a bridge so as to provide a means of communication between highways terminating on opposite sides of the dock. The dock became the property of the defendants in 1908, and their duty to maintain it arose from s. 378 of the Port of London Authority (Consolidation) Act, 1920, which provided that the defendants should maintain and keep in repair certain "works," of which this was one. Section 380 contained a proviso that the defendants should permit the public to use the bridge at all times except when it was required to be swung open for dock traffic. There was a dispute between the parties whether there was formerly a public highway over the place where the bridge stood. The evidence was that the plaintiff had tripped over a large nail projecting from the footway and had suffered injuries in consequence of his fall. The jury found that the plaintiff's injuries had been caused by his striking his foot on a nail projecting above the level of the footway, which had caused him to fall, and that the cause of the accident was the negligence of the defendants in failing to maintain the footway in good repair and condition. They assessed the damages at £153. The plaintiff moved for judgment in accordance with the verdict. D

F. Wishart for the defendants.—There should be judgment for the defendants because the plaintiff's injuries arose from an act of nonfeasance on the part of the defendants. The bridge is a highway, but whether that be so or not, the defendants are in a position analogous to that of a surveyor of highways, who is not liable for injuries arising from nonfeasance as opposed to misfeasance. [He referred to the following authorities: *Russell v. Men of Devon* (1); *Rundle v. Hearle* (2); *Sydney Municipal Council v. Bourke* (3); and *Maguire v. Liverpool Corpn.* (4).] G

M. O'Connor for the plaintiff.—There is no authority which lays it down that a statutory authority, charged with the duty of maintaining and repairing property over which the public has a right of passage, is not liable for injuries due to the non-repair of that property. The bridge in question in this case is not a highway. The cost of maintaining it is not borne by the public, and it is private property, over which the public has certain rights. [He referred to *Parkinson v. Garstang and Knott End Rail. Co.* (5) and *Butler (or Black) v. Fife Coal Co.* (6).] H

The material sections of the Port of London Authority (Consolidation) Act, 1920, appear in the judgment. I

HUMPHREYS, J.—On March 18, 1930, the plaintiff was going home from his work. His way lay across a swing-bridge called the Connaught Road Bridge, Silvertown. He fell and was injured. The persons responsible for the repair of that bridge are admittedly the defendants, the Port of London Authority. They are the proprietors of the bridge—it is their property. In answer to questions

A which I left to them the jury found that the injuries of the plaintiff were caused by his striking his foot on a nail projecting above the level of the footway which caused him to fall, and that the cause of the accident was the negligence of the defendants in failing to maintain the footway in good repair and condition. The jury assessed damages at £153. Upon those findings of the jury, counsel for the plaintiff asked me to enter judgment for the plaintiff, but counsel for the defendants

B objected that judgment ought to be entered for the defendants on the ground that they are an authority who are not liable in law to a private individual who suffers damage by reason of any nonfeasance on their part. His proposition is that this was an act of nonfeasance and nothing more. The nonfeasance is quite clear; therefore, that proposition has to be examined.

It is necessary to look just a little closely at the facts of the case. Connaught

C Bridge is a swing-bridge, and was originally built some time in 1875 as a result of s. 7 of the London and St. Katharine's Dock Co. Act, 1875. Section 7 of that Act required the London and St. Katharine's Dock Co., who were the owners at that time of the property on which now stands this bridge, to do as follows :

"In order to provide means of communication between existing or future public roads on either side of the Victoria Dock extension the company shall . . . make

D a new carriage road from the existing level."

Then the section describes the new carriage road, which is not this bridge. It contains certain provisions which rendered it necessary to make this bridge, and, accordingly, it was made. I have been told that the contention of the defendants includes this point, that at that time there was a public highway over the place

E where the bridge now stands, and it is endeavoured to support that contention by certain maps. I can only say that I have formed no opinion about the matter one way or the other. The maps are very confusing, and I do not think any of them show clearly that there was any public highway over this place. On the other hand, I am certainly not prepared to say that they show anything to the contrary. I cannot, therefore, decide this case on that ground, although I think it is un-

F fortunate that the matter has not been cleared up by evidence, because, in my view, it is by no means unimportant to know whether at the time this bridge was made it was made merely in substitution for an ordinary public highway, part of which was cut away. It may be so. It may be, on the other hand, that there was originally a public highway leading from what is now West Ham North down to a place near to the place where this Connaught Bridge now begins. It may be that

G it was at that time a public highway leading from the south, where North Woolwich now is, to the place, or near to the place, where the southern end of this bridge now is. It may be, for all I know, that the space in between was a marshy swamp intersected by cuts as they are called, and that in truth there was no continuous highway there. I do not know how that may be.

The bridge, having been constructed as it was, remained the property of the

H London and St. Katharine's Dock Co. until some later period, when it became the property of a company called the London and India Docks Co. In 1908 the Port of London Authority were constituted by an Act of Parliament, which, among other things, authorised and required them to take over the undertaking of the London and India Docks Co.; so they became the owners of, and liable to repair, this bridge. Then followed in 1920 the Port of London (Consolidation) Act, which deals

I generally with the position of the defendants. The Port of London Authority is undoubtedly an authority with public duties of great importance, including the management of the river, and among other things—and these are the duties with which this case is immediately concerned—it has the management of the docks which formerly belonged to various private concerns. The bridge in question is mentioned in two sections of the 1920 Act. By s. 378 it is provided that the Port Authority

"shall maintain and keep in perpetual repair and in their present form and condition the works following,"

and there follows a list of what are called "works." They include the said swing-bridge as well as other things such as capstans and shelters for passengers and so forth. This is how this swing-bridge, which is No. 17 (B) in the schedule, if I may call it so, to that section, is referred to. As one of the "works" there is

"the swing-bridge carrying Connaught Road over the passage between the Royal Victoria Dock and the Royal Albert Dock."

By s. 380 there is a special provision as to the Connaught Road bridge. That bridge, as distinct from all the other bridges, all of which have sections devoted to them, is referred to in this way :

"The swing-bridge carrying Connaught Road over the passage between the Royal Victoria Dock and the Royal Albert Dock shall be maintained by the Port of London Authority in such a manner that 15 ft. of the width of such bridge shall at all times be appropriated to the road, and the Port Authority shall at all times continue to permit such swing-bridge and the roadway thereon to be used free of charge by the public in connection with any road or roads which may communicate or be thereafter made to communicate therewith and shall at all times maintain such roadway in good repair and condition. Provided always that the said swing-bridge shall be kept closed except when required to be opened for dock traffic."

Then there are references to the lines of railway which, in fact, cross that bridge. The bridge itself is divided into two parts. The greater part of it is a railway bridge and the smaller part of it in the middle consists of the roadway. The evidence was that the roadway is made of iron plate, no doubt screwed down to some foundations, and on either side of that roadway there is a footpath between 4 ft. and 5 ft. wide made of timber. The timber is held down by 5 in. nails. It must be taken that the finding of the jury as to what happened was that, owing to the timber of that pathway being allowed to get into disrepair, the timber round one of the nails was worn away so that the nail stuck up beyond the level of the pathway. The plaintiff put his foot against that nail and so sustained his injuries.

That being the bridge and the history of the bridge, counsel contends that the defendants, who are the owners of it and are clearly liable to repair it, are, nevertheless, not liable in an action for damages at the suit of a person who, as a result of their negligent conduct in failing to keep it in repair, has been injured. I think it right to draw attention, first of all, to the fact that the defendants cannot set up here any sort of defence based on the principle that they are a public authority who are not trading for profit, or who are not allowed to make profit out of the undertaking with which Parliament has entrusted them. Such arguments have, from time to time, been addressed to the courts, but in the year 1866 the well-known case of *Mersey Docks and Harbour Board Trustees v. Gibbs* (7) was decided, the headnote of which runs as follows :

"The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionately diminished."

That case is quite a sufficient authority for the proposition that the defendants who are permitted to impose tolls and do impose tolls for the use of these docks cannot escape liability unless they can do so on the ground that they are a public authority who are in the position of merely carrying out their duties under an Act of Parliament in the interests of the public at large.

I merely refer in passing to the fact that very recently the Court of Appeal, having had an argument addressed to them somewhat similar to that which was

A unsuccessfully addressed to the House of Lords in the case to which I have referred, again dealt with the matter in *Blundy, Clark & Co. v. London and North-Eastern Rail. Co., Ltd.* (8). The court there had to deal with the case of a railway company which had taken over the duties and liabilities of a canal company. As a result of the negligence of the canal company—for the purposes of that case the railway company stood in the shoes of the original canal company—it was found
B that that canal company had negligently failed to maintain one of the gates of one of the locks and so damage and loss had been occasioned. One of the arguments which was addressed to the court was that the company were not liable merely for nonfeasance. SCRUTTON, L.J., after referring to *Mersey Docks and Harbour Board Trustees v. Gibbs* (7), says ([1931] 2 K.B. at p. 351):

C “The principle was in that case extended, from a company maintaining works for its own profit derived from tolls receivable under statute from all the public using the navigation, to a public authority not authorised to make profit out of its tolls. These cases show that the defence that the defendant company, being by statute bound to use reasonable care to maintain a public navigation and entitled to receive tolls from the users of the navigation are not liable for nonfeasance, cannot succeed.”

D GREER, L.J., expressed the same view and said ([1931] 2 K.B. at p. 360) that the cases

“are all cases in which it was held that failure to perform a statutory duty by a company taking tolls for its services rendered them liable to pay damages to persons who suffered special damage as a result of the company’s breach of
E their statutory duty.”

Counsel for the defendants next says that the statutory duty cast upon the defendant authority in this case is merely the duty of acting as a surveyor of highways. He says that the defendant authority is in the same position in regard to an action for damages based upon alleged nonfeasance as a surveyor of highways, and he relies upon the very well-known principle of law that a surveyor of highways,
F or any public authority whose position is analogous to that of a surveyor of highways, is not liable to pay damages to a person who has been injured by its failure to repair. He says the failure to repair this bridge was the failure of a statutory authority, a public authority, whose duty to repair was analogous to that of a surveyor of highways. The principle, which had been for a long time disputed, was, perhaps, finally decided in *Cowley v. Newmarket Local Board* (9). Very soon
G afterwards in a case in the Privy Council, *Pictou Municipality v. Geldert* (10), the effect of that case was summed up in the opinion of their Lordships delivered by LORD HOBHOUSE, who said

H “The latest English case is that of *Cowley v. Newmarket Local Board* (9), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed.”

He was dealing in that case, as do indeed all these cases, of which many have been cited to me, with the case of a public authority charged with the maintenance of
I public highways. They are cases of local boards, surveyors of highways, county councils, municipal authorities, and so forth. In the same case there is the following statement of LORD HOBHOUSE:

“By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were, nevertheless, not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair. . . . This was first held in a case in which the inhabitants of a county were sued.”

The ground of that decision was that they were not a corporation, and, therefore, there was a technical difficulty in suing them, but LORD HOBHOUSE thought that the decision also went "on the substantial ground of non-liability." In fact, non-liability has been held in later cases to be the real ground of that ancient decision. A

Therefore, in the present case, I have to look at the facts and see whether, in my judgment, the statute imposing the liability to repair this bridge does indicate an intention that the persons upon whom the liability is imposed—that is, the defendant authority—should be in the position of a surveyor of highways, or whether there is an indication to the contrary—that they are to be responsible to any person who has suffered injury as a result of their failure in the performance of their statutory duty, or of one of their statutory duties, which, of course, are many. B

A number of cases were cited. One case which was particularly relied upon by the defendants was *Maguire v. Liverpool Corpn.* (4). The case is interesting, I think, as an instance of the transfer of the duties of a surveyor of highways to an authority which certainly has the immunity which formerly attached to the surveyor of highways. It is interesting to notice from the headnote that in that case C

"the defendant corporation were declared to be the surveyors of highways for the borough of Liverpool; the control of the streets was vested in them; and they were empowered to form or pave streets with such materials as they should think fit. By s. 58 [of a private Act] it was enacted that the corporation should be liable to be indicted at common law for the want of the sufficient repair of any public highway within the said borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act. An action was brought against the corporation for injuries caused to the plaintiff's horse by the negligence of the defendants, in that they had not properly repaired a road. The want of repair was admitted, but there was no evidence of misfeasance on the part of the defendants.—*Held*: the mere fact that a new body was created with the duty to repair roads did not of itself impose on the new body a liability to actions for damages caused by non-repair of roads; and if and so far as *Hartnall v. Ryde Comrs.* (11) laid down a rule to the contrary, it must be taken to have been overruled. No fresh liability was created when the duty to repair was transferred by the local Act; and the action could not be maintained. Under the modern authorities a transfer to a public corporation of the obligation to repair roads does not, of itself, render the corporation liable to an action for damages for nonfeasance as distinguished from misfeasance; and the question whether such a liability is imposed upon them must be determined by the language of the particular Act of Parliament." D E F G

Other cases were cited to me, but I do not think there can be any real doubt as to the general principle of law which applies. If the defendants are in the position of a surveyor of highways, they are not liable in this action. However unsatisfactory the law may be, and I am only saying what has been said repeatedly by other judges, and, indeed, by many members of the House of Lords, it is still the law, and I am bound to pronounce it. The question here is: Is this a case of a public highway, or of a highway the duty to maintain which is thrown upon the defendant authority much in the same way as a duty of repairing a highway is thrown upon the surveyor of highways? In my judgment, this swing-bridge is not in the ordinary sense a highway at all. It certainly is not a public highway. It has never been dedicated to the public, and is the private property of the defendant authority upon their private ground. What the land was originally, I do not know, but the position now is that there is a public road, an ordinary public highway, going down to the north end of this bridge. There is another public road which comes from the south up to the south end of this bridge. Inasmuch as there is a large piece of water on one side which is called the Albert Dock and on the other side which is called the Victoria Dock it was necessary to have something to connect these two public highways. If this were a mere ordinary bridge, and always in H I

A position, I should not hold that, merely because it was a bridge, the road surface ceased to be an ordinary highway. But it is not; it is a swing-bridge. That means that the right of the public is to go over that swing-bridge when it happens to be in a position to enable them to do so. They have no right to have the swing-bridge put in a position to enable them to go over it at any particular time, except that the statute has provided that the swing-bridge shall be kept closed—that is to say, B available for use of the public—except at such times as it is required to be open for the transit of barges and so forth. But such a work, as it is described in s. 378 of the Act, appears to me to be in quite a different position from a portion of an ordinary public highway. I do not lay great stress upon the word “public” because, in my view, the same law would apply to a private highway, or rather to a highway along which at all times the public had a right of passing and re-passing C without let or hindrance. I do not think that the law would cease to apply to it merely because it was on private property, and there had been no dedication to the public of the surface of the road. But it seems to me that this work is totally different from the ordinary highway. Counsel for the plaintiff addressed an argument to me which I think had some substance in it when he said: Is it really the law that part of the bridge being used for two railway lines, and the Port of London D Authority, being liable, as they clearly would be, for failure to maintain that part of the bridge resulting in a railway accident, or somebody being injured on that part of the bridge, yet when you come to the other part of the bridge, the position is that the authority is immune from proceedings because it is in the position of a surveyor of highways? The truth is that the whole of this structure is about as unlike an ordinary highway as one can well conceive. As I have said, the roadway E is constructed of iron plates. The larger part of the bridge is merely a railway bridge. When one comes to the part consisting of the pathways, they are unlike the ordinary modern pathway in that they are made of wood. The case is a very difficult one, because the proposition which has been contended for is very wide. It may be that counsel for the defendants is right, but I can only say that, in my view, his contention is too wide. His contention is that, wherever there is a F liability thrown upon anyone to repair a road, that person ceases to be liable for any act of nonfeasance in respect of the non-repair of that road. I think that proposition is putting the matter too high. In this case I think the position of the defendant authority is that of persons who have a statutory duty to repair, maintain, keep in order, and look after generally a great number of things including several swing-bridges, some of which, no doubt, connect with public highways. I G am not in the least satisfied that this swing-bridge itself is a public highway or that the liability to maintain it puts the defendants in the position of public authorities, such as surveyors of highways, who are charged with the maintenance of public highways.

H Therefore, for these reasons, I think the defendants, on whom the onus of satisfying me lies, have failed to satisfy me that they are immune from the ordinary consequences of an action in which a person has proved to the satisfaction of the jury that he has suffered injuries as a result of negligence. There will be judgment for the plaintiff for the amount found by the jury.

Judgment for plaintiff.

Solicitors: *J. Nixon Watts & Co.; J. D. Ritchie.*

I [Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

Re BLAKE. Re PETITION OF RIGHT OF A. M. MINAHAN

[CHANCERY DIVISION (Maugham, J.), February 26, March 4, 25, 1931]

[Reported [1932] 1 Ch. 54; 100 L.J.Ch. 251; 145 L.T. 42;
47 T.L.R. 357]

Limitation of Action—Proceeding against Crown—Claim to intestate's estate paid by order of court to the Crown—Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

An intestate died in 1876 leaving no issue, and by an order of court made in 1883 the trust funds then constituting the estate were transferred to the Crown. On a petition by the legal personal representative of the next-of-kin of the intestate claiming the estate,

Held: on demurrer, the petition ought to be treated in the same way as an equitable claim by the next-of-kin of an intestate against a subject who had wrongly received part of the intestate's estate, pursuant to an order of the court, and without any notice of the plaintiff's title, such a defendant would not have had the means of knowing the truth and so, as the specific property transferred in 1883 was no longer in the hands of the Crown, the claim was barred, by analogy with the Statute of Limitations, 1623, six years after the payment of the trust funds to the Crown.

Brooksbank v. Smith (1) (1836), 2 Y. & C.Ex. 58; *Baker v. Courage & Co.* (2), [1910] 1 K.B. 56; and *Re Mason* (3), [1929] 1 Ch. 1, applied.

Notes. The Limitation Act, 1623, has now been repealed and replaced by the Limitation Act, 1939, s. 2 (1) of which contains the six-years limitation formerly contained in s. 3 of the 1623 Act, and s. 20 of which deals with the limitation of actions claiming personal estate of a deceased person. Petitions of right were abolished by the Crown Proceedings Act, 1947, s. 1 of which substituted for them proceedings against the Crown.

Considered: *Re Diplock's Estate*, [1948] 2 All E.R. 318; *Ministry of Health v. Simpson*, [1950] 2 All E.R. 1137.

As to the application of the Limitation Acts to claims for the recovery of an estate, administration of which has been granted to a Crown nominee, see 16 HALSBURY'S LAWS (3rd Edn.) 220, para. 401; as to the period of limitation for such a claim against an ordinary personal representative, see *ibid.*, vol. 20 (2nd Edn.) 660, para. 845; and as to constructive trusts not preventing time running unless the trustee enters into possession with knowledge, see *ibid.*, 754, para. 1032, text and note (r), and 756, para. 1036, text and note (o). For the Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718; for the Law of Property (Amendment) Act, 1924, s. 10 and Sched. 10, see *ibid.*, vol. 20, 419 and 425; and for the Limitation Act, 1939, see *ibid.*, vol. 13, 1159.

Cases referred to:

- (1) *Brooksbank v. Smith* (1836), 2 Y. & C.Ex. 58; *Donnelly* 11; 6 L.J.Ex. Eq. 34; 160 E.R. 311; 32 Digest 518, 1758.
- (2) *Baker v. Courage & Co.*, [1910] 1 K.B. 56; 79 L.J.K.B. 313; 101 L.T. 854; 32 Digest 337, 206.
- (3) *Re Mason*, [1929] 1 Ch. 1; 97 L.J.Ch. 321; 139 L.T. 477; 44 T.L.R. 603; 72 Sol. Jo. 545, C.A.; Digest Supp.
- (4) *Re Dewell, Edgar v. Reynolds* (1858), 4 Drew. 269; 31 L.T.O.S. 50; 4 Jur.N.S. 399; 6 W.R. 404; 62 E.R. 104; sub nom. *Edgar v. Reynolds*, 27 L.J.Ch. 562; 18 Digest 35, 343.
- (5) *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 80 L.J.Ch. 381; 104 L.T. 331; 55 Sol. Jo. 271; 32 Digest 518, 1761.
- (6) *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149; 68 L.J.Ch. 488; 80 L.T. 706; 47 W.R. 664; 32 Digest 405, 834.
- (7) *Soar v. Ashwell*, [1893] 2 Q.B. 390; 69 L.T. 585; 42 W.R. 165; 4 R. 602, C.A.; 32 Digest 508, 1677.

- A (8) *Friend v. Young*, [1897] 2 Ch. 421; sub nom. *Re Friend*, *Friend v. Friend*, 66 L.J.Ch. 737; sub nom. *Re Friend*, *Friend v. Young*, 77 L.T. 50; 46 W.R. 139; 41 Sol. Jo. 607; 32 Digest 393, 746.
- (9) *Burdick v. Garrick* (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 18 W.R. 387, L.C. & L.J.; 32 Digest 502, 1632.
- B (10) *Lockey v. Lockey* (1719), Prec. Ch. 518; 1 Eq. Cas. Abr. 304; 24 E.R. 232, L.C.; 32 Digest 461, 1272.
- (11) *Hovenden v. Lord Annesley* (1806), 2 Sch. & Lef. 607; 32 Digest 509, 1687.
- (12) *Re Eyre-Williams*, *Williams v. Williams*, [1923] 2 Ch. 533; 92 L.J.Ch. 582; 129 L.T. 218; 67 Sol. Jo. 500; 32 Digest 507, 1674.
- (13) *Devaynes v. Noble*, *Clayton's Case* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 29, 59.

C **Petition of Right** on behalf of one of the next-of-kin claiming an interest in the estate of an intestate.

The following facts are taken from the judgment:

D This is a petition of right in the matter of the estate of Helen Blake, deceased, presented by Annie Murtha Minahan praying for an inquiry as to who were the persons by virtue of the statutes for the distribution of the estates of intestates in force at the date of the death of the said Helen Blake entitled to her personal estate, and for consequential directions. The suppliant claims to be the legal personal representative of one William Leonard, who is stated in the petition to have been the next-of-kin, or one of the next-of-kin, of the intestate. The matter comes on before the court on a demurrer, and the Attorney-General on behalf of the Crown has consented to the points of law being set down for hearing and disposed of before the trial of the issues of fact raised by the petition. The facts stated in the petition must, of course, be treated as admitted for the purposes of the demurrer.

E Helen Blake died on Sept. 23, 1876, intestate, and she did not leave her surviving any child or other issue, or parent or remoter ancestor, or brother or sister, or any child or other issue of any brother or sister, or any uncle or aunt, or any child of any uncle or aunt her surviving. On March 14, 1877, letters of administration to the estate of the intestate were granted out of the Principal Registry of the Probate Division to the solicitor for the affairs of Her Majesty's Treasury for the use of Her Majesty.

G By a judgment dated April 14, 1877, in a proceeding the short title whereof was: "*Re Helen Blake, deceased; The Solicitor for the affairs of Her Majesty's Treasury v. Her Majesty's Attorney-General*, 1877 B. No. 132," certain accounts and inquiries were directed, and by a further order in the said proceedings, dated June 23, 1883, it was declared that Her Majesty, in right of her royal prerogative, was entitled to the personal estate of the intestate found by the court to be outstanding and undisposed of, and the residue of the personal estate, subject to the payment of costs, namely, the sum of £93,587 8s. 1d., was ordered to be paid or transferred by the plaintiff in the said proceedings to such persons or such accounts, and in such manner as Her Majesty the Queen or the Lords Commissioners of Her Majesty's Treasury should from time to time direct. Pursuant to the said order the said moneys, stocks and funds were paid over and transferred to Her Majesty's Paymaster-General.

I By para. 17 of the petition it is alleged that the said moneys, stocks and funds now form part of the consolidated fund, and it is added as a contention of law that the same are held in trust for the next-of-kin of the intestate.

The Solicitor-General (Sir Stafford Cripps, K.C.) and *Stafford Crossman*, for the Crown, referred to *Re Mason* (3) and *Re Dewell*, *Edgar v. Reynolds* (4).

Vaisey, K.C., and *A. C. Edgar* for the suppliant.

Cur. adv. vult.

March 25. **MAUGHAM, J.**, read the following judgment : A

I do not think it is necessary at the moment to state any of the further allegations in the petition, having regard to the demurrer which raises the point whether the claim of the suppliant is maintainable against His Majesty by reason of the relevant Statutes of Limitation and of s. 3 of the Intestates' Estates Act, 1884; and this point is the only point with which I shall now deal. I should perhaps observe that, having regard to s. 56 of the Administration of Estates Act, 1925, the Intestates' Estates Act, 1884, is repealed only so far as it applies to deaths occurring after the commencement of the Act of 1925. In these circumstances it is s. 3 of the Intestates' Estates Act, 1884, which is applicable, and not s. 30 of the Administration of Estates Act, 1925. Section 3 of the Intestates' Estates Act, 1884, is in the following terms : B

"After the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented, in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject." C

Before commencing on this section it is necessary to read s. 2 of the same Act, which is as follows : D

"Where the administration of the personal estate of any deceased person is granted to a nominee of Her Majesty (whether the Treasury Solicitor, or a person nominated by the Treasury Solicitor, or any other person), any action or other proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character, and be brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise), in all respects as if the administration had been granted to such nominee as one of the next-of-kin of such deceased person." E

It is apparent that s. 2, unlike s. 3, is dealing with a proceeding against an administrator who is the nominee of the Crown, whether the Treasury Solicitor—a corporation sole under the Treasury Solicitor Act, 1876—or a person nominated by the Treasury Solicitor or any other person. It may be useful to observe that an action against an administrator of the personal estate of a deceased person at the date of the Act was liable to be defeated by the limitation of twenty years imposed by the Law of Property Amendment Act, 1860, s. 13. This Act was wholly repealed by the Law of Property (Amendment) Act, 1924, but—by an unfortunate slip—without any saving for the case of deaths which have occurred before Dec. 31, 1925; but in the present case the proceeding by Annie Murtha Minahan is not in the form of an action against the Treasury Solicitor, so that s. 2 of the Intestates' Estates Act, 1884, is not the relevant section. F

Section 3 of that Act, however, has this effect, that any statute of limitations and the same rules of law and equity which would apply to an action against a subject for the recovery of the personal estate of Helen Blake, deceased, can be relied on by the Crown on the present petition of right. G

Having regard to the plain distinction between the language used in ss. 2 and 3, it must, I think, be evident that where the Crown is being sued the actions contemplated by the latter section are actions against a subject to whom the administrator has wrongly paid part of the personal estate of the intestate. Such an action might have different forms. An action in the Chancery Division brought by the next-of-kin against a person to whom the administrator had wrongly paid part of the H

A personal estate of the intestate under a mistake of fact—not joining the administrator and seeking administration—would be in the nature of a common law action for money had and received, and the court, acting on the analogy of the Statute of James I (21 Jac. 1, c. 16) [the Limitation Act, 1623], would hold the claim to be barred after the lapse of six years from the date of payment—*Re Robinson, McLaren v. Public Trustee* (5), where the law is elaborately explained by WARRINGTON, J., and *Re Mason* (3).

A common law action of the same character, assuming that such an action would lie, would also be barred by the same statute after the expiration of six years from the date of payment: *Baker v. Courage & Co.* (2). On the other hand, there is no doubt that in a proper case the next-of-kin might bring an action in the Chancery Division to follow the trust property, if the defendant to whom the administrator had paid it were still in possession of it.

It is in this way that counsel on behalf of the suppliant sought to support the present petition, and great reliance was placed on para. 17 of the petition which stated that “the aforesaid moneys, stocks and funds”—meaning, presumably, the £93,587 8s. 1d.—now form part of the consolidated fund.

This statement in the petition was the subject of some discussion during the argument, and counsel for the suppliant candidly stated that it was not intended to suggest that the sum in question had ever been in any way earmarked so as to exist as a separate portion of the funds belonging to the Crown. The term “consolidated fund” is first to be found, I think, in the Exchequer and Audit Departments Act, 1866, which provides—s. 11—that all moneys paid into the Bank of England and the Bank of Ireland on the account of the Exchequer shall be considered by the governor and company of the said banks respectively as forming one general fund in their books, and that all orders directed by the Treasury to the said banks for use out of credits to be granted by the Controller and Auditor-General as hereinafter provided for the public service shall be satisfied out of such general fund; and s. 12 provides for quarterly accounts of the income and charge of “the consolidated fund” in Great Britain and in Ireland for such quarter. The consolidated fund, in fact, is no other than the great central account of His Majesty’s Government, into which ultimately passes the produce of taxes and other sources of income, from which round sums are issued to subsidiary accounts, from which the actual drafts for the public services are met. In these circumstances, it seems to be clear that for the present purpose the petition ought to be treated in the same way as an equitable claim brought by the next-of-kin of an intestate against a subject who has wrongly received part of the intestate’s estate, pursuant to an order of the court, and without any notice of the plaintiff’s title.

It should therefore be added that by para. 18 of the petition it is stated that since shortly after the death of the intestate—over fifty years ago—the said William Leonard and the suppliant have from time to time endeavoured to obtain evidence in order to substantiate before His Majesty’s court the claim of the said William Leonard. Assuming that such an action could, in the circumstances, be maintained in equity, the question arises whether the Statute of Limitations could be successfully pleaded in answer to the claim, either as directly applicable or as applicable in a court of equity by way of analogy. It is to be observed that the person to whom the property was paid, either pursuant to the order of the court or simply by a mistake of the administrator, would clearly not be an express trustee for the rightful owner; for even the administrator is not an express trustee: *Re Lacy* (6). If the property transferred by the administrator had been in the form of securities still retained by the defendant, there would perhaps have been no difficulty about the action, apart from the question of lapse of time: *Brooksbank v. Smith* (1); *Re Robinson, McLaren v. Public Trustee* (5). In *Brooksbank v. Smith* (1) the trustees of the will of Elizabeth Brane had, by mistake, transferred a sum of stock to the defendant, who still retained £100 of such stock which the plaintiffs

identified as the residue of the stock transferred. ALDERSON, B., held that it was a case where the Statute of Limitations was not applicable, since the mistake was first discovered within six years before the filing of the bill. The case is explained in *Baker v. Courage & Co.* (2), where HAMILTON, J., points out that where a party had not the means of knowing the truth equity would not consider laches to be attributable to him, and therefore the equitable period of limitation would not run against him. But the judgment in *Brooksbank v. Smith* (1) certainly tends to show that in such a case the Statute of Limitations, that is, the Statute of James I, would be a defence by way of analogy after six years from the time when the mistake was first discovered.

It may be desirable to add a few words on the question of principle.

The right to follow trust funds into the hands of a volunteer is an equitable right which, at the highest, cannot be based on a principle more favourable to the cestui que trust than would be involved in the contention that the volunteer is a constructive trustee for the true owner. Constructive trusts are of various kinds; and without attempting a classification, I may point out that there is a wide difference from the point of view of the effect of lapse of time between cases where the constructive trustee must be taken to have knowingly assumed the obligations of a trustee and those where the relationship is due merely to equitable principles. In *Soar v. Ashwell* (7)—I take that case as an excellent example—the solicitor to trustees of a will, who had received the moneys due under a mortgage belonging to the trust, was assumed to act as trustee of the funds which he received; and being therefore bound under a direct trust to the cestuis que trust could not rely upon the lapse of time. But where the constructive trust is one in which an equitable obligation arises from the circumstances of the case, and there has been no intention to create a trust and no improper conduct in reference to trust property from which the court will infer a direct trust, there is in general no objection to the defendant appealing to the lapse of time: see *Friend v. Young* (8), where STIRLING, J., distinguishes *Burdick v. Garrick* (9). The same view was taken by LORD MACCLESFIELD in *Lockey v. Lockey* (10), and an elaborate judgment of LORD REDESDALE in *Hovenden v. Lord Annesley* (11) is to the like effect.

To avoid misconception I repeat that I am not considering cases where trust moneys have been received with the full knowledge that they are subject to a trust. In such a case the person receiving the money puts himself in the same position as an express trustee: see *Soar v. Ashwell* (7) and *Re Eyre-Williams, Williams v. Williams* (12). Nor am I dealing with a case of fraud. On the hypothesis on which I have to deal with the present case, I have come to the conclusion that there would be nothing to prevent a subject from raising the lapse of time as a bar; and, at the best for the claimant, a lapse of six years from the date of discovery of the mistake would, in my opinion, be a complete answer to the claim. In the above observations I have assumed that there is a right to follow trust funds; but the sum ordered to be transferred by the order of June 23, 1883, was a sum of money, namely, £93,587 8s. 1d., subject to costs. The old doctrine as to the impossibility of following money into the hands of a volunteer has been largely encroached upon by more modern decisions, especially in cases where the trustee is the defendant. I have, however, been unable to find any case in which a claim to follow money in the hands of a volunteer—not being the original trustee or his bankers—has been successfully made, and I doubt whether, at any rate when the money is paid over pursuant to an order of the court, such an action would lie, quite apart from the lapse of time, and this apart also in such a case as the present from the operation of the rule in *Clayton's Case* (13). A petition of right similar in some respects to the present petition was brought in *Re Mason* (3). The decision of ROMER, J., dismissing the petition, was affirmed by the Court of Appeal; and I might perhaps have placed more reliance on that decision in the present case than I have done. It appears, however, that the facts in that case differed from the facts in the present case by reason of the circumstance that the Crown had not

A retained the property, but had granted the personal estate and effects of the intestate—subject to payment of a percentage on the value for His Majesty's use—to certain third persons. Accordingly, the suppliant there was unable to assert—except as regards the commission—that any of the property remained in the hands of the Crown; and the claim for the amount of the commission does not seem to have been separately urged. I would, however, observe that there are a number of observations in the judgments of ROMER, J., in the court of first instance, and of the Master of the Rolls and LAWRENCE, L.J., in the Court of Appeal, which tend to support the views which I have expressed.

The question raised by the demurrer must therefore be determined in favour of the Crown.

C Solicitors: *Ward, Bowie & Co.*, for *Booth & Co.*, Leeds; *Treasury Solicitor*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

NEWBOULD v. ATTORNEY-GENERAL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), February 20, 1931]

[Reported [1931] P. 75; 100 L.J.P. 54; 144 L.T. 728;
47 T.L.R. 297; 75 Sol. Jo. 174]

F *Legitimation—Legitimitio per subsequens matrimonium—Child born after annulment of father's first marriage for incapacity—Subsequent marriage of father to mother—Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), s. 1 (2).*

The Legitimacy Act, 1926, s. 1 (2), provides: "Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

G On Oct. 27, 1909, N. married K. On April 23, 1929, D., a woman who was then free to marry, gave birth to a son of whom N. was the father. On May 15, 1929, N. was granted a decree nisi of nullity of his marriage on the ground of K.'s incapacity to consummate it. This decree was made absolute on Nov. 25, 1929. On Nov. 30, 1929, N. married D.

H **Held:** the effect of the nullity decree was that there had been no marriage at all (*G. v. M.* (1) (1885), 10 A.C. 171, and *Napier v. Napier*, otherwise *Goodban* (2), [1915] P. 184, followed); accordingly N. was not married to a third person when D.'s son was born and the son was legitimated by the subsequent marriage.

I **Notes.** By the Matrimonial Causes Act, 1950, s. 9, any child of a woman whose marriage is annulled who would have been the legitimate child of the marriage if it had been dissolved instead of annulled, is deemed to be legitimate. The difficulty which this provision might now cause in applying the principle of the present case to cases in which it was the mother, and not, as here, the father, whose marriage had been annulled, was mentioned in *Re Adams, Sursham v. Farquharson*, [1951] 1 All E.R. 1037.

Considered: *Re Adams, Sursham v. Farquharson*, [1951] 1 All E.R. 1037. Referred to: *Siveyor v. Allison*, [1935] 2 K.B. 403; *De Reneville v. De Reneville*, [1947] 2 All E.R. 112.

As to legitimation by subsequent marriage, see 3 HALSBURY'S LAWS (3rd Edn.) 93, para. 147; for the Legitimacy Act, 1926, see 2 HALSBURY'S STATUTES (2nd Edn.) 493.

Cases referred to:

- (1) *G. v. M.* (1885), 10 App. Cas. 171; 53 L.T. 398; sub nom. *Gordon v. Merricks*, 1 T.L.R. 326, H.L.; 27 Digest (Repl.) 416, 3461.
- (2) *Napier v. Napier, otherwise Goodban*, [1915] P. 184; 84 L.J.P. 177; 113 L.T. 764; 81 T.L.R. 472; 59 Sol. Jo. 560, C.A.; 27 Digest (Repl.) 276, 2210.
- (3) *Newbould v. Newbould, otherwise Kirkby*. Unreported.
- (4) *B—n v. B—n* (1854), 1 Ecc. & Ad. 248; 23 L.T.O.S. 99; 164 E.R. 144; sub nom. *B—n v. M—c (falsely calling herself B—n)*, 2 Rob. Eccl. 580, P.C.; 27 Digest (Repl.) 270, 2161.
- (5) *P. v. P.*, [1916] 2 I.R. 400; 27 Digest (Repl.) 658, *2222.
- (6) *A. v. B.* (1868), L.R. 1 P. & D. 559; 17 W.R. 14; sub nom. *P. v. S.*, 37 L.J.P. & M. 80; sub nom. ——— v. ———, 19 L.T. 22; sub nom. *Anon.*, 32 J.P. 743; 27 Digest (Repl.) 270, 2166.

Petition for a declaration of legitimacy per subsequens matrimonium by a father on behalf of his infant child, under the Legitimacy Act, 1926.

The infant petitioned by the father, A.E.N., as guardian ad litem for a declaration of legitimacy under the Legitimacy Act, 1926, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188. The petition set out that the infant petitioner was born on April 23, 1929, the son of A.E.N. and a named woman, D.I.P.; that at that date neither of the parents was lawfully married, notwithstanding that a form of ceremony of marriage had in fact been solemnised on Oct. 27, 1909, between A.E.N. and another woman; that by a final decree on Nov. 25, 1929, that ceremony of marriage was pronounced and declared to be and to have been absolutely null and void; that on Nov. 30, 1929, A.E.N. was lawfully married to D.I.P. at the Kensington register office, and he was domiciled in England; and that no property was involved in the legitimation of the infant petitioner. The prayer asked for a declaration that the parents of the petitioner were lawfully married on Nov. 30, 1929, and that the petitioner was legitimate as from that date. The Attorney-General as respondent filed a formal answer.

The decree absolute for nullity of marriage in *Newbould v. Newbould, otherwise Kirkby* (3) referred to the decree nisi made on May 15, 1929,

"whereby it was ordered that the marriage in fact had and solemnised on Oct. 27, 1909, at St. George's Church, Hanover Square, be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in law whatsoever by reason of the incapacity of the respondent to consummate the said marriage, and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent, unless sufficient cause be shown to the court why the said decree should not be made absolute within six months of the said decree."

The decree absolute went on:

"And no such cause having been shown, the court on application by the petitioner by final decree pronounced and declared the said marriage to be and to have been absolutely null and void, and that the said petitioner was and is free from all bond of marriage with the said respondent."

C. P. Harvey, for the petitioner, referred to *B—n v. B—n* (4); *G. v. M.* (1); *Napier v. Napier, otherwise Goodban* (2); and *P. v. P.* (5).

Ivan Horniman (with him *Sir Gervais Rentoul, K.C.*), for the Attorney-General, referred to *A. v. B.* (6).

LORD MERRIVALE, P.—This case required the close attention which learned counsel have given it. It is a petition for a declaration of legitimacy of an infant—a child born in April, 1929. The father and mother of the petitioner were married in November, 1929. If neither of them was married to a third person at the date

A of the birth of the petitioner then the child may be declared legitimate under the statute of 1926. The father of the petitioner as guardian ad litem has brought these proceedings manifestly in the interests of the infant child. He gave his evidence and set out the fact that in October, 1909, he went through a form of marriage with a person named, and he produced the proper proofs that in 1929 he petitioned for nullity of that marriage. On May 15, 1929, that petition came on
B for hearing. The person with whom the ceremony of marriage had been gone through did not defend the suit, and a decree nisi was pronounced declaring that marriage "to have been and to be absolutely null and void" owing to the incapacity of the other person. The decree of nullity was made absolute on Nov. 25, 1929.

The question to be considered is whether that decree of nullity was one by which the ceremony of marriage was pronounced to have been a mere ceremony not
C resulting in matrimony or whether the decree had dissolved a marriage which in fact existed. Counsel referred to various cases in the House of Lords and the Court of Appeal. In *G. v. M.* (1) the matter was fully discussed in the House of Lords by LORD SELBORNE and others, and, as counsel here argued, it was held that the decree of nullity for impotence was a decree which had a retrospective operation, so that it must be held that when the decree had become effective there had been
D no marriage at all. The matter was considered in *Napier v. Napier*, otherwise *Goodban* (2) by LORD COZENS-HARDY, M.R., and PICKFORD and WARRINGTON, L.JJ., and the pith of the matter is expressed in LORD COZENS-HARDY's judgment as follows:

"The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all."

E There the matter is put very succinctly.

My attention was drawn, however, to the judgment of LORD PENZANCE in *A. v. B.* (6), where he summed up the view that had been taken with respect to void and voidable marriages. That was an administration suit in which it was held that where it was sought by a third party to question the validity of a marriage, one of
F the parties to which was dead, such a thing could not be, and that where complaint arose between parties during their lifetime there were proper considerations which might limit the right to a decree for impotence. The substance of the matter seems to be that during the lifetime of the parties to a matrimonial contract any ground for impeaching it in respect of the capacity of either to enter into the contract is only a personal right of one or other of the parties. If there is disability to
G implement the contract of marriage, then the ceremony can be declared null and void, unless cause is shown by reason of action of the complaining party which disables him from taking proceedings so that on legal or equitable grounds he is to be bound by what has taken place and disabled from calling for further investigation. A number of cases show the limitations which exist on the right of the parties to a marriage contract to prosecute a claim for nullity.

H Here, by a decree of this court, the incapacity of the respondent in the nullity suit was found and declared and, no impediment being alleged, a decree was in due course made. It is a valid decree which must have effect here and elsewhere and could not be impeached except by proper proceedings. It has not been and cannot now be impeached. That being so, the petitioner in the present proceedings, moving by his father (the petitioner in the former suit), is entitled to the declaration sought.

I On the statement of counsel that, in accordance with practice, the Attorney-General did not ask for his costs, the President said: "It is in the public interest that this matter should be cleared up."

Solicitors: *H. S. Wright & Webb; The Treasury Solicitor.*

[Reported by WILLIAM LATEY, Esq., Barrister-at-Law.]

R. v. GREEN-EMMOTT

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Humphreys, JJ.),
February 24, 1931]

[Reported 144 L.T. 671; 22 Cr. App. Rep. 183; 29 Cox, C.C. 280]

Criminal Law—Recognisance—Prisoner certified lunatic at time of recognisance—Effect on validity.

A prisoner who had pleaded Guilty to a criminal offence, was ordered to be bound over on condition that he entered into a recognisance. He was subsequently charged with a breach of the recognisance and received a sentence of imprisonment. At the time when he entered into the recognisance he was a certified lunatic, and no evidence in regard to his state of mind was called at the trial.

Held: the certificate raised a presumption of insanity, which held good unless it was displaced by evidence, and as no evidence to displace the presumption had been given, the prisoner must be held to be incapable of entering into a binding recognisance, and the sentence imposed on the basis that there had been a breach of the recognisance must be quashed.

Notes. As to the presumption against the validity of a recognisance entered into by a person who was at the time a certified lunatic, see 10 HALSBURY'S LAWS (3rd Edn.) 495, para. 904, note (p).

Cases referred to:

- (1) *Beverley's Case* (1603), 4 Co. Rep. 123 b; 76 E.R. 118; 33 Digest 127, 32.
- (2) *Thompson v. Leach* (1697), 3 Mod. Rep. 301; Carth. 435; 1 Com. 45; Comb. 468; 1 Eq. Cas. Abr. 278; Holt K.B. 357; 3 Lev. 285, n.; 1 Ld. Raym. 313; 12 Mod. Rep. 173; 2 Salk. 427, 575, 675; 3 Salk. 300; 1 Show. 308, n.; 87 E.R. 199; on appeal (1698), Show. Parl. Cas. 150; 1 E.R. 102, H.L.; 33 Digest 128, 42.
- (3) *Stokes v. Oliver* (1696), 5 Mod. Rep. 210; 2 Bac. Abr. 544; 1 Burr. 361; Carth. 122; 5 Com. 2 C. 2; Comb. 63, 101; Cro. Car. 307; Cro. Eliz. 569, 853; Fitz-G. 1; Hob. 197; 2 Keb. 878; 2 Lev. 38; 1 Roll. Abr. 731, 751, 752; 2 Saund. 94; 1 Sid. 321.
- (4) *Imperial Loan Co. v. Stone*, [1892] 1 Q.B. 599; 61 L.J.Q.B. 449; 66 L.T. 556; 56 J.P. 436; 8 T.L.R. 408, C.A.; 33 Digest 130, 57.
- (5) *Daily Telegraph Newspaper Co., Ltd. v. McLaughlin*, [1904] A.C. 776; 73 L.J.P.C. 95; 91 L.T. 233; 20 T.L.R. 674, P.C.; 33 Digest 135, 124.
- (6) *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A.C. 658; 66 L.J.Q.B. 745; 77 L.T. 170; 46 W.R. 426, H.L.; 33 Digest 161, 447.

Appeal against conviction and sentence.

The appellant pleaded guilty at Manchester Assizes on May 6, 1929, to gross indecency with a male person. FINLAY, J., ordered that he be bound over on entering into a recognisance in the following terms:

"George Vereker Green-Emmott is bound over in the sum of £100 to keep the peace and be of good behaviour for two years and to come up for judgment, if called upon, within two years and to return to St. Andrew's Mental Hospital at Northampton and remain there or at some other mental hospital until discharged therefrom and to remain in custody at H.M. Prison at Manchester until he can be conveyed by officers of the St. Andrew's Mental Hospital to that hospital."

He was subsequently brought up at Manchester Assizes for a breach of the above recognisance—namely, escape from the aforementioned hospital before discharge—and on Dec. 9, 1930, was sentenced by MACNAGHTEN, J., to ten months' imprisonment.

A *W. G. Leigh*, for the appellant, referred to *Beverley's Case* (1); *Thompson v. Leach* (2); *Stokes v. Oliver* (3); and *Imperial Loan Co. v. Stone* (4). Here no evidence was called at the trial to prove that the appellant had a lucid interval, and was capable of entering into a recognisance. In fact, no medical evidence was called at all; all that happened was that the judge interviewed the appellant's mother in his private room before passing sentence that the appellant be bound over.

B *H. Elam* for the Crown.—There was evidence from which it may reasonably be inferred that the appellant was sufficiently sane to enter into the recognisance. He was represented by counsel, but no question of his fitness to plead was raised. He in fact pleaded to the indictment and expressed his willingness to enter into the recognisance.

C *W. G. Leigh*, in reply, referred to *Daily Telegraph Newspaper Co., Ltd. v. McLaughlin* (5) and *Van Grutten v. Forwell* (6).

The judgment of the court was delivered by

D **LORD HEWART, C.J.**—This appellant pleaded guilty in May, 1929, at Manchester Assizes to an indictment which charged him with gross indecency. He was bound over and entered into a recognisance. In December, 1930, he was brought up for sentence for breach of recognisance and sentenced to ten months' imprisonment. The breach of recognisance consisted in his escape from a certain institution, where he had undertaken to remain until he was discharged. He now appeals in terms against conviction and sentence; what that means, no doubt, is—it is contended—that there was no breach of recognisance, because his allegation is

E that at the time when he entered into the recognisance he had been certified as insane. There is no doubt that he had been so certified: the transcript of the shorthand note makes that quite plain.

The question which we have to consider is whether a person who has been certified to be insane can, during the time when he is certified to be insane, enter into a binding recognisance. Our attention has been directed to a long series of authorities, many of which are not really helpful on this point, but the fact seems to be

F that the certificate of insanity raised a presumption of insanity which held good unless it was displaced by evidence. After careful consideration, the court has come to the conclusion that there was here no evidence to displace the presumption raised by the medical certificate, and that, therefore, this appeal ought to succeed. The sentence of ten months' imprisonment, it follows, will be quashed.

G *Sentence quashed.*

Solicitors: *Boote, Dutton & Whittaker*, Manchester; *Director of Public Prosecutions*.

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

Re JENKINS. JENKINS v. DAVIES

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 15, 16, 1931]

[Reported [1931] 2 Ch. 218; 100 L.J.Ch. 265; 145 L.T. 184;
47 T.L.R. 379]

Will—Substituted gift—Gift of moneys invested in Swansea Harbour Trust—Swansea Harbour Trust taken over by Great Western Railway—Substitution of Great Western Railway stock for Swansea Harbour Trust stock by Private Act—Great Western Railway (Swansea Harbour Vesting) Act, 1923 (13 & 14 Geo. 5, c. 19), s. 12.

By his will, made in 1913, the testator bequeathed "the sum of £3,500 and all other moneys that I may at my death possess invested in the Swansea Harbour Trust" on trust to pay the income thereof to his wife during her life and after her death to D. for her life with a power of appointment over both capital and income. In 1923, by virtue of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, the undertaking of the Swansea Harbour Trust became vested in the Great Western Railway. Under s. 5 of the Act, the testator was issued with £2,800 5 per cent. consolidated preference stock of the Great Western Railway in substitution for the £3,500 4 per cent. stock of the Swansea Harbour Trust. By s. 12 of the Act, stock of the Great Western Railway substituted under the Act for Swansea Harbour Trust stock was to be held "on and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock" for which it was substituted, and any reference in any "deed will codicil book document instrument or writing to any such stock" was to be deemed a reference to the stock of the Great Western Railway substituted therefor. The testator continued to hold the Great Western Railway stock until his death in 1928.

Held: (i) the latter part of s. 12 of the Act of 1923, that any reference in any deed, will, codicil, book, document, instrument or writing to the Swansea Harbour Trust stock should be deemed to be a reference to the substituted stock, was not restricted in meaning by the first part of the section, and applied to any "document instrument or writing" in existence when the Act of 1923 was passed, even though such "document instrument or writing" was not then effective;

(ii) the reference in the testator's will was a reference to the Swansea Harbour Trust stock within the meaning of s. 12 of the Act of 1923, and, therefore, the bequest operated, by virtue of the latter part of s. 12, to pass the substituted Great Western Railway stock.

Notes. As to a bequest of "stock," see 34 HALSBURY'S LAWS (2nd Edn.) 260, para. 311; and for cases on the subject see 44 DIGEST 651-652, 4912-4923. As to determining the scope of language used in a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 498-499, para. 636; and for cases on the subject see 42 DIGEST 616-623, 153-240.

Case referred to:

(1) *Grey v. Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 17 Digest (Repl.) 274, 794.

Appeal from a decision of LUXMOORE, J.

By his will dated Sept. 30, 1913, Owen Thomas Jenkins, after appointing his wife his executrix and three other persons his trustees, made the following bequest: "I give and bequeath the sum of £3,500 and all other moneys that I may at my death possess invested in the Swansea Harbour Trust" to his trustees on trust to

A pay the income therefrom to his wife for her life, and after her death to pay the income to Martha Jane Davies for her life, and after her death on trust as to capital and income for her children as she might appoint, and, in default of any appointment, for the children in equal shares as tenants in common. The testator's wife died in his lifetime on Nov. 16, 1924. The testator died on Dec. 17, 1928, and on Oct. 23, 1929, letters of administration were granted to the respondents, the lawful next-of-kin of the testator, with the will annexed. Martha Jane Davies was a married woman with a number of children, who were the appellants. She was a daughter of the testator but was not a legitimate child and, therefore, could not be one of the testator's next-of-kin. At the date of his will, the testator possessed £3,500 4 per cent. stock in the Swansea Harbour Trust. In 1923, by virtue of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, the undertaking of the Swansea Harbour Trust became vested in the Great Western Railway. Under that Act, the testator was issued with a certificate for £2,800 5 per cent. consolidated preference stock of the Great Western Railway in substitution for the £3,500 4 per cent. Swansea Harbour Trust stock. The £2,800 stock was held by the testator at the date of his death. An originating summons was taken out by the respondents to determine, inter alia, whether, on the true construction of the will and of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, the bequest of the £3,500 in the Swansea Harbour Trust was a valid disposition of the £2,800 Great Western Railway stock substituted therefor, or whether it formed part of the testator's residuary estate. LUXMOORE, J., held that s. 12 of the Act of 1923 did not cover the case of future trusts and that the general words in the later part of the section were dominated by, and did not extend, the meaning of the words used in the first part of the section, and that, therefore, the testator's will did not come within the ambit of the section and did not operate to pass the £2,800 Great Western Railway stock which fell into the testator's residuary estate. The appellants appealed to the Court of Appeal.

The Great Western Railway (Swansea Harbour Vesting) Act, 1923, s. 12, provides :

F "Stock of the company substituted by virtue of this Act for any stock of the trustees or (as the case may be) any cash paid under this Act to the holders of mortgages granted by the trustees shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock or mortgages for which by virtue of this Act the stock of the company is substituted or the cash is paid and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock or mortgages shall be deemed to be a reference to the stock of the company or (as the case may be) the cash by virtue of this Act substituted therefor."

G *W. F. Swords, K.C., and A. J. Belsham* for the appellants.

H *H. H. King* for the respondents.

I **LORD HANWORTH, M.R.**—This appeal must be allowed. The point we have to determine is what is the effect and the true interpretation of s. 12 of the Great Western Railway (Swansea Harbour Vesting) Act, 1923. [His Lordship stated the terms of the will and continued:] Let us clear up at once one matter that arises, what is the meaning of "all moneys that I may at my death possess invested in the Swansea Harbour Trust." The testator, at the time of making his will, had £3,500 invested in stock of the Swansea Harbour Trust issued by the trustees of the Swansea Harbour Trust under the Swansea Harbour Act, 1886. Is that a reference to money or does it connote the investment in the stock of the Swansea Harbour Trust? I am clearly of opinion that the testator has designated by these words the stock he held. They were not a reference to money, but to money which had been invested or turned into something else, namely, this Swansea Harbour Trust stock.

After he made his will, the Act of 1923 was passed whereby the Great Western

Railway took over the undertaking of the Swansea Harbour Trust, and provision was made for payment off of the stockholders. The amount of stock and mortgages granted and issued by the Swansea Harbour Trustees up to 1923 was £607,900. Section 7 of the Act of 1923 provided that the holders of that stock and those mortgages should receive certain 5 per cent. consolidated preference stock of the Great Western Railway. The recitals of the Act of 1923 indicate that difficulties had arisen in the working of the Swansea Harbour Trust, and that the undertaking should be transferred to, and become vested in, the Great Western Railway as part of their undertaking on the terms therein provided. The result of that was that the testator received £2,800 5 per cent. Consolidated Preference stock of the Great Western Railway on Oct. 3, 1924, in substitution for the £3,500 4 per cent. stock of the Swansea Harbour Trust held by him.

It is plain that the words of the gift in the will would not carry this sum of Great Western Railway stock substituted by words indicative only of the stock of the Swansea Harbour Trust. But to overcome difficulties arising from the transmutation of one stock for the other s. 12 of the Act of 1923 was passed.

LUXMOORE, J., has found, however, that s. 12 did not effect the identification of the new Great Western Railway stock with the stock of the Swansea Harbour Trust referred to in the will. It is plain that the purpose of s. 12 was to overcome the difficulties in identifying the stock which was previously stock of the Swansea Harbour Trust. That this was the purpose appears on the face of the section itself, and especially in the words in the last few lines of the section, which seem to be of wide application. But LUXMOORE, J., has held that those last few lines were dominated by what was contained in the earlier part of the section. The first part of the section declared that the stock of the Great Western Railway substituted should be held on, and subject to, the same trusts, liens, charges, powers, and other legal or equitable rights and privileges and restrictions as affected the stock for which by virtue of the Act the stock of the Great Western Railway was substituted. The meaning of that is plain. No one who had previously held mortgage or stock of the Swansea Harbour Trust could, when he received cash or stock of the Great Western Railway under the Act of 1923, declare that the cash or stock was held by him independently of, or without being affected by, the "trusts liens charges powers and other legal or equitable rights privileges and restrictions" which had previously affected his holding in the Swansea Harbour Trust. Where there were any rights, privileges or restrictions affecting the holding of Swansea Harbour Trust stock their continuity was preserved by that earlier portion of the section.

Then the last part of the section is :

"and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock or mortgages shall be deemed to be a reference to the stock of the [Great Western Railway] . . . substituted therefor."

Now we have to give some meaning to all the words of the section, and it seems to me that, if we interpret the section in the narrow way adopted by LUXMOORE, J., the last five lines of the section become mere surplusage if they are dominated by the earlier part of the section. If we treat the section as only referring to cases where rights, legal or equitable, or trusts are affected, it is difficult to see why those words were necessary. On the other hand, the legislature may well have thought it right to provide for every case where there was transmutation of the stock, and that there might be cases which were not covered by the earlier words of the section. It is a fundamental principle in construing Acts of Parliament to give words their ordinary sense if by that there arises no repugnancy or inconsistency. In his speech in *Grey v. Pearson* (1), LORD WENSLEYDALE said (6 H.L.Cas. at p. 106) :

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the

A grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

B Applying that dominating principle here, the latter part of s. 12 ought to have an effect independent of the earlier part. That being so, we have in this document a reference to the Swansea Harbour Trust stock, which is, under the latter part of the section, now to be deemed to be a reference to the stock of the Great Western Railway.

C Counsel for the respondents fairly and freely admitted that the testator's intention was to refer to the Swansea Harbour Trust stock and not to money, but that the last part of s. 12 of the Act of 1923 did not refer to the present stock, because the document was not effective when the Act of 1923 was passed. I think, however, that the intention of the last part of the section was to sweep in other cases so that in no case should there be a lapse. We find in this section words sufficient to carry the appellants' contention that the will, by virtue of s. 12, passed the £2,800 5 per cent. consolidated preference stock in the Great Western Railway substituted
D for the stock mentioned in the gift in the will.

E I leave out of consideration the point whether the document in question is a "will" within the meaning of the section, although I would point out that, in common parlance, a testator who had signed his will would always answer the question whether he had made his will in the affirmative. What would be called a will is, I think, intended to include a will such as this was, though not operative at the time of the Act of 1923, and the word "will" in the latter part of the section would, therefore, include this will, but it is not necessary to rely on that, as there are the other words in this latter part of the section: "document instrument or writing." This will, though ambulatory, was a document, an instrument, or a writing.

F Therefore the section meets the present case, and the gift in the will of the £3,500 4 per cent. stock of the Swansea Harbour Trust gives the benefit to the appellants of the £2,800 5 per cent. consolidated preference Great Western Railway stock substituted therefor.

G **LAWRENCE, L.J.**—I agree. The short question is what is the true meaning of s. 12 of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, and whether its terms are sufficient to allow of the £2,800 5 per cent. consolidated preference stock of the Great Western Railway passing to the legatee of the £3,500 4 per cent. stock of the Swansea Harbour Trust.

H At the date of his will, which was made in 1913, the testator was possessed of £3,500 4 per cent. stock of the Swansea Harbour Trust, and I am clearly of opinion that that bequest was a reference to that stock within the meaning of s. 12 of the Act of 1923. By that Act the stock of the Swansea Harbour Trust was abolished and, in lieu of it 5 per cent. consolidated preference stock of the Great Western Railway was substituted, and, under the provisions of the Act, the testator became the holder of £2,800 of the latter stock in lieu of his holding of £3,500 in the Swansea Harbour Trust. I agree with LUXMOORE, J., that, but for s. 12, the bequest of the Swansea Harbour Trust stock would have been adeemed, but I do
I not agree that s. 12 does not operate to save the bequest and make it equivalent to a bequest of the substituted Great Western Railway stock. In my opinion, s. 12 contains two provisions which, though they overlap to some extent, are distinct from one another. I cannot read the second part of the section as a mere appendage inserted to carry the first part of the section into effect. The first limb provides that the substituted Great Western Railway stock shall be held on, and subject to, the same trusts, liens, charges, &c., as affected the Swansea Harbour Trust stock for which it was substituted, and the second limb provides that any reference in any will, codicil, document, instrument or writing to any Swansea Harbour Trust

stock shall be deemed to be a reference to the Great Western Railway stock substituted therefor. A

The first limb of the section covers the case of trusts existing at the time of the transmutation of the stock, and the second limb applies in express words to all documents, instruments or writings, whether creating trusts or rights or not, and that part is applicable to this case, where there was clearly a document, though the trusts to be created by it were not, at the time of the transmutation, effective. The will executed by the testator in 1913, though ambulatory, and not creating any trusts during his lifetime, was, nevertheless, a document, instrument or writing, and, therefore, it was amply covered by the express language used in the second limb of the section. The will contained a clear reference to Swansea Harbour Trust stock. I

Therefore, under the express provisions of s. 12, the reference was to be deemed to be a reference to the Great Western Railway stock substituted for the Swansea Harbour Trust stock, with the result that the bequest of the Swansea Harbour Trust stock operated to pass the Great Western Railway stock substituted therefor. There is no ground for confining the second limb of the section to documents creating trusts, charges, powers, &c., within the meaning of the first limb, for that would require introductory words and would render the second limb wholly otiose and would fail to carry out what was quite clearly the intention of the legislature. To hold otherwise might lead to great injustice being created. D

The declaration asked for should, therefore, be made and the appeal allowed.

ROMER, L.J.—I agree. I agree with LUXMOORE, J., that the charges, trusts, powers, &c., referred to in the first part of s. 12 of the Act of 1923 must be operative at the time of the transmutation of the stocks under the Act for that part of the section to be effective, but I am unable to agree with him that the later words of that section are merely complementary to those in the first part of the section. If that were so, the second part might just as well have been left out of the section. Full effect ought to be given to the later words in the section as otherwise, for example, in the case of an annuity directed to be paid so long as the annuitant held a fixed amount of stock in the Swansea Harbour Trust, or in the case of articles of association providing that a person should be a director only so long as he held Swansea Harbour Trust stock, the annuitant or the director would lose any rights on the substitution under the Act of 1923 of Great Western Railway stock for the Swansea Harbour Trust stock. It is quite clear, however, that the legislature never intended that the annuity should then cease or the director be no longer a director. E

The only question remaining is whether, in the will, document, instrument or writing there is any reference to stock of the Swansea Harbour Trust for which stock of the Great Western Railway has been substituted. Turning to the gift in this will, we find the words, "I give and bequeath the sum of £3,500 and all other moneys that I may at my death possess invested in the Swansea Harbour Trust." F To what is the testator referring? It is to his £3,500 stock in the Swansea Harbour Trust, and, therefore, it is impossible to say that the will contains no reference to Swansea Harbour Trust stock. G

For these reasons, the appeal must be allowed.

Appeal allowed.

Solicitors: *Smith, Rundell, Deas & Beckett*, for *Morgan, Brunt & Nicholas*, I
Pontypridd; *J. Wilmer Hives*, for *Evans, Thomas & Jones*, *Llandissul*.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.] H

Re TAYLOR. PULLAN v. TAYLOR

[CHANCERY DIVISION (Farwell, J.), April 15, 1931]

[Reported [1931] 2 Ch. 242; 100 L.J.Ch. 374; 145 L.T. 417]

B *Intestacy—Descent and distribution—Infant heir—Death of infant unmarried—Survival of infant's mother and younger brother—Devolution of real estate—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 1 (2), (3)—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 46 (1) (iv), s. 51 (3).*

T. died intestate on Sept. 25, 1925, seised of freehold land and survived by his infant children, Sydney, the eldest, Doris and Harry, and by his widow.

C On Jan. 1, 1926, by virtue of the Settled Land Act, 1925, s. 1 (2), the freehold land vested in the infant Sydney became settled land under a settlement "deemed to have been made by" T. and subjected, by virtue of s. 1 (3), to the widow's right to dower. On Oct. 8, 1930, Sydney died intestate, an infant and unmarried. On the question whether the freehold land passed to the widow, as his mother, by virtue of s. 46 (1) (iv) of the Administration of Estates Act, 1925, or whether the notional settlement effected by s. 1 of the Settled Land Act brought the land within s. 51 (3) of the Administration of Estates Act, and so made Sydney's interest an entailed interest,

D **Held:** the notional settlement did bring the land within s. 51 (3), and it, therefore, passed on Sydney's death to Harry, as next heir of T., for an entailed interest until Harry attained the age of twenty-one or married under that age and thereafter absolutely.

E **Notes.** As to the application of the pre-1925 rules of intestate succession to settled land on the death thereafter of infants who have never been married, see 16 HALSBURY'S LAWS (3rd Edn.) 413, para. 796; as to the meaning of "settlement" under the Settled Land Act, 1925, see *ibid.*, vol. 39 (2nd Edn.), 668 et seq., para. 952. For cases on the subject, see 40 DIGEST 726-728, 2572-2589. For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12; and for the Administration of Estates Act, 1925, see *ibid.*, vol. 9, 718.

F **Adjourned Summons** as to the entitlement to the freehold land of an intestate.

An intestate who died on Sept. 25, 1925, seised of real estate in fee simple in possession, left three children—namely, Sydney, the eldest son and heir, born on Aug. 21, 1911; Doris, born on Dec. 15, 1912; and Harry, born on June 23, 1919. His widow, who survived him, took out administration to his real and personal estate on Nov. 14, 1925.

G The Settled Land Act, 1925, came into operation on Jan. 1, 1926, and under s. 1 (2) the real estate vested in Sydney, an infant, became settled land under a settlement "deemed to have been made by the intestate," and was subject under sub-s. (3) to the widow's right to dower. On May 8, 1926, the widow appointed herself and the plaintiffs in the present summons Settled Land Act trustees, and on the same day as administratrix executed a vesting assent. On Oct. 8, 1930, Sydney died an infant and unmarried.

H Questions arose whether on Sydney's death the real estate passed owing to his intestacy to his mother, the widow, by virtue of s. 46 (1) (iv) of the Administration of Estates Act, 1925, or whether the estate of Sydney had become an estate tail under s. 51 (3) of that Act, and had ceased to exist on his death, and whether the real estate passed to his next brother, Harry, as heir of the intestate father. The plaintiffs took out this summons to determine the questions.

I The relevant sections of the Settled Land Act, 1925, and the Administration of Estates Act, 1925, are sufficiently set out in the judgment.

Errington for the plaintiffs.

Horace Freeman for the widow.

Droop for the infant brother, Harry Taylor.

April 15. **FARWELL, J.**, read the following judgment: On and after Nov. 14, 1925, the legal estate was vested in the widow as administratrix, and the beneficial interest was vested in Sydney absolutely, subject to the widow's right to dower. On Jan. 1, 1926, the Settled Land Act, 1925, came into operation. Section 1 (2) provides that

"Where an infant is beneficially entitled to land for an estate in fee simple, and by reason of an intestacy or otherwise there is no instrument under which the infant's interest arises or is acquired, a settlement shall be deemed to have been made by the intestate, or by the person whose interest the infant has acquired."

Subsection (3) provides that

"An infant shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (not assigned by metes and bounds) affecting the land, and such right of dower shall be deemed to be an interest comprised in the subject of the settlement and coming to the dowress under or by virtue of the settlement."

The effect of those two subsections is that both the widow and Sydney took under the notional settlement deemed to have been made by the intestate. The widow took her right to dower, and, subject thereto, Sydney was absolutely entitled with the right to call for a transfer of the property at twenty-one. If Sydney had attained twenty-one there would have been no difficulty. But he died an infant, unmarried and intestate, and the problem arises. Section 46 (1) (iv) of the Administration of Estates Act, 1925, provides that

"If the intestate [here Sydney] leaves no issue, but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely."

If that were all, the widow, as Sydney's mother, would take subject to her own right to dower, which would merge. But that is not the end of the story.

Section 51 (3) provides that

"Where an infant dies after the commencement of this Act without having been married, and, independently of this subsection, he would at his death have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly."

Now, if the word "settlement" in that subsection includes a notional settlement deemed to have been made by an intestate on an infant under s. 1 (2) of the Settled Land Act, 1925, then, on that infant dying without having been married, he is to be deemed to have had an entailed interest instead of an absolute interest, and it is suggested that the result of this is to leave a reversion in the settlor—namely, the intestate.

The widow contends that s. 51 (3) cannot apply, as, if it applied, the freehold reversion would oscillate backwards and forwards between Sydney and the intestate father and never come to rest, and that that cannot have been the intention of the legislature. She also submits that the expression "settlement (including a will)" points to an actual settlement by deed or will, and does not apply to a merely notional statutory settlement on intestacy. Now, if the legislature thought it necessary to make a special provision in the case of an infant dying unmarried under twenty-one, cutting down his absolute interest under a settlement or will to an entail, I have great difficulty in believing that it did not mean to cut it down under an intestacy, now deemed a settlement made by the intestate. I must, therefore, see whether I can give a reasonable meaning to the subsection, without giving rise to the suggested oscillation of the reversion. The solution is suggested by counsel for the defendant Harry.

- A** He says that Sydney became absolutely entitled, subject to dower, under the intestacy in 1925. Under the Settled Land Act, 1925, s. 1 (2), his interest was treated as derived from a settlement deemed to have been made by the intestate. Then, under s. 51 (3) of the Administration of Estates Act, 1925, his interest, though still potentially absolute, was cut down to an entail if he died an infant and unmarried. In other words, the legislature says to the infant: "If you attain twenty-one or marry the estate is yours absolutely. Otherwise it is only an entail."
- B** The result is this. The descent to Sydney as heir was fully satisfied once for all, and on his death under twenty-one the property goes to Harry, the next heir of the last purchaser, i.e., the intestate, just as under the old law of inheritance. That is the result of s. 51 (3). Sydney got all that he was entitled to, and the reversion, tracing back the title from the intestate, goes to Harry. Harry again only takes
- C** an entail until twenty-one or marriage, when his estate will become absolute.

Solicitors: *Collyer, Bristow & Co.*, for *Titley & Paver-Crow*, Harrogate.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

D

Re BURN. Ex parte DAWSON AND OTHERS

E [CHANCERY DIVISION (Luxmoore and Farwell, JJ.), November 25, 1931]

[Reported [1932] 1 Ch. 247; 146 L.T. 386; [1931] B. & C.R. 103; 101 L.J.Ch. 110]

Bankruptcy—Appeal—"Person aggrieved"—Appeal against refusal of application by trustee for order for payment to trustee of part of bankrupt's earnings—

F *Appeal by creditor—Competency—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 51 (2), s. 108 (2).*

A trustee in bankruptcy applied to the county court under s. 51 (2) of the Bankruptcy Act, 1914, for an order that the bankrupt should pay to him part of his income to be applied by him in such manner as the court directed. The county court judge refused to make the order, and a creditor of the bankrupt

G appealed.

Held: the creditor was not a "person aggrieved" within s. 108 (2) of the Act, and so was not entitled to appeal.

Bankruptcy—Trustee in bankruptcy—Application for directions—Direction whether or not to call meeting of creditors—Duty of court—Consideration of all circumstances—No useful end served by meeting—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 79 (2), (3).

H

By s. 79 (3) of the Bankruptcy Act, 1914, a trustee in bankruptcy may apply to the court for directions in relation to any matter arising under the bankruptcy. Under this subsection the trustee may apply to the court for a direction whether or not he should comply with a request by creditors under s. 79 (2) that he should call a meeting of the creditors. On such an application the duty of the court is to consider all the circumstances, including the purpose for which the meeting is to be called, and, if the court is satisfied that no useful end can be served by the meeting, or that for any other reason it is not right or proper that the meeting should be held, to refuse to direct that the meeting should be held, and that is so even though the purpose, or one of the purposes, of the meeting is to remove the trustee and appoint a new one.

I

Notes. As to meetings of creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 325 et seq.; as to appropriation of income, see *ibid.* 456, 457; and as to appeals, see

ibid. 580 et seq. For cases see 4 DIGEST 211, 212, 524 et seq., and 5 DIGEST 726 A et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

- (1) *Re Sidebotham, Ex parte Sidebotham* (1880), 14 Ch.D. 458; 49 L.J.Bey. 41; 42 L.T. 783; 28 W.R. 715, C.A.; 4 Digest 225, 2114.

Appeals from Durham (Sunderland) County Court in bankruptcy.

On Dec. 9, 1930, on a petition by one McClellan, a creditor of the bankrupt, James Burn, a receiving order was made, and on Dec. 30 a trustee was appointed. On Aug. 7 the trustee moved in the county court of Sunderland for an order that the bankrupt should pay him such weekly or other sum as might be directed out of his earnings after providing for himself and his family. No order was made thereon. The next day the petitioner and another creditor, Dawson, requisitioned the trustee to call a meeting of creditors with the object, among others, of removing him from office. On Aug. 19 the trustee issued a notice of motion in the county court for a declaration that he need not act on the requisition, and that the petitioner and Dawson be restrained from taking steps for his removal without leave of the court. On Aug. 25 Dawson requisitioned the official receiver to summon a meeting and to consider the conduct of the trustee in not having done so, but this the official receiver refused to do. A meeting was, therefore, summoned by Dawson on Oct. 7 and held at Sunderland, and a notice of motion was afterwards issued that the trustee's motion of Aug. 19 be removed from the file and that he and/or the official receiver be directed to call the meeting desired. On Oct. 22 three applications were heard by the county court judge. By the first the bankrupt asked for a discharge which, notwithstanding the opposition of the petitioner and Dawson, was granted with a three months' suspension. The next was the trustee's notice of motion of Aug. 19; this order was made as asked. The third asking that the trustee's notice be removed from the file and that he be directed to summon the meeting as requested was dismissed. The present proceedings were appeals by Dawson from these orders.

The Bankruptcy Act, 1914, provides:

"Section 51 (2): Where a bankrupt is in receipt of a salary or income other than [the specific salaries or income specified in sub-s. (1)], or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the court may direct."

"Section 79 (2): The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, and it shall be lawful for any creditor, with the concurrence of one-sixth in value of the creditors (including himself), at any time to request the trustee or official receiver to call a meeting of the creditors, and the trustee or official receiver shall call such meeting accordingly within fourteen days . . ."

"Section 108 (2): Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal . . ."

The appellant in person.

S. T. T. James for McClellan.

Stable, for the trustee, referred to *Ex parte Sidebotham* (1).

Burrows for the official receiver.

LUXMOORE, J.—This is an appeal by Mr. Dawson from an order of His Honour Judge RICHARDSON made at Sunderland County Court and dated Aug. 7, 1931, which was made on a motion by the trustee in bankruptcy asking, first, for an order against the bankrupt to pay to the trustee such weekly or other sums as

A the court might direct out of the personal earnings of the bankrupt after providing for the maintenance of himself and his family at such rate per week as the court might direct. The motion also asked for an order directing the bankrupt to show cause why certain proofs of debts lodged in the matter by Mr. Dawson and by Mr. McClellan, a respondent to this appeal, should not be admitted by the trustee. B Mr. Dawson is appealing from the order so far as it rejects the trustee's application that the bankrupt should be directed to pay part of his earnings to the trustee. There is no appeal on the second part of the motion with regard to the proof of debts.

Counsel who appears for the trustee in bankruptcy has taken the preliminary objection that Mr. Dawson is not entitled to appeal so far as the order deals with what I call the first question, that is, the payment by the bankrupt out of his future earnings. That part of the application was made under s. 51 (2) of the Bankruptcy Act, 1914. It will be noticed there that the application is to be made by the trustee. The learned county court judge has determined that no part of the salary or income of the bankrupt should be applied under s. 51, and he declined to make any order for the payment by the bankrupt to the trustee of any part of his future personal earnings as a pilot. The trustee has accepted that decision, and does not D appeal from it in any way. Counsel says that, that being the case, there is no right in any creditor in the bankruptcy to appeal.

A creditor's right to appeal against an order is provided by s. 108 (2) of the Bankruptcy Act, which provides that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows . . ." The question, therefore, is whether in such a case as this a creditor is a "person aggrieved." E It was decided as long ago as the year 1880 in *Ex parte Sidebotham* (1) that the words "person aggrieved" have this meaning—I am reading from the judgment of JAMES, L.J.:

"But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." F

G Can it be said that an order which is made refusing an application by a trustee that part of a bankrupt's future earnings shall be paid to him has done anything to the creditor to bring him within any of the classes which are referred to by JAMES, L.J., in the passage which I have just read? I do not think it is possible to say that a creditor comes within that definition. It is made even clearer, I think, by what was said by BRAMWELL, L.J., in the same case, where he is dealing with a question in which the Comptroller in Bankruptcy had made a report, and the county court judge had refused to act on the report that the trustee in bankruptcy had been H guilty of misfeasance or neglect or omission, by which the estate had sustained a loss which the trustee ought to make good. The bankrupt was appealing from the refusal of the county court judge to act on that report, and BRAMWELL, L.J., said:

"Supposing that the Comptroller has a right to appeal from the refusal of the judge to act upon his report, and he does not think fit to do so, is there to be an appeal by the bankrupt or by any of the creditors? Is the Comptroller to be satisfied, and yet is the bankrupt or any creditor to be entitled to appeal? I do not say that such a state of things is impossible, but certainly the general rule is that an appeal must be by the party who has endeavoured to maintain the contrary of that which has taken place. It is not so much that there is a disability on the part of the bankrupt to appeal, as that no one but the Comptroller is entitled to appeal." I

It is said, first, that the appellant, Mr. Dawson, is entitled to appeal in this matter, because he was a respondent to the motion by the trustee. He was made a respondent to that motion, not with regard to the first matter in respect of which

relief was asked, but with regard to that matter in respect of which he was himself personally interested, that is, with regard to the proof which he had lodged in the bankruptcy. Mr. Dawson contends that he is entitled to appeal because the application was in some way made under s. 38 (1) (a) of the Bankruptcy Act, 1914, which says that the property of the bankrupt divisible among his creditors shall comprise (among other assets) the following particulars:

"All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

He says that because there is no limitation in the section limiting the right of the trustee to apply to the court with regard to the bankrupt's property, he, as a creditor, would be entitled to make some application to the court. Any application to be made to the court would not be an application to recover any part of the property in question, but could only be an application to the court to direct the trustee in bankruptcy to make such application as he thought fit. In my judgment, the preliminary objection which has been taken, so far as this part of the motion is concerned, is a good objection, and Mr. Dawson, as appellant, is not entitled to appeal from the judgment of the county court judge so far as it affects this matter.

FARWELL, J.—I agree.

The court then dealt with a further appeal by Mr. Dawson, and, after hearing counsel, gave judgment as follows.

LUXMOORE, J.—This other appeal is by Mr. Dawson from three orders, which are all dated Oct. 22, 1931, and made by JUDGE RICHARDSON. The first, taking them in the order in which they appear in the notice of appeal, was made on an application by the trustee in bankruptcy dated Aug. 19, 1931, by which order the trustee in bankruptcy was directed not to act upon a requisition dated Aug. 8, 1931, by two creditors in the bankruptcy, the appellant, Mr. Dawson, and the respondent, Mr. McClellan, requiring the trustee in bankruptcy to call a meeting of creditors for the purpose of passing a resolution to remove the trustee. By the same order the trustee was directed not to act on two resolutions of the creditors in the bankruptcy passed at a meeting held on Jan. 8, 1931, at which the two creditors named were present, they at that time being the only creditors who had established their right to prove. The first of these two resolutions was to the effect that the conduct of certain appeals from orders of the county court of Middlesex, in which it was said the bankrupt and his estate were interested, should be committed to the respondent McClellan; the second of the two resolutions was to the effect that the trustee in bankruptcy should reject the proof of a certain firm of solicitors. The second order appealed from was an order made on the application of the appellant, Mr. Dawson, and the respondent, Mr. McClellan, dated Oct. 7, 1931. The application asked, first, that the trustee's application of Aug. 19 and the evidence in support of it should be taken off the file, and, secondly, that the trustee or the official receiver, or both or either of them, might be ordered to issue notices forthwith summoning a meeting of creditors for certain purposes of which the removal of the trustee was one. In substance this is the converse of the trustee in bankruptcy's application so far as it asks that the trustee in bankruptcy be directed not to act on the requisition of Aug. 8, 1931. The learned county court judge declined to strike out the application and refused to order the meeting to be convened. So far as the first point is concerned, it would be impossible to ask to take the evidence off the file when an order is asked by way of appeal from the order made by the county court judge on that application. I propose to treat the appeal from this order as asking solely for an order directing the trustee in bankruptcy and the official receiver, or both or either of them, to requisition a meeting of the creditors. The third order appealed from is an order of the county court judge granting the bankrupt his discharge subject to three months' suspension. If the order appealed from stands, the bankrupt's discharge will be absolute on Jan. 22, 1932.

A It has been argued by the appellant, Mr. Dawson, that there is a statutory right for creditors who fulfil the conditions laid down in the Bankruptcy Act, 1914, to insist on a meeting being called by the trustee in bankruptcy or the official receiver; that this right is paramount; and that, if the trustee in bankruptcy or the official receiver refuses to call the meeting, no matter how ridiculous the object, the court must, on the application of the creditor requisitioning the meeting, order the trustee in bankruptcy or the official receiver to comply with the requisition without considering any other matter. It is said that that follows from s. 79 of the Bankruptcy Act, 1914. Section 79 forms one of three sections headed "Control over Trustee." It is to be noticed that it does not provide what is to happen if the trustee or the official receiver fails to comply with the notice. Clearly, the only way to enforce compliance by the trustee or the official receiver is to apply to the court having bankruptcy jurisdiction. The court has wide powers in bankruptcy. They are summed up, I think, in s. 105 of the Bankruptcy Act, 1914. It is obvious that the court has complete control over the administration of a bankrupt's estate for the benefit of all persons interested, subject only to such express limitations as are to be found in the Act. It is admitted that if a meeting of creditors resolved on some particular course which the trustee might think would not be beneficial, the trustee has power to apply to the court for directions with regard to it. It would, indeed, be strange if the court, while having power to direct a trustee not to act on a particular resolution, had no power to direct a trustee not to call a meeting for the purpose of getting that resolution passed. I think the trustee had ample power under sub-s. (3) of s. 79 of the Act to apply to the court for directions whether a requisition for a meeting in compliance with the requirement of the Act shall be acted on or not. Subsection (3) of s. 79 is in the widest general terms. It provides:

"The trustee may apply to the court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy."

The question whether a meeting ought to be called or not must be a matter arising under the bankruptcy, and I can find nothing in the Act to cut down the generality of this provision so as to exclude the trustee from asking directions in respect of such a question. Moreover, it must be borne in mind that what the court is asked to do is not to restrain the holding of the meeting, but to give directions to the trustee whether he should convene it or not. In my judgment, on the facts of this case, it is clear that no useful purpose could be effected by calling the meeting. It is plain that the object of the meeting is not really the removal of the trustee; its object is in some way or other to bring it about that an appeal be made from the decision of the county court judge of Middlesex in the proceedings to which I have referred. I think the learned county court judge was right in directing the trustee not to hold it. It is quite true that one of the objects or avowed objects of the meeting was to remove the trustee, and, no doubt, the Act gives a majority of creditors a right to remove the trustee under an ordinary resolution obtained at a meeting called under s. 95 of the Act. But if the circumstances are such that the reason for calling the meeting is to attempt to obtain by the removal of the trustee an object which can only result in a useless expenditure of the assets in the bankruptcy, I am satisfied that the court has ample jurisdiction to refuse to direct the trustee to call the meeting necessary to effect that object. It follows from what I have said that the appeal from the order directing the trustee not to act on the requisition fails.

That leaves the second order appealed from to be dealt with. As I have already said, the second order appealed from is in substance the converse of the first in that by the application in which the order was made the appellant, Mr. Dawson, and the respondent, Mr. McClellan, ask that the trustee in bankruptcy or the official receiver, or one or both of them, should be ordered to convene a meeting for the purpose of removing the trustee. The notice of application includes other matters which were in fact never the subject-matter of any requisition to the trustee in bankruptcy or to the official receiver. There were three separate requisitions.

The first was on Aug. 8. That was addressed to the trustee in bankruptcy, and it asked that the meeting should be called for four purposes: first, to remove the trustee from office; secondly, to terminate the retainer of certain solicitors; thirdly, for the appointment of a new trustee; and, fourthly, to pass any further necessary resolutions relating to or arising out of the above matters. On Aug. 25 the appellant, Mr. Dawson, wrote to the official receiver asking him to call the meeting for the four purposes mentioned in the letter of Aug. 8, and to add a further paragraph to the effect that the meeting should consider the conduct of the trustee in avoiding compliance with the requisition duly served upon him to call this meeting of the creditors as provided and directed by the Bankruptcy Act, 1914, and the statutory rules made thereunder. That letter was only signed by Mr. Dawson, and was not in compliance with the requirements of the Act. On Sept. 14 there was a further letter from Mr. Dawson asking that the official receiver should require that further security should be obtained from the trustee. The actual notice of application to the court includes a number of other matters. It is composed of three notices, to which I have referred, and additional matters are included in it some of which at any rate were not in the power of the meeting to consider at all. I am satisfied, for the reasons which I have already given, with regard to the first order appealed from, that the order of the county court judge was right in refusing to direct the meeting to be convened, and I think that the reasons I have given cover the second order. In my judgment, the second order appealed from should be affirmed, and the appeal in this case should also be dismissed with costs.

[His Lordship said that the appeal against the third order would also be dismissed.]

FARWELL, J.—I agree and I only want to add very few words on the one question which seems to me to be of some general importance. Under the Bankruptcy Act, 1914, a creditor, if he complies with the necessary conditions laid down by the Act, may require the trustee or the official receiver in some cases to summon a meeting of creditors, and the trustee in bankruptcy or the official receiver's primary duty is to summon that meeting. If, however, a trustee or official receiver declines or neglects to summon a meeting, then the creditor undoubtedly has the right to come to this court and to ask for an order upon the trustee in bankruptcy or official receiver to convene the meeting. When that application is made, is the function of this court merely ministerial? That is to say, is its only function simply to make the order, once it is proved that the requisition was given, the conditions fulfilled, and the refusal or neglect to call the meeting; or has this court jurisdiction to consider the circumstances of the case as a whole, including the purpose or purposes for which the meeting is called, and, if it thinks proper, to decline to make any order upon the application? The appellant here has argued that the only function of the court is to make the order. He says, it is, as it were, an order of course, once the facts I have stated are proved, and that, however foolish, useless, or expensive the result of a meeting may be, this court has no power to do anything else but order a meeting to be held.

In my judgment, that is not the true view of the Act. In my judgment, this court's duty is, on such an application, to consider all the circumstances, including the purposes for which the meeting is to be called; and if the court is satisfied that no useful end can possibly be served by the meeting, or that for any other reason it was not right or proper that the meeting should be held, it is the duty of the court to refuse to make any such order. In my opinion, that is so even though the purpose or one of the purposes of the meeting may be to remove the trustee and to appoint a new one. It is quite true that under the Act, the creditors have the power to remove a trustee; but if the court, when it is asked to order a meeting to be held, comes to the conclusion that that meeting ought not to be held, in my judgment, it is bound to give effect to that by refusing the order, although it may by that means prevent for the time being the removal of the trustee. But I desire to add that, speaking for myself, it seems to me that the occasions upon which the

A court will refuse an order upon the trustee or official receiver to convene a meeting must be comparatively few. This court does not, in my judgment, concern itself generally with questions of policy, which are usually matters for the creditors, and, generally speaking, if a creditor bona fide requires a meeting of creditors to be called to consider matters of general policy or questions arising with regard to some particular matter in the bankruptcy, the court would not interfere, but would give effect to the desire of the creditors by ordering the meeting to be held. If, however, the court is satisfied that the holding of a meeting would be useless and would necessarily lead to quite useless expense and wasting of the assets, then, in my judgment, in such a case as that, the court must refuse to make the order. I have no doubt in the present case that no useful end can be served by holding this meeting, and that, if the meeting were to be held, the only possible result would be that some of these assets would be wasted in a fruitless endeavour to appeal against an order which, in my judgment, will necessarily fail.

In those circumstances, if I had been the county court judge, I should have considered it my duty to refuse to make the order, and I think he came to the right conclusion when he took that course and did refuse to order the trustee or official receiver to convene the meeting. Accordingly, in my judgment, the learned county court judge came to a right conclusion. On the rest of the case, I agree with what my brother LUXMOORE, J., has said, and I have nothing to add. In the result, the appeal will be dismissed with costs.

Solicitors: *J. Addis & Co.; Maude & Tunnicliffe, for J. Tindell Green, Sunderland; Solicitor to the Board of Trade.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

F

BAKER AND OTHERS v. SILLITOE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Acton, JJ.), July 22, 1931]

G

[Reported 145 L.T. 635; 95 J.P. 182; 47 T.L.R. 632;
29 L.G.R. 521; 29 Cox, C.C. 356]

Gaming—Ready money football betting—"Bet or wager"—Purchase of coupons in pool—Ready Money Football Betting Act, 1920 (11 Geo. 5, c. 52), s. 2.

H

By the Ready Money Football Betting Act, 1920, any person who publishes or circulates any coupon of a ready money football betting business commits an offence. By s. 2: "'Ready money football betting business' shall mean any business or agency for the making of ready money bets or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game." "Bets or wagers" in sub-s. 2 include staking sums of money on the results of games by means of the purchase of coupons in a pool.

I

Certain persons promoted competitions in accordance with a system under which football coupons were distributed to a large number of persons. The competitors were invited each week to forecast the results of a number of football matches, and each paid the promoters an entrance fee of one penny in respect of his forecast. That entrance fee was not in any event recoverable, but the promoters awarded prizes to competitors who made a correct forecast, or the most nearly correct forecast, or equalled other competitors in doing so. The amount of the prizes was indeterminate and entirely in the discretion of the promoters, but in practice largely exceeded the entrance fee.

Held: the promoters were rightly convicted of circulating coupons of "a ready money football betting business," contrary to the Ready Money Football Betting Act, 1920, despite the fact that the prizes were indeterminate in amount. A

Notes. Ready money pool betting is legalised by s. 10 (1) of the Pool Betting Act, 1954, but only so far as it is carried on by post by a promoter registered under the Act. B

As to ready money football betting, see 18 HALSBURY'S LAWS (3rd Edn.) 198, 199; and for cases see 25 DIGEST 449. For Ready Money Football Betting Act, 1920, see 10 HALSBURY'S STATUTES (2nd Edn.) 780.

Cases referred to:

- (1) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484; 61 L.J.Q.B. 696; 56 J.P. 665; 8 T.L.R. 680; 36 Sol. Jo. 628; on appeal, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 25 Digest 394, 2. C
- (2) *A.-G. v. Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141 L.T. 153; 45 T.L.R. 294, H.L.; Digest Supp.
- (3) *Strathern v. Scottish Greyhound Racing Co.*, 1930 S.C.(J.) 24; Digest Supp. D
- (4) *Earl of Ellesmere v. Wallace*, [1929] 2 Ch. 1; 98 L.J.Ch. 177; 140 L.T. 628; 45 T.L.R. 238; 73 Sol. Jo. 143, C.A.; Digest Supp.
- (5) *Strang v. Brown*, 1923 S.C.(J.) 74; 25 Digest 464, d.
- (6) *Suttle v. Cresswell*, [1926] 1 K.B. 264; 95 L.J.K.B. 367; 134 L.T. 144; 90 J.P. 3; 42 T.L.R. 75; 23 L.G.R. 695; 28 Cox, C.C. 94, D.C.; Digest Supp.

Case Stated by justices for the city of Sheffield. E

An information was laid by the respondent, Percy Joseph Sillitoe, chief constable of the city of Sheffield, against the appellants, who were twenty in number, alleging that between Dec. 1, 1930, and Jan. 9, 1931, and on divers other dates within six months then last past, within the city of Sheffield, the appellants unlawfully did knowingly circulate a coupon of a ready money football betting business contrary to the statute in such case made and provided. F

At the hearing it was admitted or proved that the Sheffield Foundry Workers' Club and Institute was registered as a friendly society under the Friendly Societies Act, 1896, and occupied premises in Birch Road, Attercliffe, in the city of Sheffield. The club was also registered as a club under the Licensing (Consolidation) Act, 1910, and in the last return, furnished on Jan. 19, 1931, to the clerk to the justices, pursuant to s. 92 (3) of that Act, and signed by the secretary, the number of members of the club was given as 850. During all material times the first nineteen appellants ("the promoters") were officers of the club and/or members of the committee of management which was specially appointed by the club committee to promote and manage the competitions hereinafter described. The promoters were citizens of credit and renown in the Attercliffe district. The twentieth appellant, James Hayes, was at all material times the doorkeeper of the club, employed by the other appellants on behalf of the club. G

Competitions in accordance with the system hereinafter described had been conducted by the promoters weekly since the beginning of August, 1930. On Jan. 9, 1931, these competitions were well established and the system of conducting them was well known to the numerous competitors. The system was as follows: (a) Printed coupons were from time to time ordered by the promoters from one William Edward Hayes, a printer, and were from time to time delivered by him to the promoters at the club premises. (b) Members of the public, whether members of the club or not, might and did call at the club premises, and upon request made by them might and did take away as many coupons as they wished. They were readily admitted by the appellant James Hayes if they stated that they wanted coupons, and the said Hayes assisted in distributing coupons to such applicants. (c) The names of football teams engaged in football matches on the Saturday of the week during which the coupons were distributed were printed in pairs on the left of the H

- A coupons. Columns numbered 1-26 were provided for the purpose of forecasting the results of those matches. (d) Any or all of the columns might be used by an individual competitor, who might, but need not, be the person who had obtained the coupon from the promoters, and who might, but need not, be the person who finally returned it when complete to the promoters. (e) Each competitor signed his name in the space provided below his own forecast, and, if not himself the holder (i.e., the person who returned the coupon, when completed, to the promoters), thereupon paid to the holder to be transmitted to the promoters one penny in respect of each column signed by him. (f) On a coupon being completed, the holder delivered it to the promoters at the club premises not later than the Friday, or occasionally the Saturday morning, of the week to which it related, and paid to them in respect of it one shilling and ninepence for the twenty-six columns, i.e., fivepence less than a total of one penny per column. When the holder had not himself made a forecast on the coupon he thus earned a commission or profit of fivepence in respect of the time and trouble expended by him in obtaining entries. In cases where the holder had obtained twenty-one entries and entrance fees from others and made five forecasts himself (as was often done) he thus made no direct payment to the promoters in respect of his own entries, but received the right to
- D make them in consideration of the time and trouble expended by him in obtaining entries from others. (g) The terms upon which each competitor made his forecast and paid his entrance fee were: (i) That as soon as possible after the results of the matches were known the promoters should award one or more money prizes—the amount being in their discretion—to the competitors, if any, who had correctly forecast all the results. (ii) That if no competitor were found to have made a correct forecast, the promoters should award one or more money prizes—the amount being in their discretion—to the competitor or competitors who had made the most nearly correct forecast. (iii) That no entrance fee should be returned to a competitor whether or not he won a prize. (iv) That out of the entrance fees received the promoters should make some contribution—the amount being in their discretion—to funds of the Sheffield Branch of the National Union of Foundry Workers known as the Benevolent Fund and the Children's Outing Fund. Although the amount of the prizes was in the discretion of the promoters, the justices drew the inference and found that it was well known to a large number of competitors from October, 1930, onward that the total of the prizes awarded weekly had amounted to over £100. (h) Week by week on the day after the results of the matches became known, or very shortly thereafter, the coupons received were checked by or on behalf
- G of the promoters, and prizes were awarded in accordance with the above terms.

- The number of coupons supplied to the promoters for the week ending Oct. 4, 1930, was 10,000, and from that date the weekly number gradually increased until for the week ending Dec. 27, 1930, it was 13,000. Before any entries from competitors were received in any particular week the promoters had already paid or become liable for the printing expenses in respect of the coupons for that week.
- H The coupons circulated over a large area, instances being proved of their reaching an ironworks at Swinton and a club at Walsall, respectively ten and seventy miles from Sheffield. Instances also were proved of their being filled up by competitors and entrance fees being paid in a licensed house in Sheffield. A schedule included in the Case showed week by week the amount received by the promoters in entrance fees, the printing expenses, the amounts debited by the promoters for other expenses, the expenditure in prizes, and the balance remaining in the hands of the promoters for disposal. The amounts shown as debited by the promoters in respect of "other expenses" were taken from the books of the promoters, but those books did not specify, nor was any evidence given to specify, what those expenses were. The totals from Aug. 23, 1930, to Dec. 27, 1930, were: income, £6,738 16s. 1d.; expenditure, prizes, £2,060 15s. 6d.; other expenses, £1,035 13s.; printing expenses, £104 18s. 6d.; balance in hand, £3,537 12s. 1d.

The promoters week by week: (a) Knowingly circulated such coupons as aforesaid; (b) received the entrance fees paid by competitors subject to the commission

arrangement above described; (c) were the persons to whom the competitors looked for the payment of prize money; (d) undertook to pay that prize money; (e) in fact paid it as set out above; (f) supervised the checking of coupons; (g) were financially interested as officers of the club and/or members of the committee of management in the volume of the weekly transactions inasmuch as they became possessed of the surplus after payment of expenses and prizes; (h) in fact disposed of part of that surplus as set out in the preceding paragraph. If the competition for any one week were regarded as a whole, the promoters, in view of the fact that the amount of prize money to be awarded was in their discretion, could suffer financial loss in respect of it only if the entrance fees received were insufficient to meet the expenses incurred by them. The chances of such a loss were negligible. The position as between an individual competitor and the promoters was: (a) That the competitor could not in any event recover his entrance fee; (b) that the promoters in any event received and kept the entrance fee, subject to the commission arrangement above mentioned; (c) that if the competitor failed to make a correct or the most nearly correct forecast, the promoters were under no liability to him; (d) that if the competitor made a correct or the most nearly correct forecast, or equalled one or more other competitors in doing so, the promoters were under an obligation to pay him a prize of an amount to be determined by them, but which would in practice largely exceed the entrance fee.

It was contended on behalf of the appellants that they had not committed any offence; that they had not circulated a coupon of a ready money football betting business within the terms of the Ready Money Football Betting Act, 1920, under which they were charged; that by s. 2 of the said Act, ready money football betting business is defined as

“any business or agency for the making of ready money bets or wagers, or the receipt of any money or valuable thing as the consideration for the bet or wager in connection with any football game”;

that there was no bet or wager proved, since, in accordance with the decisions of the court hereinafter referred to, to constitute a bet or wager there must be two persons professing to hold opposite views touching the issue of a future uncertain event and mutually agreeing that, dependent upon the determination of that event, one should win from the other and the other pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in the contract than the sum he should win or lose, there being no other real consideration for the making of such a contract for either of the parties: per HAWKINS, J., in *Carlill v. Carbolic Smoke Ball Co.* (1) ([1892] 2 Q.B. at p. 491). The justices were referred by the appellants to the following cases: *Carlill v. Carbolic Smoke Ball Co.* (1); *A.-G. v. Luncheon and Sports Club, Ltd.* (2); *Strathern v. Scottish Greyhound Racing Co., Ltd.* (3); and *Ellesmere v. Wallace* (4). It was contended by the respondent that each of the appellants was guilty of the offence charged. In addition to the cases cited on behalf of the appellants he referred to the following case: *Strang v. Brown* (5).

So far as the justices were entitled to draw any inference from the foregoing findings of fact, they drew the inference and found as facts: (i) That the competitors were betting and wagering with the promoters; (ii) that the bets or wagers were ready money football bets or wagers; (iii) that if the competitors were not betting or wagering with the promoters they were betting and wagering between themselves; (iv) that those bets or wagers were ready money football bets or wagers, and, if it was material to their decision, that the appellants aided and abetted, counselled and procured their making; (v) that whether (i) or (ii) were correct, the promoters carried on a business in connection with these bets or wagers and that that business was a ready money football betting business; (vi) that coupons of the said business were knowingly circulated by all the appellants. They were, therefore, of opinion that the appellants should be convicted. They, accordingly, convicted them, and fined them £10 in some cases and £25 in others. The question

A upon which the opinion of the court was desired was whether the justices came to a correct determination and decision in point of law.

Willoughby Jardine, K.C., and John Neal for the appellants.

R. M. Montgomery, K.C., and W. A. Macfarlane for the respondent.

B **LORD HEWART, C.J.**—This is a Case Stated by justices for the city of Sheffield. The appellants were convicted on an information alleging that they knowingly circulated a coupon of a ready money football betting business contrary to the statute in such case made and provided. I do not propose to read again the Case, which is very fully stated. The question for this court is whether the justices who convicted the appellants came to a correct decision in point of law. In view of their findings of fact, I do not think that it is possible to say that they did not, especially having regard to *Suttle v. Cresswell* (6), where the Scottish case of *Strang v. Brown* (5) was approved. Great stress has been laid by counsel for the appellants on the fact that the prizes in the present case were indeterminate, but I do not think that that is material. The same feature was present in *Strang v. Brown* (5). In my opinion this appeal should be dismissed.

D **AYORY, J.**—I am of the same opinion, though I have entertained some doubt whether a transaction can amount to a bet in which one party can be said to stake a certain amount and the other to stake an uncertain amount, that is to say, an amount in his own discretion—where one says: “I will stake one penny,” and the other: “I will stake some amount more than a penny that you do not name the winners, but reserve the right to say after the event how much I will pay.” I have

E felt some doubt whether that is a bet.

It is to be observed that we are here dealing with the Ready Money Football Betting Act, 1920, which defines a “ready money football betting business” as

“any business or agency for the making of ready money bets or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game.”

F It is worthy of notice that the words of that section differ in a slight respect from the words of the Betting Act, 1853, which provided that

“no house, office, room or other place shall be opened, kept, or used for the purpose of the owner, occupier or keeper thereof or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter

G any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.”

So, under this Act with which we are now concerned, it is clear that it must be shown that there is either a ready money football betting business or a receipt of money as the consideration for a bet. As I have said, I have entertained some doubt whether in view of the fact that the promoters were not staking a definite amount, the transaction could properly be described as a bet, but in view of the Scottish decision of *Strang v. Brown* (5), in which undoubtedly the same element appeared, and in view, further, of the fact that that case was cited and approved in *Suttle v. Cresswell* (6), I am prepared to resolve my doubt in favour of the respondent, and to say that the decision was right and the appellants properly convicted. I desire to add that in the other case to which our attention has been called, *Strathern v. Scottish Greyhound Racing Co., Ltd.* (3), which was decided

after the decision of the House of Lords in *A.-G. v. Luncheon and Sports Club, Ltd.* **A**
(2), the decision in *Strang v. Brown* (5) was again mentioned and approved as not
being in conflict with *A.-G. v. Luncheon and Sports Club, Ltd.* (2).

ACTON, J.—I agree.

Appeal dismissed.

Solicitors: *Corbin, Greener & Co.*, for *Arthur Neal & Co.*, Sheffield; *Sharpe, B*
Pritchard & Co., for the Town Clerk, Sheffield.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL v. YULE AND MERCANTILE BANK OF INDIA **D**

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January
28, 29, 30, February 2, March 4, 1931]

[Reported 145 L.T. 9]

*Domicil—Change of domicil—Burden of proof—Abandonment of domicil of origin
and choice of new domicil—Evidence—Declaration of change.* **E**

A person cannot get rid of his domicil of origin by merely residing in another
country, for there is a clear distinction between residence and domicil, or by
merely making a declaration, e.g., in his will, that he has abandoned his
domicil of origin and acquired another domicil. The domicil of origin con-
tinues until he has manifested an intention to abandon that domicil and choose **F**
another. A domicil of choice is inferred by the law where a person fixes his
sole or chief residence in a particular place with the intention of abandoning
the domicil of origin and settling in the new country. This intention need
not be an expressed one. It may, and usually has to be, inferred from a
variety of circumstances. In some cases it may be inferred from long con-
tinued residence in the new country, though it would be difficult, and probably **G**
impossible, to do so where a place of residence was retained in the country of
origin. Even where the person has, apparently, severed all ties connecting
him with his country of origin and has resided for a long time in a new country,
it would not be safe to infer from these actions an intention to abandon his
domicil of origin if they could be attributed to some other cause. It is always
material, in determining a person's domicil, to consider where his wife and **H**
children have their permanent place of residence. As to a declaration as to
domicil no importance should be attached to it unless there is some evidence
to show that the person knew what "domicil" means. Domicil is a legal con-
ception on which the views of a layman are not of much assistance, but a
declaration by a person, made orally or in writing, that he intends to remain
in a certain country, will, if not inconsistent with the facts, be of assistance
in determining the question whether he has become domiciled there. The **I**
presumption of law is always against a change of domicil, and the onus on
those who seek to prove that a domicil of origin has been abandoned in favour
of a domicil of choice is a heavy one. Where that onus has been discharged,
the onus of proving the subsequent abandonment of the domicil of choice and
the reversion to the domicil of origin is on those concerned to prove those facts.

Notes. Considered: *Abraham v. A.-G.*, [1934] P. 17. Referred to: *Boldrini v.*
Boldrini and Martini, post, p. 708; *I.R. Comrs. v. Cohen* (1937), 21 Tax Cas. 301.

A As to change of domicile, see 7 HALSBURY'S LAWS (3rd Edn.) 18 et seq.; and for cases see 11 DIGEST (Repl.) 331 et seq.

Cases referred to:

- (1) *Re Steer* (1858), 3 H. & N. 594; 28 L.J.Ex. 22; 32 L.T.O.S. 130; 157 E.R. 606; 11 Digest (Repl.) 335, 78.
- B** (2) *Platt v. A.-G. of New South Wales* (1878), 3 App. Cas. 336; 47 L.J.P.C. 26; 38 L.T. 74; 26 W.R. 516, P.C.; 11 Digest (Repl.) 349, 179.
- (3) *Ross v. Ellison (or Ross)*, [1930] A.C. 1; 96 L.J.P.C. 163; 141 L.T. 666, H.L.; 11 Digest (Repl.) 335, 81.
- (4) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, 39.
- C** (5) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, 22.
- (6) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, 41.

Appeal by the executors of the will of Sir David Yule from an order of ROWLATT, J.

The facts are fully set out in the judgment of the Master of the Rolls.

D *Sir John Simon, K.C., H. B. Vaisey, K.C., Wilfrid M. Hunt and G. R. Upjohn* for the executors.

The Attorney-General (Sir William Jowitt, K.C.), the Solicitor-General (Sir Stafford Cripps, K.C.) and J. H. Stamp for the Crown.

Cur. adv. vult.

E March 4. The following judgments were read.

LORD HANWORTH, M.R.—The question to be decided in this case is what was the domicile of Sir David Yule at his death on July 3, 1928.

By his will, which was dated June 28, 1922, he made a declaration of Indian domicile. But a declaration in a will does not decide the point. It is laid down in *Re Steer* (1) that both on principle and authority a person cannot get rid of his domicile of origin by merely residing in another country, but the domicile continues, unless he has manifested an intention of abandoning the domicile of origin and acquiring another. An intention must be drawn and inferred from the facts—a mere declaration of it is not conclusive. In *Re Steer* (1) the court held, contrary to the declaration contained in the will, that the testator was domiciled in Hamburg. Equally, the declaration in Sir David's will does not conclude the matter, and it is, therefore, necessary to state the facts with some care.

G Sir David Yule was born in Edinburgh on Aug. 4, 1858; he was one of a family of six children, three boys and three girls. His father, David Yule, had two brothers, George and Andrew, whose success as merchants provided the pathway to their nephew's success. George founded the firm in London of George Yule & Co.; Andrew founded the firm in Calcutta of Andrew Yule & Co., which carried on the business in cotton, jute and tea. Both brothers were partners in these two firms; and by an irony of fate, George was chiefly in India at Calcutta, while Andrew was much in London, living at Dulwich till his death in 1902. George worked in close association with the Indians, with whom he came in contact in his business, and was in sympathy with them; in fact, he became President of the Indian National Congress soon after it had been founded. The young David Yule went to the

I Royal High School in Edinburgh in 1866, and when sixteen years old, he left school and was sent in 1875 to Calcutta, where he worked in the cotton mills of Andrew Yule & Co. In 1880 he became a partner in that firm, and in 1883 he came home for a few months. A noticeable incident of this visit is that while he was at home he first met the daughter of his uncle Andrew, then a girl of about nine years old, and she afterwards became his wife. Returning in 1883 to Calcutta, he became head of the firm of Andrew Yule & Co. in 1888, and applied himself with extraordinary determination and industry to the business of the firm. He stayed on in Calcutta, apparently not leaving it, even in the hot weather, and did not pay

another visit home till 1900, when he had reached the age of forty-two years. He thus remained in India for an unbroken period of seventeen years. During this time there is evidence that he followed the example of friendliness towards Indians that his uncle George had set him, but in an intensified degree. He became intimate with a number of Indians and sought, by sympathetic treatment of them, and securing their confidence, to advance his business, not forgetting at the same time to do kind actions towards them. Thus he took charge of the children of his friend, Ramjeedas Jatia, who died in 1893, leaving two boys and a girl. He promised his friend on his deathbed that he would take care of them—a promise which he faithfully kept, for he treated them as his own children and took part in their religious festivities from time to time, and ultimately presented them to the King and Queen when they visited India in 1912. Sir Onkar Mull Jatia—one of the boys that Yule took charge of—states that Sir David was a man of the simplest possible habits and was never happy unless at work—"He used to work on Sundays just the same as on other days. He was a shrewd, hard-working business man, and he devoted his whole life to his business—in fact his business was his life. He rarely went into society at all, but, if he did, it was rather in gatherings of Indians than of Europeans that he found his place."

In September, 1900, he came home to his family circle, proposed to and was accepted by his cousin, Annie Henrietta, the daughter of his uncle Andrew. The marriage took place without delay on Dec. 12, 1900, and the bride and bridegroom went to Scotland for their honeymoon. In January, 1901, they went out to Calcutta, and at first they lived in a house of some importance, the old palace of the Kings of Oudh in Garden Reach, Calcutta. Unfortunately, the climate of India did not suit Mrs. Yule, who had an attack of malaria in July, 1901, and returned to England in November of that year. David Yule followed her in February, 1902. He went back to India in November of that year, while his wife remained in England; and successively in the years 1903 to 1910 he paid visits for a substantial time in each year to be with his wife in England. The house in Garden Reach was given up, and when in 1907 the offices of the firm of Andrew Yule & Co. were re-built, a comfortable, if not very large, flat was provided at the top of them, where Yule took up his residence, and where he continued to reside whenever he was in India. Meantime, in order to provide a suitable home for his wife when she was unable to accompany him on his return to India, in November, 1902, Hanstead House, near St. Albans, was purchased, and there a daughter was born on July 30, 1903—an only child, as subsequent events proved. It is a property comprising some 150 acres—a gentleman's residence in a district which offered facilities for stock and horse breeding, in which his wife, and, later on, his daughter, became interested. From January, 1912, to November, 1915—approximately four years—Sir David—for he had been knighted in 1911—remained in England and did not visit India, being detained, it is said, by some litigation over here in which he was interested. In 1916 Lady Yule and her daughter went out to Calcutta, but returned after two months, for once more Lady Yule suffered from malaria. While in Calcutta the ladies lived at Sir David's flat, which was small and only had two or three bedrooms, a bathroom, dining room and hall. Sir David followed his wife home in 1917, and thereafter he remained in England till he died at Hanstead House on July 3, 1928, save for some comparatively short visits to India in 1919, 1920, 1922, 1924, and 1925. He was, however, not continuously during this spell in England while he was in Europe, for a villa was bought in 1921 at Cannes by Lady Yule, as a sort of compromise residence—not too far from England and not so far as England from India—and some visits to it were paid by Sir David from time to time when Lady Yule was residing in it. She went there chiefly in the winter season, and in one year Sir David remained at Hanstead while his wife had gone to Cannes to escape the winter in England. The daughter, however, had no interests at Cannes and much preferred Hanstead, so the villa was sold in 1927, and once more the residence of the family was transferred to Hanstead, where, either in the large house, or in a smaller cottage upon the property which was found

A convenient during the war [of 1914–18], Sir David—who was made a baronet in 1922—resided with his wife and daughter.

While remaining the dominant partner in the house of Andrew Yule & Co., Sir David had in 1906 and in subsequent years become increasingly interested in business in London. He was made a director of the Mercantile Bank of India in 1906, and attended the board frequently when at home. The table drawn out for the information of the court proves that in 1918 he held five directorships, which he retained to the end of his life, adding to them in the last few years of it. The evidence is convincing that Sir David was throughout his life devoted to his business; that he applied himself to it with a constancy which was never relaxed; and his cotton broker, Ramcoomar Chokhany, who did business with him every day, and had known him for twenty-five years, tells us that he used to say that he—Sir David—did not like any other place in the world better than Calcutta. He had, however, one form of recreation—fishing—which is not without some significance upon the issue before the court. In 1902 he took a lodge at Inverlochry for fishing, and again they were there in September, 1903, when their little baby was with them. They were only prevented from taking it in the subsequent intervening years, until 1910, by the fact that another tenant secured it; and in those years, though not regularly, they went to some place in Scotland in August or September for fishing. In 1910 the lodge fell vacant and Yule took it on a seven-twenty-one years' lease. He never broke the lease, so he remained tenant of the lodge and fishing at the time of his death. The above is a sketch of Sir David's life. Further details can be filled in from the evidence, but they do not, to my mind, alter the general outline.

The executors claim that Sir David Yule had established a domicile of choice by the year 1900 to be inferred from his continual and unbroken residence in Calcutta, or, at any rate, in India, for seventeen years, coupled with his sincere attachment to the Indians themselves. There is no doubt that his confidential stockbroker was an Indian, Sham Lall Laha, from 1886 onwards; that his cotton broker was also an Indian—Ramcoomar Chokhany; that he associated in some unusually intimate ways with Indians; and that, if and so far as he kept any society, he was as much, perhaps more, at home with Indians as with Europeans, and he spoke their language fluently. The executors claim that they have discharged the onus, which they admit lies upon them, of establishing a domicile of choice, and that thereafter the onus lies upon the Crown to displace the domicile of choice, which has not been and cannot be done, for did not Sir David in his will make the declaration that he adhered to an Indian domicile? In my opinion, ROWLATT, J., was right in his view that the earlier period of Sir David's life cannot be estimated in a compartment separate from his later years, and that the later years must be regarded as throwing light upon the earlier.

In my judgment, the executors have not established that Yule had acquired a domicile of choice in 1900. The evidence of intention in the pre-marriage period is slight. It is to be found in his close attention to his business—his friendliness with Indians, and the like. But other facts which point in an opposite direction must not be overlooked. Throughout this space, there is no evidence that he had broken away from his home ties. The family of Yule was what would have been called in those days, Anglo-Indian, in the sense of having interests both at home and in India. David Yule was in touch in his business with George Yule & Co. in London. His uncle Andrew, who had been in India, for a time, or at times, ultimately left it for London and settled down in Dulwich, where he died in 1902, and left his example behind him. His uncle George remained a partner in George Yule & Co., of London, till 1892, when he died. He was a good deal in India, as the fact of his becoming President of the National Congress proves, so that David was not cut off from his family entirely during the whole seventeen years—even if he did not go home. It is more in keeping with the facts that David followed his uncle's example and consistently worked with Indians without breaking his contact with them by frequent absences to home. There is no doubt that his success in

business may be attributed to his mixing freely, and his close association, with Indians, but, as ROWLATT, J., finds, he never became orientalised, and there is no evidence that in the pre-marriage period he expressed himself as determined to make India his final home, however much or often he may have expressed his devotion to it later. Mr. Wheatley's words express this affection most forcibly when he says that Sir David was "always writhing to get back to India when he was here—his object was to get back to his work there. That was his song all the way through." That testimony must intrinsically be referred to some date after he had left India in September, 1900. But in December of that year a crucial event took place. Sir David was married. He did not seek his bride among European ladies in India, but came home in September, and on Dec. 12 he married the cousin whom he had met as a girl in 1883.

The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband: see DICEY'S *CONFLICT OF LAWS*, 4th Edn., p. 123, and cases there cited. It seems material to ask: Was he intending to make his cousin join him in his acquired domicile of choice when she became his bride at a time when she had had no experience whether she would like India? There is some evidence that she had her misgivings. "I wanted to know how long I should have to be out there," said Miss Yule to him before they were married, "and I do not know whether he said it jokingly, or whether he meant it, but he said about ten or eleven years." It seems to me that if at that time Mr. Yule had formed a fixed resolve to remain an Indian with an Indian domicile, he would have explained the position candidly to his bride. After 1900 the facts do not, in my judgment—and, indeed, it is not contended that they do—indicate a choice in favour of India. When he had married, and it was found that his wife could not live in India—still more when his child was born and developed tastes which attached her to Hertfordshire—there was a heavy pull towards "home," which increased in force as time went on. A glance at the chart prepared for us and covering the years 1902 onwards makes this plain—more and more business in London, fewer and shorter visits to India. His position is well summed up by Lady Yule, who tells us that "he said his interests were very large and he preferred India and that he would never lose his affection for India"; and, speaking of his marriage: "He said if he had not married he never would have left India. He said that distinctly." That was the rub. Yet none the less it seems to have had a decisive effect upon his choice.

It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence: see *Platt v. A.-G. of New South Wales* (2). The law thus recognises in this subject the power of human affection.

Some evidence was placed before us as to a will made on his marriage and his description in it. For my part, the wills, or drafts of them, have not much weight—the source of the description in the draft or the will remains obscure and uncertain. I do not find any sure ground on which to base an inference. There are, however, two letters of recent date which seem important. When he was proceeding to make his last will, which is dated June 28, 1922, his solicitor writes to him on Jan. 24, 1922: "I think it will save complications if you retain your British domicile." In his reply on Feb. 20 he does not reply that his domicile is Indian and cannot be changed. It would seem to be treated as an open question on which Sir David finally chose an Indian domicile.

The question arises: Was it open to his choice? In his speech in *Ross v. Ellison* (or *Ross*) (3) ([1930] A.C. at pp. 6, 7) LORD BUCKMASTER says:

"Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

A In *Bell v. Kennedy* (4) (L.R. 1 Sc. & Div. at p. 320) LORD WESTBURY makes clear the distinction between residence and domicile; that they are two perfectly distinct things. He says:

"It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of the parties. . . . Domicil, therefore, is an idea of law."

B He explains that (L.R. 1 Sc. & Div. at p. 32):

"it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation."

C Later, he lays it down that, unless you are able to show with perfect clearness and satisfaction that the domicile of choice had been established, it follows that the domicile of origin continues. In *Udny v. Udny* (5) LORD WESTBURY again explains that domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. He proceeds (L.R. 1 Sc. & Div. at p. 458):

D "It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose of animus manendi can be inferred, the fact of domicile is established."

E He also enunciates the rule that as the domicile of origin is the creature of the law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile and it does not require to be reconstituted animo et facto, in the manner which is necessary for the acquisition of a domicile of choice. These passages that I have quoted from LORD WESTBURY are repeated

F and approved by LORD MACNAGHTEN in his speech in *Winans v. A.-G.* (6) ([1904] A.C. at p. 291) and he sums them up:

"So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice! and rightly, I think. A change of domicile is a serious matter. . . . The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile."

G Applying these rules to the present facts, I think that the declaration in the will and the choice of Sir David must be set aside as not deciding the point. Domicile is an idea of law, not of the citizen's choice only. It must be decided animo et facto. The animus manendi must be considered, the intention of the resident must be observed and deduced. The fact of residence in Calcutta between 1883 and 1900 does not afford a discharge of the heavy burden which falls upon the executors. There does not emerge from the period—"with perfect clearness and satisfaction"—a manifest and concluded intention to overcome the domicile of origin. Still less does that period of residence fulfil such a purpose when it is analysed by the light of subsequent events. The marriage interrupted any such accruing intention and provided once more ties which bound Sir David to his domicile of origin. Hopeful as he might have been from time to time that Lady Yule would be able to come for longer visits to, or residence in, India, that hope seems to have been gradually, but certainly, dispelled, and in the last years of his life he yielded to the stress of circumstances. His love for India and its people and its climate remained; but his loyalty to his wife and daughter compelled his wishes to be ineffective. In my judgment, ROWLATT, J., came to a right conclusion and the appeal must be dismissed with costs. I am authorised and requested by **LAWRENCE, L.J.**, to say that he has read the judgment which I have just delivered, and that he agrees with it.

ROMER, L.J.—In order to succeed upon this appeal the executors have to discharge the onus of proving that at some time or another before his death Sir David Yule chose an Indian domicile in substitution for his domicile of origin, which admittedly was Scottish. Should they succeed in discharging this onus, the onus of proving that Sir David subsequently abandoned his Indian domicile and so reverted to his domicile of origin would fall upon the Crown. A

Winans v. A.-G. (6) and other authorities leave no room for doubt as to what facts have to be established in order to prove the acquisition of a domicile of choice. Leaving out of consideration the rare cases in which an emigrant, having left his own country, dies in the course of his journey to another, these facts are (i) residence in a country other than the country of origin, (ii) a deliberate intention to abandon the domicile of origin and settle in the new country. This intention need not be an expressed one. It may, and, indeed, usually has to be, inferred from a variety of circumstances. In some cases it may be inferred solely from long continued residence in the new country, though it would be difficult, and probably impossible, to do so where a place of residence was retained in the country of origin. And even where the individual in question has, apparently, severed all ties connecting him with his country of origin and has resided for a long time in a new country, it would not be safe to infer from these actions an intention to abandon his domicile of origin if they can be attributed to some other cause. The onus that lies upon the shoulders of those who seek to prove that a domicile of origin has been abandoned in favour of a domicile of choice is indeed, as LORD MACNAGHTEN said in *Winans v. A.-G.* (6) ([1904] A.C. at p. 291), a heavy one. So it ought to be. For, to use LORD MACNAGHTEN's words again, a change of domicile is a serious matter, involving far-reaching consequences in regard to many things. But, heavy though the onus be, the executors contend that in the present case they have discharged it. They allege that by the year 1900 Sir David Yule had abandoned his Scottish domicile and had acquired an Indian one in its place. It is upon this allegation that the executors must, in my opinion, stand or fall. If he had not abandoned his domicile of origin at the date of his marriage in 1900, it seems to me impossible to contend that he did so afterwards. If, on the other hand, he had at that date abandoned his domicile of origin and acquired an Indian one, I cannot find any evidence sufficient to warrant the finding that he subsequently abandoned that domicile of choice and thus reverted to his domicile of origin. D E F

The strength of the executors' case in favour of an acquisition of an Indian domicile by the year 1900 lies in the following facts. In the year 1875 when he was seventeen years of age, the testator, Sir David Yule, left his parents' home in Edinburgh and proceeded to Calcutta, where he resided continuously until the year 1900 except for a brief visit to England in the year 1883. During this long period he does not appear to have exhibited any interest in his native land, and, so far as is known, he did not even visit Scotland when he came to England in 1883. In India, on the other hand, he identified himself to an extraordinary extent with the life and customs, and even with the religious observances, of the natives. These facts by themselves are not, however, in my judgment, sufficient to give rise to any inference that the testator had by the year 1900 formed any intention of abandoning his Scottish domicile and settling in India. When he left England in 1875, and for some four years afterwards, he was, of course, incapable of abandoning his domicile of origin by reason of his minority. He was not, however, too young to make up his mind whether or not he intended to reside indefinitely in India, and, if he did then form such an intention, it would probably have continued unchanged after he attained his majority. But it seems to me somewhat improbable that in those early days he should have formed such an intention. Everything points to his having left Scotland, not by reason of any distaste for the country or unwillingness to live there if he had been able to do so, but by reason of the fact that in India he would find greater scope for turning to profitable use that passion for work that seems to have been his dominating characteristic. He was a member of a family that had long had connections with India. His uncles George and Andrew had in G H I

A their earlier days spent a great deal of time there, and there they had laid the foundations of their success and fortune. It was, accordingly, not unnatural that young David Yule should have conceived the idea of following in their footsteps. But both uncles came back to England or Scotland in later life, and I can see no reason for thinking that their nephew went to India with any other intention. Nor can I find enough in the length of his continuous residence or in the nature of his life out there sufficient to lead to the inference that he formed any other intention after he arrived. Work was his passion, and it is to this rather than to any intention concerned with domicil that his prolonged stay in India is, in my opinion, attributable. Had he indulged in lengthy holidays and spent them in travelling about India when he might have returned to Scotland the case would have been different. But, so far as we know, while he was in India during these twenty-five years he was living in Calcutta.

C Why, when he returned to the United Kingdom in 1883, he did not visit Scotland we do not know. But it certainly is not an incident from which any inference can be drawn adverse to a retention of his domicil of origin. Nor do I think that his extraordinary relations with the native population of India ought to give rise to any such inference in all the circumstances of this case. Those relations can be sufficiently explained by what has been called by the Attorney-General the "Yule philosophy," without having recourse to some presumed intention to acquire an Indian domicil of choice. That philosophy demands that not only in the interests of successful trading, but also for higher and nobler reasons, the European in India should not hold himself aloof from the natives of the country, but should seek to identify himself with native life and thought. The testator was evidently not in the habit of doing things by halves. He entered upon the practice of this philosophy as thoroughly and as enthusiastically as he had thrown himself into his work. He attained a degree of friendliness and intimacy with the natives and a knowledge of their language and their family customs such as in all probability have never before been acquired by a European. But I am not prepared to infer from this that he did not contemplate a return to Scotland when his work should be finished and there should no longer be any necessity for his remaining in India. An Englishman resident in Rome may do as Rome does with the minutest particularity without necessarily acquiring an Italian domicil.

F But the acts of the testator to which I have referred, though insufficient, in my opinion, to raise any inference of a change of domicil, ought, especially when coupled with his great love for India, to make one's mind readily susceptible to any indication that his declarations may afford as to his intentions or decisions in the matter formed during the period ending with his marriage. I have, therefore, examined the evidence as to these very carefully, but have in the end arrived at the conclusion that they are not after all of any great value. Such statements as that he regarded India "as his country" or "as his real home" do not seem to me to do anything more than indicate the gratitude he felt for all that India had given him. G A boy may say that he looks upon a man as his father without intending to indicate any fact other than the existence of gratitude and affection. But even if the expressions used by the testator might otherwise be regarded as something more than harmless exaggerations, all doubt upon that matter seems to be set at rest by the statement made by Sir David Yule at the time of his marriage and before he took his wife back with him to India. When asked by his wife how long she would have to be out there, he answered "ten or eleven years." I think it is impossible to regard this conversation as referring merely to their next visit to this country. It must have referred to the length of their residence in India. If this be so, the testator's answer is quite inconsistent with his having formed any intention of residing in India indefinitely. If, indeed, the possibility of eventually taking a wife was always present to the testator's mind, it is unlikely that he would have come to a final determination where he would spend the evening of his life. So much would seem to depend upon whom he might marry. And, in truth, it was in the end his wife who proved the determining factor in this question of domicil,

as I read the story of his married life. For the moment, however, I merely record my conclusion that the executors have not discharged the onus of showing that David Yule had acquired a domicile of choice at the time of his marriage. A

After his marriage the testator returned with his bride to Calcutta where, as we know, he hoped to reside at any rate for ten or eleven years more. Had she been able to endure the climate it is more than probable that this period would have been largely exceeded, and that in the end the testator, his wife, and the daughter who was born in 1903, would have settled permanently in India and acquired an Indian domicile. Unfortunately, it proved impossible for his wife to live in India and, after being seriously ill with malaria, she was compelled to return to England in 1902, and, except for a short period in 1916, when she once more endeavoured to live in India and her health again failed, she never returned to that country. This was a grievous disappointment to Sir David Yule, who never seems to have given up hope that one day her health would sufficiently recover to enable all three of them to settle in India. In this hope he kept a look-out for any favourable opportunity of acquiring a suitable house there for the purpose. No such house, however, was in fact acquired. In the meantime he acquired a house in England for his wife and daughter, and there he often stayed himself on the visits he paid to the United Kingdom. At other times they went to Scotland for fishing, a sport to which he appears to have been greatly attached. These absences from India became more and more frequent as time went on, until it became the exception rather than the rule for him to be in that country. In 1906 he joined the board in England of the Mercantile Bank of India and in the course of the following years formed many other business connections in this country until by the year 1924 he was upon the board of no less than fourteen companies. Thus India gradually played a smaller and smaller part in his life. It is true that he never gave up his dream of residing there with his wife and daughter, as appears from what he said to his Indian friends. And yet the very words that he employed seem to indicate quite clearly that, however great his hopes might be, and whatever he might have done had circumstances not been too strong for him, he realised that he had never succeeded in settling in India. Mr. Laha, for instance, deposes to the fact that from what the testator told him he understood it was the testator's intention to acquire a property in Calcutta or its suburbs in which to settle down permanently in the surroundings of his life's work and ambitions. But he never did. Then on more than one occasion he said that he never would have left India if he had not married. But he did marry and he did leave India. On at least one occasion his wife urged him to retire from business and settle in England. As this would have been an end to his hopes of settling in India he refused, and continued to urge her to go out with him to India which he referred to as his home. That he preferred India to any other country and would have chosen to settle there permanently with his wife and child had he been free to choose, is, I think, quite clear. But, as I understand the evidence, he never was in the position to make this choice, and he died, as he had been born, a domiciled Scotsman. B C D E F G H

It only remains to refer to the declaration contained in his will. For myself, I am not prepared to attach any importance to a declaration by a man as to his domicile unless there is some evidence to show that the man knew what "domicil" means. A declaration by a man made orally or in writing that he intends to remain in a certain country will, if not inconsistent with the facts, be of assistance in determining the question whether he has become domiciled there. Domicil is, however, a legal conception on which the views of a layman are not of much assistance. In the present case the subject appears to have been presented to the testator as one upon which he had for the purposes of his testamentary dispositions an unfettered choice. The subject of domicile being so presented, he elected in favour of an Indian one. It is true that some of the testamentary dispositions he desired to make could not be given effect to if his domicile were Indian, and that by reason of his election those dispositions had to be modified. It is, however, obvious that the election of an Indian domicile would greatly benefit the principal objects of his I

A bounty, though whether this was or was not known to Sir David we do not know. But, however this may be, the fact that when his solicitor offered him a choice of domicile he chose an Indian one can have no bearing upon the question of what his domicile in fact was in circumstances that, as I have already indicated, were so strong as to deprive him of exercising any choice in the matter at all. For these reasons I have come to the conclusion, though not, I confess, without some hesitation, that the appeal should be dismissed.

Appeal dismissed.

Solicitors : Nye, Moreton, & Clowes; Solicitor of Inland Revenue.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

C

D

MERSEY DOCKS AND HARBOUR BOARD v. WEST DERBY ASSESSMENT COMMITTEE AND BOTTOMLEY

E

BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD

BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE AND LIVERPOOL GRAIN STORAGE AND TRANSIT CO., LTD.

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), May 6, 7, June 8, 1931]

[Reported [1932] 1 K.B. 40; 101 L.J.K.B. 8; 145 L.T. 592; 95 J.P. 186; 47 T.L.R. 468; 29 L.G.R. 576; [1926-31] 2 B.R.A. 846]

G Rates—De-rating—Freight-transport hereditament—Bonded warehouse—Wool warehouse—Preparation of wool for sale—Grain warehouse—Elevator for shipping and unshipping—Apportionment—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), s. 5 (1) (c), s. 5 (2) (c), s. 6 (1), s. 6 (3) (b).

H

By s. 5 (1) of the Rating and Valuation (Apportionment) Act, 1928: "In this Act the expression 'Freight-transport hereditament' means . . . (c) A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers . . ." By sub-s. (2): "Dock purposes" meant "all purposes connected with the shipping or unshipping at a dock of . . . merchandise. . . ." By s. 6 (3): "For the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, . . . (b) in the case of a hereditament . . . occupied and used for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes."

I

Bonded warehouses situated at the port of L. received tobacco, sugar, wines, and spirits on delivery at the port. At the S. warehouse, where only tobacco was received, more than 50 per cent. stayed therein for more than a year and more than 80 per cent. for more than six months. In the W. warehouse, where

tobacco and sugar were received, 50 per cent. of the mixed goods stayed more than three months; and in the A. warehouse, where tobacco, sugar, wines, and spirits were received, some 65 per cent. of the mixed goods stayed for more than three months.

Held: the great bulk of the goods received in those warehouses were received, not for or in course of transport, but because their transport was to stop, and, therefore, the warehouses were primarily occupied and used for warehousing merchandise not in course of being transported within s. 6 (3) (b) of the Act, with the result that they were not to be deemed to be occupied and used for dock and transport purposes within s. 5 (1) (c) and s. 5 (2) (c) and were not entitled to be de-rated.

In a wool warehouse near the L. docks the wool was sorted to marks, samples were taken for submission to buyers, and the wool was otherwise prepared for sale at the next wool sale. Such sales took place about every six weeks. Wool not sold at the first sale after receipt in the warehouse might remain in the warehouse for a second sale, but two-thirds of the wool was out by the end of a month and 85 per cent. by the end of two months. Four per cent. was still in the warehouse at the end of a year.

Held: the warehouse was used as a place for preparing the wool for sale, storage until sale, and sale to a buyer who (and not the consignee) would settle the eventual destination of the wool, and, therefore, it was not occupied and used for transport purposes and was not entitled to be de-rated.

Part of the structure of three grain warehouses at the port of L. was an elevator by which grain was discharged from ships or carts into the warehouse and moved out again into land vehicles, in the one case, and into ships in the other. Sixty-five per cent. of the grain left the warehouse within a month, some within a very short time, and 84 per cent. within two months.

Held: the warehouses were used to a substantial extent for purposes connected with the shipping and unshipping of the grain and were entitled to be de-rated to that extent.

Per GREER, L.J.: The words "as respects every [freight-transport] hereditament occupied and used partly for transport purposes" in s. 6 (1) of the Act of 1928 (which subsection provides for the apportionment of the net annual value between the occupation and user of the hereditament for transport purposes and those for other purposes) do not mean to confine apportionment of the annual value to cases in which the part occupation and user can be stated in terms of space. The subsection contemplates apportionment not only by dividing the hereditament into separate parts to be separately valued, but also by proportionate user of the hereditament as a whole, i.e., if a hereditament is used, say, for one day a week for transport purposes and for the rest of each week for other purposes, the annual value should be apportioned just as it should be if one floor is always used for transport purposes and the other floors always used for other purposes.

Notes. Followed: *Wilkinson v. Sibley and Donovan* (1931), 101 L.J.K.B. 26; *Shell-Mex and B.P., Ltd. v. Clayton*, [1955] 3 All E.R. 102. Referred to: *Union Cold Storage Co. v. Moon*, [1932] 2 K.B. 648.

As to the de-rating of freight-transport hereditaments, see 27 HALSBURY'S LAWS (2nd Edn.) 459-466. For Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 167.

Cases referred to:

- (1) *Dixon v. Baldwin* (1804), 5 East, 175; 102 E.R. 1036; 5 Digest 897, 7386.
- (2) *Re Isaacs, Ex parte Miles* (1885), 15 Q.B.D. 39; 54 L.J.Q.B. 566, C.A.; 4 Digest 528, 4833.
- (3) *Bethell & Co. v. Clark & Co.* (1888), 20 Q.B.D. 615; 57 L.T.Q.B. 302; 59 L.T. 808; 36 W.R. 611; 6 Asp.M.L.C. 346; sub nom. *Re Bethell & Co. and Clark*, 4 T.L.R. 401, C.A.; 39 Digest 618, 2764.

- A** (4) *Dartford Rural District Council v. Bexley Heath Rail. Co.*, [1898] A.C. 210; 67 L.J.Q.B. 231; 77 L.T. 601; 62 J.P. 227; 46 W.R. 235; 14 T.L.R. 91, H.L.; 16 Digest 281, 934.
- (5) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, 2264.
- B** (6) *Mersey Docks and Harbour Board v. Birkenhead Overseers* (1873), L.R. 8 Q.B. 445; 42 L.J.M.C. 141; 29 L.T. 27; 38 J.P. 5; 21 W.R. 913; 38 Digest 432, 62.
- (7) *Farmer v. William Cotton's Trustees*, [1915] A.C. 922; 84 L.J.P.C. 137; 113 L.T. 657; 6 Tax Cas. 590; 31 T.L.R. 478; 59 Sol. Jo. 611, H.L.
- (8) *Herbert v. Samuel Fox & Co., Ltd.*, [1916] 1 A.C. 405; 85 L.J.K.B. 441; 114 L.T. 426; 32 T.L.R. 261; 60 Sol. Jo. 237; 9 B.W.C.C. 164, H.L.; 34 Digest 300, 2494.
- C** (9) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 59 Sol. Jo. 144; 6 Tax Cas. 399, H.L.; 30 Digest (Repl.) 221, 643.
- (10) *Moon (Lambeth Revenue Officer) v. L.C.C.*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; [1926-31] 2 B.R.A. 573, H.L.; Digest Supp.
- D** (11) *Battersby v. Kirk* (1836), 2 Bing.N.C. 584; 1 Hodg. 451; 3 Scott, 11; 5 L.J.C.P. 166; 132 E.R. 228; 41 Digest 965, 8579.
- (12) *Ward v. Folkestone Waterworks Co.* (1890), 24 Q.B.D. 334; 59 L.J.M.C. 65; 62 L.T. 321; 54 J.P. 628; 38 W.R. 426, D.C.; 43 Digest 1096, 262.
- E** (13) *Bailey (Stoke-on-Trent Revenue Officer) v. Stoke-on-Trent Assessment Committee and Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 46 T.L.R. 601; 74 Sol. Jo. 504; 28 L.G.R. 550, C.A.; on appeal, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; [1926-31] 2 B.R.A. 573, H.L.; Digest Supp.

F **Appeals** from orders of the Divisional Court in a group of seven Cases Stated—five by the Recorder of Liverpool and two by the chairman of the West Derby Quarter Sessions. The Cases raised the question whether certain premises situated near the port of Liverpool were freight-transport hereditaments within the meaning of s. 5 (1) of the Rating and Valuation (Apportionment) Act, 1928, so as to entitle them to be de-rated.

G In the first case the hereditament consisted of a block of warehouses situate on the south side of the Stanley Dock, Liverpool, comprising the principal warehouse, known as the Stanley tobacco warehouse, and two smaller blocks of warehouses used as bonded warehouses for tobacco. In the second case the hereditament consisted of the floors other than the quay floor of warehouses in the Wapping Dock, used principally as a bonded warehouse for tobacco and sugar. The third case was

H that of the Albert warehouses, used as a bonded warehouse for wine and spirits, tobacco and sugar. Those three were bonded warehouses, and the great bulk of the goods received in them were not received for or in course of transit. In the fourth case the hereditament consisted of a wool warehouse in Great Howard Street, Liverpool, not connected with any particular dock, and not a bonded warehouse. In the fifth case the hereditament was situated adjoining the East Waterloo Dock,

I and used for the accommodation of grain. All the foregoing hereditaments belonged to the Mersey Docks and Harbour Board. In the sixth and seventh cases the hereditaments were warehouses at Bootle, belonging to the Liverpool Grain Storage and Transit Co., Ltd., and called the Alexandra warehouses, which were used solely for the accommodation of grain imported into the port of Liverpool. Part of their structure was an elaborate elevator for the discharge of grain. The assessment committee de-rated all seven hereditaments. An appeal from that decision was dismissed by the recorder of Liverpool in the first five cases and by county quarter sessions in the sixth and seventh cases. The Divisional Court allowed the appeal

in the first four cases, namely, the three bonded warehouses and the wool warehouse, and removed these hereditaments from the special list. In the three grain warehouse cases, the Divisional Court dismissed the appeal. The Mersey Docks and Harbour Board appealed in the first four cases and the revenue officer in the last three. On the hearing of the appeals the preliminary objection was taken that the last three appeals were out of time.

G. J. Lynskey, K.C., and F. A. Sellers for the Mersey Docks and Harbour Board and for the Liverpool Grain Storage and Transit Co., Ltd.

The Attorney-General (Sir William Jowitt, K.C.), Wilfrid Lewis and Colin H. Pearson for the revenue officer.

Cur. adv. vult.

June 8. The following judgments were read.

SCRUTTON, L.J.—This group of seven appeals brings before this court for the first time the question of freight-transport hereditaments under the De-rating Act. These hereditaments are divided by s. 5 of the Act of 1928 into (i) hereditaments used wholly or partly for railway transport purposes; (ii) hereditaments used wholly or partly for canal transport purposes; (iii) hereditaments used wholly or partly for dock purposes. The appeals in question relate to the third class, and for the purposes of transport made prominent in the cases of railways and canals (s. 5 (2) (a) and (b)), there are substituted in the cases of docks (s. 5 (2) (c)),

“all purposes connected with the shipping or unshipping at a dock of passengers and their luggage, or of carriages, parcels, or merchandise . . .”

Why “carriages” have separate mention I do not understand. Again, why purposes connected with conveyance or transport of goods by dock railways are mentioned, but not transport by dock carts or mechanically propelled lorries, I do not understand. Further, it is clear that Parliament did not intend to give the benefit of de-rating to some kind of warehouses in docks—places “primarily occupied and used for warehousing merchandise not in the course of being transported” (s. 6 (3) (b))—but did intend to give it to premises connected with the purposes of “shipping or unshipping.” In shipping the shipper brings the goods into the dock from the land for the purpose of putting the goods on board a ship, work which may be done either by the dock company or the shipowner. In some cases the goods may be already in the dock warehouses, and may have been put there in the first instance to wait for transhipment to a known ship or destination, or, on the other hand, to wait till the receiver decided to what destination he would send them. In unshipping, the ship is bound to deliver to the receiver according to the contract of carriage, and the work of delivery may be done either by the servants of the dock or the ship. The delivery may be into a warehouse. In that case the receiver may have already determined where the goods are going, and the goods may only wait in the warehouse for a short time in course of the already determined voyage. On the other hand, the receiver may not have sold the goods or determined where they are going, and the goods may stay in warehouse till the receiver has determined their destination, sometimes for years, frequently for months. In these circumstances whether premises are connected with shipping and unshipping, and so entitled to de-rating, or with warehousing not in course of transport, and so not entitled to de-rating, may vary with the practice in every dock and have to be determined by a consideration of the special facts of each dock, and the special relations between ship and receiver. Speaking generally, there will be no warehousing not in the course of transport until the ship delivers to the receiver. The shipowner may warehouse in the course of transport where a through bill of lading is concerned which requires the goods to wait in a dock warehouse for transhipment. But when the shipowner has delivered to the receiver, the receiver may be either sending on from the warehouse at once in a predetermined transport, or he may be waiting and keeping the goods in warehouse because he does not know where the goods are going to, or to whom he shall sell them. This latter class of warehousing seems to be pointed at by the proviso excluding premises from de-rating “primarily

A occupied and used for warehousing merchandise not in the course of being transported": s. 6 (3) (b).

I doubt whether the persons who drafted and passed this Act considered in detail the work done in docks, and I am clear that the language they used has made it difficult to ascertain their meaning. For instance, in defining dock purposes in s. 5 (2) (c), they have, except in the case of dock railways, omitted the word **B** "transport," and made the relevant matter "purposes connected with . . . shipping or unshipping," yet when they come to warehousing (s. 6 (3) (b)) they have brought back the words "for transport purposes." It is necessary, therefore, to examine closely each hereditament and the purposes for which it is used.

The hereditaments are: (i) The Stanley warehouses, a building used as a bonded warehouse for tobacco. (ii) The floors other than the quay floor of the warehouses **C** in the Wapping Dock used principally as a bonded warehouse for tobacco and sugar. (iii) The Albert warehouses, used as a bonded warehouse for wine and spirits, tobacco, and sugar. These three are bonded warehouses, No. (ii) having the special feature that the ground floor for very relevant reasons referred to hereafter is separately rated as part of a quay and water space hereditament and has been given the benefit of de-rating without appeal. (iv) A wool warehouse in Great **D** Howard Street, not actually connected with any particular dock, and not a bonded warehouse. (v), (vi) and (vii) Three grain warehouses, of which No. (v) belongs to the Mersey Docks and Harbour Board, and is situate adjoining the East Waterloo Dock, and (vi) and (vii) are warehouses belonging to the Liverpool Grain Storage and Transit Co., Ltd., and called the Alexandra warehouses at Bootle. The assessment committee de-rated all seven hereditaments. On appeal the recorder of **E** Liverpool in the first five cases, and the county quarter sessions in the sixth and seventh cases, dismissed the appeals. The Divisional Court dismissed the appeals in the three grain cases, (v), (vi) and (vii), but allowed the appeal in the first four cases (the three bonded warehouses and the wool warehouse), and removed these hereditaments from the special list entitling them to de-rating. The harbour board appeal in the first four cases; the revenue officer in the last three.

F It is convenient to deal with the three bonded warehouses, Wapping, Albert, and Stanley, first and together. These three Special Cases were all stated by the recorder of Liverpool after submission to the parties, but unfortunately a finding of fact got into the Cases which, as the parties agreed before us, was both inaccurate and incomplete. The parties, therefore, agreed on an addendum as to each warehouse stating the actual facts as to each warehouse in respect to the position of **G** the ship and the receiver, with references to the appropriate pages of the rate book. They also agree that all technical objections to the insertion of this addendum in the Special Case, without that Case having been sent back to the recorder, should be waived. This might have raised serious difficulties if any finding of pure fact by the recorder was affected by the addendum. But the only possible finding of fact so affected might be the statement in para. 5 of all the Cases that

H "no part of the said hereditaments was primarily occupied and used for warehousing merchandise not in the course of being transported."

This is meant to negative the application of s. 6 (3) (b), but appears to me to proceed on an erroneous construction of that paragraph, and especially of the word "transported." It is probably true that nearly all goods that go into a dock ware- **I** house will ultimately go out. Goods are not put into warehouses to stay there for ever. They are put into warehouses to stay till their owner is ready to take them out, because he has sold them or determined a destination for them which he did not know when he put them in warehouse, and, therefore, warehoused them till he did know on what fresh transit he would send them. This is especially true of bonded warehouses where the owner of goods leaves them for some time, because when he takes them out he will have to pay duty on them. He has not sold them, and does not then want to transport them any further. So he warehouses them, not in the course of transport. The useful graph in the wool case shows that in

the Stanley bonded warehouse over 50 per cent. of the tobacco sent in stays more than a year, and over 80 per cent. stays more than six months. The percentages in the Wapping and Albert warehouses are reduced by the fact that in the Wapping warehouse sugar is stored as well as tobacco, and in the Albert warehouses sugar and wines and spirits as well as tobacco. But in the Albert warehouses about 65 per cent. of the mixed goods stay more than three months in warehouse, and in the Wapping warehouse 50 per cent. so stay. In view of these figures, the recorder's finding of fact seems to be based on his construction of "in the course of being transported" in s. 6 (3) (b), as covering a case where goods in warehouse will go out some day, however distant, and that any waiting, however long, till the goods go out does not prevent the warehousing being in course of transport. This finding of the recorder, turning as it does on the view he takes of the expression in the statute "in the course of being transported," is, in my opinion, a mixed question of fact and law, and, therefore, open to review by the court. A B C

A somewhat similar question arises in the cases on stoppage in transitu determining where the transit ends. It is held that when the vendor can give no further instructions as to transit, but the goods are in the hands of the vendee or his agent, the transit is over: compare *Dixon v. Baldwin* (1) and *Re Isaacs, Ex parte Miles* (2) with *Bethell & Co. v. Clark & Co.* (3). If the vendor is forwarding under a through bill of lading, the transit is not over, and a detention in warehouse till the goods can be sent forward by transhipment would be in course of transport, but if the goods have reached the receiver, who warehouses them because he is not then proposing to send them on, the goods, in my opinion, are not then in course of transport. The ordinary form of bill of lading for tobacco is "to be delivered to King's warehouse at owner's risk but ship's expense." The shipowner at Liverpool, therefore, pays the stevedore and master porter for delivery into the warehouse. When the goods are taken from the shipowner's carts, i.e., those he pays for, into the warehouses by the servants of the harbour board, the receiver or consignee pays either the consolidated rate, or a rate called the transitu rate. The consolidated rate covers rent for a year. The smaller transitu rate, if claimed before the goods come in, covers only four weeks' rent. The greater proportion of tobacco in the three warehouses pays the consolidated rate because it is going to stay more than four weeks. In the Wapping warehouses 77 per cent. of the tobacco pays the consolidated (year's rent) rate. In the Albert warehouse 87 per cent., and in the Stanley warehouse 79 per cent., of the tobacco pay the consolidated rate. Graph D in the Cases shows the very substantial time the goods stay in the warehouse. Apparently, the goods are sorted to marks in the warehouse, but the shipowner does not pay anything for this operation, which is covered by the consolidated rate paid by the consignee. D E F G

The Stanley bonded warehouse is entirely devoted to tobacco, but in the Albert and Wapping warehouses there are also bonded sugar and wine. As to sugar in the Albert warehouse, it is sorted to marks on the quay by a master porter, paid by the consignee, who also pays for its transit to warehouse by land carriage. At Wapping a slightly different practice exists. The small quantity of sugar that comes by road vehicles is treated in the same way as at the Albert warehouse. But the bulk of the sugar at Wapping is discharged ex ship on the open ground floor of the warehouse, which is practically quay. The master porter paid by the consignee there sorts to marks. In my opinion, the sugar ceases to be in course of transport when the consignee puts it into bonded warehouse. Wine and spirits are only in bonded warehouse at the Albert. The master porter receives the goods on the quay, sorts to marks, and delivers to the warehouse, the consignee paying for all these services. All the docks as to water space and quay space are rated as one hereditament stretching for miles along the Mersey. Owing to the peculiar open structure of the ground floor of the Wapping warehouse, as shown in the photograph in the rate book, the ground floor is treated as quay space and included in the special list for de-rating as part of the dock and quay hereditament. The Special Case before us as to Wapping is limited to the four upper floors of that warehouse. H I

- A On these facts for the reasons given I am of opinion that these three bonded warehouses are not subjects for de-rating. The great bulk of the goods received in them are not received for or in course of transport. They are received because their transport is to stop. The consignee has received them, but does not want their transport to proceed. He does not know where they are going, nor does he yet want to pay duty on them; he, therefore, stores them in bond, often for a very substantial time. The warehouse is primarily occupied and used for warehousing merchandise not in course of transport, and is not entitled to de-rating. I, therefore, agree with the result arrived at by the Divisional Court as to these warehouses, though, as they have not given reasons for their decision, and, indeed, had not before them the detailed facts before us, I may have arrived at the same result as they did for different reasons. In my view, it can only be in the most unusual cases
- B that a bonded warehouse would be entitled to the benefit of de-rating.
- C

No point appears to have been raised in the courts below on the original Special Cases as to the effect of a shipowner claiming a lien for freight on goods in a warehouse. It appears from passages in the addendum that, as in the case of tobacco in casks the shipowner has to deliver into the bonded warehouse, the harbour board do not deliver out to the consignee without a delivery order from the shipowner, who, of course, will not give it until any freight due is paid. The goods are entered in the name of the consignee with a note as to the shipowner's lien for freight. All charges in the warehouse are paid by the consignee and nothing by the shipowner. As the point was not raised below I do not express any final opinion on it, but at present I do not think that any incidental use of the warehouse in preserving the shipowner's lien is for a purpose connected with unshipping so as to require apportionment of the warehouse for the purpose of de-rating any more than the use of the warehouse for the purpose of collecting customs duties, though postponing the time of their payment is a purpose connected with unshipping.

D

E

The wool warehouse in Great Howard Street stands in a different position. It is obviously used as a storage place for wool about to be sold at the regular wool sales, about eight a year at six weekly intervals, and as a place at which the consignee

F can prepare the goods for sale and for inspection by intending buyers. The shipowner delivers the wool to the master porter on the quay, and the dock board conveys the wool in its vehicles to the warehouse, the consignee paying the master porter, and a consolidated rate to the dock board, including carriage. The goods are sorted to marks in the warehouse, but the consignee pays for this operation in the consolidated rate. The shipowner does not pay anything for the work in the warehouse. The detailed operations of sampling and preparing for sale are stated in the addendum. We were told that some wool might not be sold and might remain in the warehouse for a second sale, and that the buyer might leave the goods in warehouse on rent till he was prepared to take them. But it is clear from the graph that most wool goes out of warehouse when sold. Two-thirds of the wool is out by the end of a month, and 85 per cent. by the end of two months. Four

G per cent. is in the warehouse at the end of a year. The time the wool is in warehouse of course depends on the date of its arrival compared with the date of the next available sale. It seems to me clear on the facts stated that the warehouse is not used for or in course of transport within the meaning of the Act, but as a room for preparing for sale, and for sale. The consignee has received the goods and proposes to sell them to some unknown buyer, who alone will settle the destination.

H

I This is storage for sale, not in course of transport. I, therefore, agree with the view of the Divisional Court that this wool warehouse is not the subject of de-rating and this court has before it a number of details of fact which the Divisional Court had not before it.

The special feature of the three grain warehouses, two of which belong to the Liverpool Grain Storage and Transit Co., Ltd., and one, the warehouse in the East Waterloo Dock, to the harbour board, is that part of their structure is an elaborate elevator by which grain is discharged from ships, barges or carts into warehouse or silo and moved out again into sea or land vehicles. The photograph

in the company's book shows the very elaborate system by which different parcels of grain are carried to their special bins. It is obvious that part of the user of the warehouse silo and elevator is for shipping and unshipping. It is further clear from the rate books that the owners of the hereditaments contemplate that grain may, after being unshipped, stay a very short time in the warehouse. There seem to be three rates. The first of them is charged to the consignee for receiving and three days' free rent; this assumes that the grain will go out of the warehouse almost at once. A second and higher rate gives six days' free rent. The third and highest specifies no period of stay, but is followed by a weekly rent. Unfortunately, there are no figures to show what proportion of grain uses the three or six days' free rent charges, which might be very material in deciding whether the hereditament is primarily or mainly used for warehousing merchandise not in course of being transported. The harbour board Graph D shows that 65 per cent. of the grain has gone out at the end of a month, and 84 per cent. at the end of two months, but not how much has gone out at the end of six days. As to the Special Cases, the two stated by the county quarter sessions on the Grain Storage Co.'s assessments, find that of the revenue of the company 62 per cent. is from shipping and unshipping, and 33 per cent. from storage and warehousing. The cases do not expressly find that the hereditament is not primarily occupied and used for warehousing merchandise not in course of transport, but as the hereditament is de-rated that finding is involved. The Case stated by the recorder of Liverpool in the East Waterloo dock hereditament case does find that the premises were not primarily occupied and used for warehousing merchandise not in the course of being transported. It is true that the Case also finds as a fact that no part was primarily used for warehousing merchandise not in course of being transported. As some grain stays in the warehouse for a year and 16 per cent. for more than two months, this finding must turn on an erroneous construction of the word "transport," as I have already explained. But on facts found in the cases I cannot say that the other findings of mixed fact and law are wrong. The appeals, therefore, in all seven cases must be dismissed with costs.

GREER, L.J.—These appeals turn on the right construction of ss. 5 and 6 of the Rating and Valuation (Apportionment) Act, 1928, and the right application of the sections when so construed to the facts stated in each of the seven Cases. It is, therefore, convenient, before dealing with each Case, to consider the wording of the two sections, and certain general matters relevant to their interpretation and their application to the facts stated in the several Cases.

The full title to the Act describes it as

"an Act to make provision, with a view to the grant of relief from rates in respect of certain classes of hereditaments, for the distinction in valuation lists of the classes of hereditaments to be affected, and the apportionment in valuation lists of the net annual values of such hereditaments according to the extent of the user thereof for various purposes."

Section 1 requires that in every valuation list, three classes of hereditaments shall be distinguished from each other and from all other hereditaments. Every valuation list made after the Act came into force will, therefore, distinguish four classes of hereditaments of which three are defined by the Act: (i) agricultural hereditaments; (ii) industrial hereditaments; (iii) freight-transport hereditaments; and (iv) all other hereditaments. No relief from rates is granted by this statute, but it is plain from the title to the Act that the first, second and third classes of hereditament were defined in the Act so that Parliament might, if it was afterwards so decided, grant some relief in rates to these three classes. It was suggested by the Attorney-General in the course of his argument for the revenue officer, that the court was entitled to consider some of the provisions of the later de-rating Act, the Local Government Act, 1929 (19 & 20 Geo. 5, c. 17), as affecting the construction of the 1928 Act. It was contended that, as the later Act obliged railways to pass on the benefit of the de-rating by reduction of railway rates to the users of railways,

A the definition clauses of the Act of 1928 should, if possible, be read as applying only to that part of their property which earned rates that could be reduced in proportion to the de-rating benefits received by the railway, and therefore the Act should, if possible be read as excluding from the privileged classes warehouses for the use of which a customer pays rent and not railway rates, and therefore could not be given the advantage of having the de-rating benefit passed on to him. It was further

B argued that, if railway warehouses are outside the definition for these reasons, dock warehouses should also be deemed outside the definition. In my judgment, this argument ought not to have any weight attached to it. The Act of 1928 cannot be interpreted by what Parliament chose to do by an Act of 1929. We are not entitled to assume that the need of so wording the Acts as to confine the prospective advantages of differential rating to those hereditaments whose rateable occupiers could pass on the benefit to their trade customers was present to the mind of the legislature when they passed the Act of 1928. We can, however, treat as relevant the purposes for which the Act was passed as stated in the title: see the cases collected in CRAIES ON STATUTE LAW (3rd Edn., p. 176), especially *Dartford Rural District Council v. Bexley Heath Rail. Co.* (4) and LORD MACNAGHTEN in *Fenton v. Thorley & Co.* (5) ([1903] A.C. at p. 447).

D These appeals are all concerned with warehouses which are claimed to be freight-transport hereditaments as defined by the Act. The relevant sections are ss. 5 and 6. But it is worth noting that the Act, by s. 6 (3) (b), expressly excludes hereditaments such as warehouses primarily used for storage from the class of industrial hereditaments. One would not expect warehouses primarily used for storage to be included in another class of hereditaments intended to receive the full benefit of rating relief. Section 5 of the Act is the section in which the statutory definition of freight-transport hereditaments is contained. It is only in s. 6, which deals chiefly with apportionment, that we find the provision that freight-transport hereditaments are to appear as such in the valuation lists. Section 5 (1) defines three classes of freight-transport hereditaments: (a) hereditaments occupied and used for railway transport purposes; (b) hereditaments occupied wholly or partly for canal transport purposes; and (c) hereditaments occupied and used wholly or partly for dock purposes. We are only concerned here with (c). Subsections (2) and (3) contain definitions of some of the words used in sub-s. (1) (c). It will be convenient to set out in full the definition contained in s. 5 (1) (c) by substituting for the words there used the definitions contained in sub-ss. (2) and (3). Section 5 (1) (c) will then read:

G "A hereditament used wholly or partly for purposes connected with the shipping or unshipping at a dock, harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers as part of an undertaking carried on by a dock authority (including any other undertaking comprising as part thereof a dock, harbour, pier or jetty, &c.), so far only as its business is carried on at or in connection with a dock, &c."

H It is unnecessary to complicate the definition by including the definition of "dock authority," as it is incontestable that the Mersey Docks and Harbour Board is a dock authority, and it has been admitted for the purposes of these appeals that the Grain Storage Co. is a dock authority within the definition. Section 6 (1) contains the provision above referred to requiring freight-transport hereditaments occupied and used wholly for transport purposes to be shown in the list. The subsection then goes on to deal with hereditaments that have been included in the definition because they are partly occupied and used for transport purposes, and then makes provision for apportionment of the net annual value of this kind of freight-transport hereditament. Freight-transport hereditaments are thus divided into two subclasses: (i) those that are wholly used for transport purposes; (ii) those which are partly used for transport purposes. The words of s. 6 (1) as regards the second class are:

"As respects every such hereditament occupied and used partly for transport

purposes the net annual value thereof shall be shown in the prescribed manner as being apportioned between the occupation and user of the hereditament for transport purposes and the occupation and user thereof for other purposes."

In my judgment, considered by themselves the words quoted do not mean to confine apportionment of annual value to cases in which the part occupation and user can be stated in terms of space. I think that the section contemplates apportionment not only by dividing the hereditament into separate parts to be separately valued, but also by proportionate user of the hereditament as a whole, that is to say, if a hereditament is used, say, for one day a week for transport purposes, and for the rest of each week for other purposes, the annual value should be apportioned, just as it should be if one floor is always used for transport purposes, and the other floors always used for other purposes.

But I have still to consider the effect of s. 6 (3) and the proviso thereto. This seems to me the most difficult part of the Act to construe. The subsection reads:

"For the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment: Provided that—(a) no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used; and (b) in the case of a hereditament occupied and used for canal transport purposes as part of a canal undertaking or occupied and used for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes."

Apart from the proviso, it enacts that a hereditament partly used for transport purposes shall be deemed to be used for transport purposes subject to certain exceptions. Apart from these exceptions, a hereditament of which a small part only was used for transport purposes would be entitled to be classed as a freight-transport hereditament and no apportionment could be claimed. So also a hereditament that was used on one day a week for freight-transport purposes would be a freight-transport hereditament in respect of which apportionment could not be claimed. There are, however, three exceptions, one contained in the subsection apart from the proviso, and the other two in the proviso. The only exceptions that need be considered are those in the proviso. The effect of (a) is that when one can point to a distinct part of the hereditament capable of being separately let, and, therefore, treated as a separate hereditament within the decision in *Mersey Docks and Harbour Board v. Overseers of Birkenhead* (6), and such part is so "let out," then such part is not, unless it is actually so used, to be deemed to be used for transport purposes. Thus, the upper floors of a warehouse can be separately let and separately assessed, and if wholly used for transport purposes there would have to be an apportionment if the whole warehouse were included in one assessment. Proviso (a) obviously requires separation by metes and bounds, and probably by walls or floors, or some physical dividing lines. In my opinion, the effect of proviso (b) is that, if one finds a building, yard or other place which is partly occupied and used for transport purposes, but is primarily occupied and used for warehousing merchandise not in the course of being transported, then no part of such building, yard or other place is to be affected by the restraint on apportionment enacted by sub-s. (3), but it remains subject to the provision as to apportionment contained in sub-s. (1), that is to say, it is taken out of sub-s. (3), but it is left to be dealt with under sub-s. (1) without the gloss put on the operation of that subsection by sub-s. (3). The net annual value must then be apportioned. In many cases the place used for warehousing merchandise not in the course of being

A transported may be a part of a larger hereditament, and definable by metes and bounds, and in these cases there will be no difficulty in making an apportionment. There is great difficulty in applying this proviso to the case where the hereditament that is rated is a warehouse used for transport purposes, but primarily used for warehousing merchandise not in the course of being transported, the part user not being determined by metes and bounds. Though difficult, the task is not impossible, and, in my judgment, the Act requires it to be done. It should also be borne in mind that the Act is not dealing with transport purposes generally, but only with three kinds of transport: transport by canal, transport by railway, and transport so far as it is included in the definition of dock purposes. The fact that goods in a warehouse are intended sooner or later to be moved elsewhere does not make them while in warehouse "in the course of being transported" within the meaning of the Act (s. 6 (3) (b)). The learned recorder of Liverpool seems to have attached too wide a meaning to the words "in the course of being transported."

C Another problem it may be necessary to solve in order to decide some of these appeals is the problem involved in the question: When is an inference from stated facts to be treated as a question of law, and when is it to be treated as a question of fact? The general rule is stated by LORD PARKER in *Farmer v. William Cotton's Trustees* (7) in the following words ([1915] A.C. at p. 932):

"Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."

E In a case under the Workmen's Compensation Act (*Herbert v. Samuel Fox & Co., Ltd.* (8), [1916] 1 A.C. at p. 419), LORD WRENBURY applies the same rule in these words:

"I have to see upon the facts found by the county court judge whether within the meaning of the statute the accident arose out of and in the course of the employment. . . . If there is no evidence to support the finding of fact, or if the facts found do not support the conclusion of law, the decision is appealable."

F On the other hand, when dealing with a case under the Income Tax Acts in which the question was whether certain disbursements, expenses, and money forgone, were "money wholly and exclusively laid out and expended for the purposes" of a brewery trade, LORD SUMNER said in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (9) ([1915] A.C. at p. 466): "Though the answer to the question may itself be an inference from a wide area of facts, it is an answer of fact." I do not think LORD

G SUMNER intended to lay down a general rule that in all cases it is an inference of fact. Where a statute draws, when rightly construed, a definite line, and the material facts found by the tribunal of fact show that the case is on one side of that line, the tribunal of fact is not entitled to draw an inference of fact that it is on the other side of the line. If it did so its decision would necessarily involve a decision not to apply the provisions of the statute rightly construed. There are,

H however, many cases where the statute does not when rightly construed draw a definite line, and the question whether the indefinite line has been crossed becomes one of degree, and may be one of fact. If, for example, a statute provides that a contract by an infant shall be void, no tribunal of fact could infer as a fact that an individual proved to be only twenty years and 364 days old was bound by his contract. But if a statute should place an obligation on all men of middle age, it

I could be definitely ruled as matter of law that a man of twenty-one is not a person of middle age, but if the man was between forty and fifty, then the inference of the tribunal one way or the other would be an inference of fact. I do not think LORD SUMNER meant any more than is implied in the above illustration. If he did, I prefer the statement of law as laid down by LORD PARKER in the words I have quoted ([1915] A.C. at p. 932).

I have dealt with this question because it may be necessary to apply the rule to the case of the Liverpool Grain Storage Co. where it may be necessary to determine what is the primary purpose for which the hereditament is occupied and used. As

in the cases which have already been decided with regard to industrial hereditaments, I think we must treat "primary" as meaning the main or principal use to which the hereditament is put, and not the ulterior purpose of the occupier. In such cases the evidence may show beyond question that the principal use is either for transport purposes, or for warehousing goods not in the course of transport. In this event any tribunal deciding otherwise would be wrong in law. On the other hand, the evidence may show that the user is nearly balanced between the one and the other, and in this case, in my view, the question would be one of fact, and the decision of quarter sessions could not be reviewed by the High Court on a Case Stated. Those responsible for the wording of s. 5 of the Act evidently intended to make it easy by successive definitions of the words and phrases used to determine the classes of hereditaments that were to receive relief from rates as freight-transport hereditaments. Unfortunately, notwithstanding the efforts of the draftsmen to leave no uncertainty in the definition, they left in the definition (s. 5 (1) (c)) the vague phrase "purposes . . . concerned with the shipping and unshipping of merchandise." It would have been useful if we could have rested our decision in these appeals on some principle which would have laid down once and for all a clear dividing line between hereditaments occupied and used for purposes connected with shipping or unshipping of merchandise, from hereditaments occupied and used for purposes not connected with shipping and unshipping of merchandise. I have tried to do this, but without success. I think we must be content to deal with the facts of each case as it is presented for decision.

The fourth of these appeals was concerned with the Great Howard Street wool warehouse, of which the Mersey Docks and Harbour Board are the rateable occupiers. Whatever may be the exact meaning of the words "concerned with the shipping or unshipping of merchandise," they do not, in my judgment, extend to include the purposes for which this warehouse is occupied and used. On the facts originally stated in the Case, together with the additional facts stated by agreement between the parties, it appears that the wool is received at the dock by the consignees acting by the master porter, whose charges they pay, is then carted by carters employed by the dock board, who are paid for this service by the consignees, is then delivered to the warehouse where a variety of operations is carried out to enable the wool to be properly sorted, weighed, sampled and lotted for sale, all of which are done by the servants of the board for the benefit of and are paid for by the consignees. Rent is charged to the consignee from the time his goods first come to the warehouse until they leave it. Rather more than three-fifths of the wool so received usually leaves the warehouse within a month from its arrival there, but a small proportion remains as long as twelve months. It is true that sorting to bill of lading marks takes place on the ground floor of the warehouse before the wool is taken to the upper floor, where it is placed in piles in the order of lotting numbers supplied by the brokers. The returns referred to in the addendum could not be made up without sorting to marks. But this work is paid for by the consignee in the consolidated rate. By the practice of the port which has been accepted by the trade, the consignees are content that the master porter should receive the wool at the dock on behalf of all the consignees without calling on the ship to sort to marks, and the consignees undertake the work of dividing the bales between the different receivers. In my judgment, on these facts the warehouse was not occupied or used for purposes connected with the unshipment of goods. The wool deposited in this warehouse was not there in connection with its unshipment. The warehouse is not, on the facts stated, occupied and used for purposes, e.g., uses "connected with the unshipping" of the wool within the meaning of s. 5 (2) (c) of the Act. The purposes for which it is occupied and used are wholly concerned with the business of the wool importer, after everything connected with the unshipment of the goods has been completed. I agree that this appeal should be dismissed.

With regard to the cases relating to the Stanley warehouse, the Wapping warehouse, and the Albert warehouse, I am inclined to think that, if the recorder had

A been asked to order these warehouses to be put in the special list and there apportioned, such an order would not have been wrong in law having regard to the facts now stated in the addendum. So far as the warehouses are used for receiving and storing tobacco in bales and cases, sugar and wine, the case is similar to the wool case. The warehouses are to that extent not being used for dock purposes, and are being used for warehousing goods not in the course of being transported. I can see no distinction between the use of the warehouses for these purposes, and the uses to which the wool warehouse is put. But 90 per cent. of the tobacco received and stored in these warehouses is tobacco in casks, shipped on bills of lading requiring delivery to the consignee at King's warehouses (i.e., bonded warehouses). The shipowner pays the master porter's charges, and also pays for the cartage from quay to warehouse. But even when the goods are received into the warehouse the shipowner has not finished with them. Paragraph (ii) of the addendum contains this sentence:

"During the receipt of the tobacco into the warehouse the shipowner notifies the dock board in writing that he has a lien on the tobacco pending the production of bills of lading and payment of freight, and in some cases instructs the board that the tobacco is to be stored in the shipowner's name and held to his order."

Paragraph (iii) contains the following statement:

"In due course the consignee produces a delivery order signed by the shipowner and addressed to the board in favour of the consignee. This has the effect of removing the stop placed upon the goods by the shipowner at the time of their receipt into the warehouse, and until the delivery order is presented the consignee cannot get delivery of the tobacco."

I cannot read these statements as referring to exceptional occasions. They seem to me to state what is the general course of business. The probable explanation of this exceptional treatment of tobacco in casks is that, as the ship has to deliver to warehouse, the consignee does not want to take over his goods at any time before the shipowner has completely performed his contract of carriage. Then, having ascertained that the goods are in warehouse, he pays his freight and gets his delivery order. But for some appreciable time the tobacco in casks is held in the warehouse subject to the shipowner's lien, and for the purpose of enabling him to collect his freight. I am disposed to think that the warehouses are partly used for dock purposes, that is to say, for purposes connected with the unshipping of merchandise. The tobacco continues to be in the course of being transported to the consignee until he presents a delivery order and so frees the goods from the shipowner's lien. Thereafter, so far as any particular parcel is concerned, the warehouse is being used for warehousing merchandise not in the course of being transported. But once the hereditament is within s. 5, it cannot be entirely taken out by the proviso to s. 6. For reasons stated in the earlier part of my judgment, I think that the proviso merely saves the warehouse from being deprived of the right to have the rateable value apportioned. Every part of the warehouse in which tobacco in casks is placed is primarily used and occupied for warehousing merchandise not in the course of being transported, and is also secondarily, and in a small degree, used for purposes connected with the unshipment of merchandise. It is, therefore, taken out of s. 6 (3); it is not because one of its uses is for transport purposes to be deemed to be occupied and used for transport purposes, as it would have been if the proviso had not been in the Act. But it is still subject to s. 6 (1), and its net annual value must be apportioned. This question of apportionment only arises by reason of the facts stated in the addendum. As facts are there stated which raise the question, I have thought it right to express my opinion on it. But this ought not to affect the result of these appeals as the point was not raised on the hearing of the appeal by the recorder, and he has not so drawn the Case as to raise the question, nor was it raised in the argument in the Divisional Court or before us. In these circumstances I agree that the decision of the recorder that

the Case should remain in the special list simpliciter was wrong in law, and that on the facts stated by him, the Divisional Court were right in allowing the appeal, and this court ought not to interfere with their decision. A

With regard to the grain warehouses, for the reasons stated in SCRUTTON, L.J.'s judgment, I agree that these appeals should be dismissed. The hereditaments are partly used for purposes connected with unshipping the grain, i.e., as a convenient method of delivery to the consignee, in other words, as plant for the purposes of shipment and unshipment, and I cannot say that the recorder was wrong in law in deciding that no part of the dock board's grain warehouses was primarily occupied and used for warehousing merchandise not in the course of being transported. Nor can I say in the case concerning the warehouses of the Liverpool Grain Storage and Transit Co., Ltd., that the county quarter sessions were wrong in law in dismissing the appeal from the decision of the assessment committee. As they dismissed the appeal they must be taken as having decided that the hereditament was partly occupied and used for dock purposes, and no part of it was primarily used for warehousing goods not in the course of being transported. In my opinion, we must treat the decision of the recorder, and that of the county quarter sessions, as turning on inferences of fact. In the result, I agree with the conclusion which SCRUTTON, L.J., has expressed in his judgment in all these cases. B C D

SLESSER, L.J.—These appeals raise questions which involve the proper construction of those parts of the Rating and Valuation (Apportionment) Act, 1928, which deal with hereditaments occupied and used for certain purposes connected with railways, canals and docks. The scope of this statute has received the consideration of the House of Lords: see *Moon (Lambeth Revenue Officer) v. L.C.C.* (10). It is, therefore, unnecessary here generally to discuss it. We were invited by the Crown to have regard to the subsequent legislation, such as the subsequent Local Government Acts dealing with the de-rating of hereditaments placed in the special list under the Act, with reference to the treatment of docks. Though the court, in appropriate cases, is not precluded from taking into its consideration the objects for which the statutory powers have been conferred, in my view, to seek such assistance as is here suggested would not be proper. No later Act purports to construe or clarify the one of 1928; we are, therefore, confined to the language of that statute, disregarding anticipatory or retrospective legislative interpretations. Except as a Parliamentary exposition regarded as a glossary for the proper interpretation of the earlier Acts, subsequent Acts are not to be relied on as of aid to the construction of prior Acts: *Battersby v. Kirk* (11); *Ward v. Folkestone Waterworks Co.* (12). I pass, therefore, to those sections which are here directly in point. E F G

By s. 5 of the Rating and Valuation (Apportionment) Act, 1928, provisions are made for the definition of what is there called a freight-transport hereditament. I propose to extract from a number of matters not here relevant or not in dispute the description essential to the determination of these cases, which is as follows: "A hereditament occupied and used wholly or partly for dock purposes" (s. 5 (1) (c)): that is to say "all purposes connected with the shipping or unshipping at a dock of . . . merchandise" (s. 5 (2) (c)). By the proviso to s. 6 (3) (b) of the same Act it is provided among other things that in the case of such a hereditament so occupied and used for dock purposes as part of a dock undertaking, H

"no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes." I

Apart from this exclusion and other exceptions and provisions which are not here material, for the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and other purposes respectively the hereditament shall be deemed to be occupied and used for transport purposes. The subject-matter of the present claims to be placed upon the special list as freight-transport hereditaments is what may broadly be called warehouses.

A Five of them are warehouses belonging to the Mersey Docks and Harbour Board and two belong to the Liverpool Grain Storage and Transit Co., Ltd. By s. 5 (1) (c) the hereditament, to succeed, among other matters, must be part of a dock undertaking which, by definition, means an undertaking carried on by a dock authority. The expression "dock authority" by s. 5 (3) includes the lessees of any dock authorised by or under any Act. There is no question here but that both proprietors of the hereditaments are dock authorities within the definition. The two critical phrases which fall to be considered are, first, the meaning of "connected with the shipping or unshipping at a dock of . . . merchandise" in s. 5 (2) (c), and, secondly, the meaning of the phrase "primarily occupied and used for warehousing merchandise not in the course of being transported" in s. 6 (3) (b).

C As regards s. 5 (2) (c), I think that, whatever may be the meaning of the words "connected with the . . . unshipping at a dock of . . . merchandise," it is clear from proviso (b) to s. 6 (3) that any part of the hereditament being a building, yard or other place primarily occupied and used for warehousing merchandise not in the course of being transported must be excluded from what might otherwise be a hereditament under s. 5 (1) (c) as being used wholly or partly for dock purposes, and although the phrase "wholly or partly" in s. 5 (1) (c) extends, in my view, to an occupation or user of a part either defined by physical limitation or by commercial function, it may well be, in a particular case, that the whole hereditament, in the physical sense, may as a place primarily be occupied and used for warehousing merchandise not in the course of being transported and so, nevertheless, be wholly excluded from the special list under proviso (b) of s. 6 (3), which is limited by its language to physical occupation within metes and bounds, although the hereditament might otherwise fall within the wider functional definition of s. 5 (1) (c) as being partly connected with the unshipping of goods. This conclusion follows the decision of this court in *Bailey (Stoke-on-Trent Revenue Officer) v. Stoke-on-Trent Assessment Committee and Potteries Electric Traction Co., Ltd.* (13). By s. 3 (2) of the Act now under consideration, it was provided that a place used for the housing or maintenance of road vehicles

F "shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . be deemed not to form part of the factory."

C This court came to the conclusion in that case that, as the whole factory was in fact so used for housing or maintenance of road vehicles, no part of the place in question was not excluded. The House of Lords agreed in principle and only differed from this court on the question whether in that case in fact the work done in the whole of the hereditament was or was not maintenance of the motor vehicles. LORD BUCKMASTER said ([1931] A.C. at p. 164):

"I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief."

H I do not think it is necessary to repeat the facts as to the work done and charges made in the hereditaments which have been set out in the Cases and their exhibits of books of rates, and in the agreed addendum. In the case of the wool warehouse I think that the facts show, on a proper view of the law, that it is not occupied and used wholly or partly for dock purposes—that its purposes are not connected with the unshipping at a dock of merchandise by reason of the facts stated by my Lords. Thus, the hereditament does not come within s. 5 at all. It is not connected with the dock physically and the cost of what is there done is paid for by the consignee. No question, therefore, arises as to the application of s. 6.

I The Stanley, Wapping and Albert warehouses are, in my opinion, in a different position, and s. 6 is there material. In these cases, so far as the shipowner pays the master porter for delivery into the warehouse or the master stevedore "delivers to King's warehouse at owner's risk but ship's expense," and in certain cases so far as the shipowner possesses a lien and delivery can only be made to his order, I think that the purposes of the warehouses are at least partly connected, both physically and functionally, with the unshipping of goods within the meaning of

s. 5 (1) (c), but I am, nevertheless, of opinion, regarding proviso (b) to s. 6 (3), that no place at all forming part of the hereditament is primarily occupied and used for warehousing merchandise in the course of being transported. There is thus no room for apportionment. If the consignee wished the transport at once to proceed he would pay his duty and not store the goods in bond. The very provision of bond appears to me to be inconsistent with a continuous transport. By the Customs (Consolidation) Act, 1876, s. 284 [now replaced by s. 307 of the Customs and Excise Act, 1952]: "Queen's warehouse" means "any place provided by the Crown or [appointed] by the Commissioners of Customs for the deposit of goods for security thereof and of the duties due thereon." The sole surviving section of the Bonded Warehouses Act, 1848, s. 26, speaks of any warehouse or place in which goods are deposited for security of the duties of customs, and contains special provisions for removing the goods: [see now s. 86 of the Act of 1952].

There remains the question of the merits of the three grain warehouse appeals. In my view, it is clear that these cases all fall within s. 5 (1) (c), that is to say, they are at least partly used for purposes connected with the unshipping at a dock of merchandise. They are also used for the shipping of merchandise. I agree with the reasons given by SCRUTTON, L.J., for this conclusion. It may be that under s. 6 (3) (b) on apportionment, certain parts of the hereditament, physically definable as buildings, yards or other places, will be shown to be primarily occupied and used for warehousing merchandise not in the course of being transported, but the facts as found show clearly that physically, part of such hereditaments, such as the elevators which form a part of the hereditament, are used for unshipping grain and transporting it, and functionally the whole hereditament is partly occupied and used for such a purpose. I do not think that we should disturb the findings on these facts, nor have the agreed additions in any way affected my conclusion on this matter. As all these findings are in agreement with those of the Divisional Court, I am of opinion that all these appeals should be dismissed.

Appeals dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *E. G. Finch*, Liverpool; *Gregory, Rowcliffe & Co.*, for *Laces & Co.*, Liverpool; *Treasury Solicitor*.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

A

BARTON AND OTHERS v. REED AND OTHERS

[CHANCERY DIVISION (Luxmoore, J.), October 27, December 15, 16, 17, 1931]

[Reported [1932] 1 Ch. 362; 101 L.J.Ch. 219; 146 L.T. 501]

B *Landlord and Tenant—Restrictive covenant—Prohibition of use of premises for carrying on business—Subletting of premises in self-contained flats—"Suffering" such use—Failure of mesne landlord to take legal proceedings.*

In 1865 the plaintiffs demised a dwelling-house for a term of years to F.D., who covenanted that he would not suffer it to be used for the carrying on of any trade or business or for a purpose that the plaintiffs might deem to be an annoyance or inconvenience to neighbours. There was the usual power of re-entry for breach of covenant. By an underlease dated Dec. 23, 1865, F.D. demised the premises for a term of years to S.G., subject to a similar covenant.

C On Jan. 29, 1894, the lease was assigned by F.D. to the first defendant, M.R., subject to the underlease, which, on March 24, 1928, was assigned by S.G. to the second defendant, A.P. A.P., without the knowledge or consent of the plaintiffs, but with the knowledge of M.R., converted the premises into self-contained flats, which she let, contracting to supply the tenants with hot water, heat and lighting. In an action by the plaintiffs for possession of the premises on the ground of breach of covenant,

Held: (i) the subletting by the second defendant of the premises in flats, with or without the provision of services such as hot water or lighting, was the carrying on of a "business" which would have constituted a breach by her of the covenant in the headlease if she had been an assignee thereof and also a breach of the covenant not to suffer the premises to be used in a manner which the plaintiffs might deem to be an annoyance or inconvenience to neighbours, and she was also in breach of the covenants of the underlease;

F (ii) it was the duty of the first defendant under the headlease to take the necessary legal proceedings to stop the commission by the second defendant of breaches of the underlease, and, as she had failed to do so, she had "suffered"—a term which was wider than "permitted"—the premises to be used in breach of covenant, and, therefore, the plaintiffs were entitled to possession.

Atkin v. Rose (1), [1923] 1 Ch. 522, followed.

G **Notes.** As to the plea of possession in defence to an action for the recovery of land, see R.S.C., Ord. 21, r. 21, and *Kisch v. Hawes Bros., Ltd.*, [1934] All E.R.Rep. 730.

As to covenants restricting the use of premises, see 23 HALSBURY'S LAWS (3rd Edn.) 620 et seq.; and for cases see 31 DIGEST (Repl.) 160 et seq.

H Cases referred to:

(1) *Atkin v. Rose*, [1923] 1 Ch. 522; 92 L.J.Ch. 209; 128 L.T. 653; 67 Sol. Jo. 350; 31 Digest (Repl.) 161, 2981.

(2) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 35 Digest 342, 846.

(3) *Rolls v. Miller* (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806, C.A.; 31 Digest (Repl.) 170, 3045.

I (4) *Bryant v. Hancock & Co.*, [1899] A.C. 442; 68 L.J.Q.B. 889; 81 L.T. 96; 64 J.P. 84; 15 T.L.R. 490, H.L.; 31 Digest (Repl.) 108, 2514.

(5) *Hobson v. Middleton* (1827), 6 B. & C. 295; 9 D. & R. 249; 5 L.J.O.S. 160.

(6) *Barton v. Keeble*, [1928] Ch. 517; 97 L.J.Ch. 215; 139 L.T. 136; Digest Supp.

(7) *Berton v. Alliance Economic Investment Co.*, [1922] 1 K.B. 742; 91 L.J.K.B. 748; 127 L.T. 422; 38 T.L.R. 435; 66 Sol. Jo. 487, C.A.; 31 Digest (Repl.) 160, 2980.

(8) *Berton v. London and Counties House Property Co.* (1920), unreported.

Witness Action.

By a lease made in 1865 between the Estates Governors of Alleyn's College, Dulwich, of the one part, and F. Doulton, of the other part, premises known as 37 Alleyn Park, Dulwich, were demised to him, his executors, administrators, and assigns for eighty-four years, from March 25, 1859. The lease contained a covenant by the tenant

"that he the said Frederick Doulton his executors administrators or assigns shall not convert the said messuage when so completed or any buildings to be erected on the said premises into or suffer the same to be used as an inn public house tavern or place of public entertainment or for the carrying on thereon any trade business or manufactory or for a school or chapel or place of public worship or for the reception of lunatics or insane persons or parish poor or in any way or manner or for any purpose that shall or may be deemed by the said governors or their successors or assigns to be an annoyance or inconvenience to the public or neighbourhood or to any contiguous tenants of the said governors."

There was a proviso for re-entry on failure to comply with any of the covenants. By an underlease dated Dec. 23, 1865, F. Doulton demised the premises to S. Gibbins for seventy-nine years less ten days from March 25, 1864. The underlease contained covenants almost identical with those of the headlease, with similar powers for re-entry. On Jan. 29, 1894, the lease of 1865 was assigned to the first defendant, Miss M. Reed, and in 1928 the underlease was assigned to Mrs. A. V. Porter, her interest being subject to a charge in favour of the defendant, the Hon. Edward Duke. The house was a detached dwelling-house with a large garden, the adjoining land was the plaintiffs' and developed as a high-class residential property. The plaintiffs alleged that Mrs. Porter wrongfully and without their knowledge or consent converted the premises into three separate tenements or flats, and sublet them to three separate sub-tenants, and that the premises had been thereby converted into a place for carrying on a business which was an annoyance or inconvenience to them as owners of other houses and premises in the neighbourhood and their tenants. They served on the defendant, Miss Reed, a notice on June 17, 1930, in writing, specifying the breaches of covenant complained of and requiring her to remedy them and make compensation. This was not complied with. The original defences of the defendants were that they were in possession by themselves or their tenants: see Note, *supra*. At the first hearing, on Oct. 27, the plaintiffs, after giving notice that the point would be raised, stated that they would claim—after proof of the lease, the assignment thereof to the first defendant, Miss Reed, and the devolution of the reversion to the plaintiffs—possession on the ground of the forfeiture due to the first defendant pleading a denial that she had ever held under the lease. This being, however, the first time this plea had been raised against them, they offered to waive the forfeiture (if any) on the terms that the defendants put in proper legal defences. This offer was accepted and terms were agreed on. The matter stood over for that purpose.

Gavin Simonds, K.C., and F. E. Farrer, for the plaintiffs, referred to *Rogers v. Hosegood* (2); *Rolls v. Miller* (3); the Landlord and Tenant Act, 1927, s. 17; *Bryant v. Hancock & Co.* (4); and *Hobson v. Middleton* (5).

Lavington, for the defendant, Miss Reed, referred to *Barton v. Keeble* (6).

Nokes for Mrs. Porter.

Soskice for the defendant, Hon. E. Duke.

LUXMOORE, J., stated the facts, and continued: The college estate in Camberwell embraces a large area containing about 1,478 acres. This area has been developed and now contains some 3,290 houses. Over 400 acres are devoted to open spaces, including Dulwich Park, which was some years ago given to the London County Council as a public park. Part of the estate is known as Alleyn Park, and at the time at which the lease, to which I shall presently refer, was granted, this part of the estate was being developed for residential purposes in plots, each plot having a single dwelling-house erected on it. I believe there are

A eighty-six such dwelling-houses on this part at the present time. Recently applications have been made to the governors to allow the conversion of some of these houses into a number of separate tenements or flats, and in some very few instances permission has been granted for this purpose, but, speaking generally, the governors have refused to consent to any conversion and have resisted applications under the Housing Act, 1925, s. 102, to vary the covenants of particular leases and to allow
B any conversion to take place.

The house in question in the present case consists on the top floor of three rooms, a living room, two bedrooms, a small room used as a kitchen, and bathroom and other offices. That floor is separated from the rest of the house by a door shutting off the staircase at the point where it leads up to this floor. On the first floor there are two sitting rooms and three bedrooms, a separate kitchen, bathroom and a
C dressing room, which is used for some other purpose. On the ground floor there are two reception rooms, two bedrooms, a kitchen, and again a separate bathroom and other offices. There is no evidence as to when or by whom these structural alterations were made. Neither the defendant, Miss Reed, nor the other defendant, Mrs. Porter, nor any person on her behalf, has given evidence nor was she interrogated with regard to the matter. It is, however, admitted that she has sublet
D the three floors on various occasions. On Feb. 27, 1929, Mrs. Porter entered into an agreement with one Harold Cunningham, whereby he agreed to occupy for dwelling purposes only the top-floor suite of rooms with private stair for a period of five years from March 25, 1929, to March 25, 1934, with the option of a break at the end of three years. The agreement says:

E "For the use of these rooms partly furnished I agree to pay the sum of £104 per annum payable quarterly in advance, inclusive of all rates and taxes. I also agree to abide by the rules of the Dulwich College with you."

Then there was a note which said that "partly furnished" meant "the linoleum on the floor of the hall and bathroom, which was laid when I entered on possession of the premises." Mr. Cunningham has given evidence, and he stated that at the
F same time as he entered into that agreement verbal arrangements were made under which he was to have a supply of hot water provided for him by Mrs. Porter, and that certain services should be rendered with regard to the hall and staircase and the cleaning of those parts of the building. At about the same time an agreement was entered into letting the ground floor to a Mr. J. H. Taylor. I have not seen the agreement between Mrs. Porter and Mr. Taylor. At this time Mrs. Porter was
G herself in occupation of the first floor, and she remained in occupation of that floor until about the time when she agreed to let it to a Mr. S. P. Pamment. His agreement is dated Dec. 30, 1929:

"I Sidney P. Pamment agree to rent from you the first-floor suite of rooms at the above address for a period of five years commencing Dec. 9, 1929, to Dec. 8, 1934, with the option of breaking after three years, for the sum of £130
H per annum payable quarterly in advance. The rent to include all rates and taxes and a supply of hot water."

Again there is the provision: "I agree with you to abide by the rules of the Dulwich College." Mr. Taylor terminated his agreement in May, 1930, and after he had left Mrs. Porter occupied the ground floor of the premises until Oct. 9, 1930, when she gave possession to a Mr. E. J. Baldwin, with whom she had entered into an
I agreement on Sept. 29 of that year. The agreement is a more formal one than the other. It provides for the letting of the ground floor "including the back garage and portion of the garden of the premises known as 37, Alleyn Park, West Dulwich," with the right of user of the entrance hall in common with the other tenants for the term of one year from Oct. 9, 1930, at a yearly rent of £120 payable quarterly in advance. The tenant agrees to pay the rent to the landlord without any deduction, also to pay for gas and electric light and—this is important—

"the tenant likewise agrees to pay his proportion of the cost of fuel for the

domestic hot water supply to the said flat and also for the central heating at the rate of not exceeding £5 per annum to be paid quarterly on demand by way of additional rent." A

It is alleged that what Mrs. Porter has done would constitute a breach of the covenants contained in the headlease if she had in fact been an assignee of that lease, and that such acts constitute breaches of covenants in the underlease. So far as Mrs. Porter is concerned, I am satisfied that what she has done constitutes the carrying on of a business. She has let suites of rooms. She has agreed to provide, and is bound to provide, certain services, for instance the provision of hot water. She has agreed to provide for the cleaning of the hall and staircase and matters of that kind, and she retains control at any rate of parts of the house such as the hall, staircase and garden which are not included in the respective tenancies. I think this is none the less a business although it has no specific description. "Business," of course, is a wide and flexible word, but that the subletting of premises in suites of apartments with or without the provision of any other service is a business, I think can be open to little doubt. In the Landlord and Tenant Act, 1927, which is B C

"an Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof; and to amend the law of landlord and tenant," D

it is provided by s. 17 (3) as follows :

"For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business—(a) by reason of their being used for the purpose of carrying on thereat any profession; (b) by reason that the tenant thereof carries on the business of subletting the premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by the tenant." E

This suggests that, in the absence of that enactment, there could be no question but that the subletting of premises in the way referred to would or might be considered the carrying on of a business. F

It is said by counsel for Mrs. Porter that no business has been carried on at any rate since Oct. 9, 1930, because on that date Mrs. Porter left the house and no longer resided there; that the business, if it be one, consists in the negotiation of and entering into agreements for letting, and that those negotiations and agreements must be taken to have been effected elsewhere, because Mrs. Porter was no longer resident in any part of No. 37. I do not think this follows, and I have no evidence that Mrs. Porter negotiates or enters into agreements relating to these premises somewhere else. She has not been called, and I see no reason why I should make any inference in her favour to this effect. In my judgment, the fact that she retains control of an important portion of the premises and is under liability to supply certain services like the provision of hot water and so on constitutes the carrying on of a business. Counsel asked me to infer that she no longer supplied the hot water service and the other services because the ground floor flat was let to Mr. Baldwin. I can see no reason to make any such inference, more especially as Mr. Baldwin's agreement provides that he will pay his proportion of the cost of the fuel for the domestic hot water service supply to the flat—I suppose on the ground that Mrs. Porter herself is to provide that service. I have no doubt whatever that Mrs. Porter is in fact carrying on a business at No. 37 which would constitute a breach by her of the covenants of the headlease if she were the assignee, and which in fact constitutes a breach by her of the covenants of her underlease. Further, I am satisfied that what she is doing would also be a breach of the second part of the covenant in the headlease not to suffer the premises to be used G H I

"in any way or manner or for any purpose that shall or may be deemed by the governors or their successors or assigns to be an annoyance or inconvenience to the public or neighbourhood or to any contiguous tenants of the said governors."

- A It has been argued that there is no evidence that the governors have in fact considered that what is being done is an annoyance or inconvenience within the words of the covenant. The evidence of the chairman of the governors has satisfied me that the whole matter was considered at a properly constituted meeting of the governors, and that the members present were unanimous on the point before instructing the solicitors to take steps to enforce the observance of the covenant.
- B Further, I am satisfied by the evidence that the governors have, except in special cases, always resisted any attempt to vary the covenants so as to enable houses in particular parts of the estate to be let out in separate suites or flats, and that such resistance has been on the ground that they deem this kind of proceeding detrimental to the estate, to their tenants, and to those interested in it.

- Of course, the matter does not end here, for, though Mrs. Porter may, in doing what she has done, be effecting what would be breaches of covenant if she were an assignee of the headlease, still there is no contractual relationship between Mrs. Porter and the governors. The governors can only re-enter if their lessee, Miss Reed, has committed a breach of covenant. Admittedly, Miss Reed has not converted the house into a place of business and is not herself carrying on any business in it, but the covenant binding on her is that she will "not suffer" the premises to be used for the carrying on thereon of any business or in any way or manner or for any purpose that shall be deemed by the governors to be an annoyance or inconvenience to the public or the neighbourhood or any contiguous tenants. The covenant is one which imposes some liability on the lessee. Counsel for the plaintiffs was prepared to argue that this was an absolute covenant against user of the premises for the purpose of a business, and he reserved this point in the event of the case going elsewhere. However, the point has not been argued before me, and I say nothing more about it. The word "suffer" is a wide term. It seems to me to be wider than the word "permit." Obviously, had Miss Reed given permission for the business to be carried on she would have committed a breach. The words "permit" and "suffer" have been the subject of judicial decision, and in one case I think it was said they were synonymous. Speaking for myself, with all possible respect to the learned judge who said so, I think there may well be as a matter of construction a substantial difference between the word "permit" and the word "suffer," but it is not material to consider that here. The word in the case before me is "suffer," and that must cover allowing something to be done which the sufferer has the complete power to prevent. It is said that a covenant not to suffer a thing to be done imposes no liability on the covenantee to take legal proceedings to prevent the thing being done. I think that is putting the case too high. In *Berton v. Alliance Economic Investment Co.* (7) ATKIN, L.J., said this ([1922] 1 K.B. at p. 758):
- G "The alleged breaches of the covenants in the lease of March 25, 1907, consisted in permitting parts of the premises to be occupied as separate tenements by several tenants."
- H He referred to *Berton v. London and Counties House Property Co.* (8) and continued:

"But the question is whether the appellants have, to put it shortly, used the premises or permitted them to be used in breach of the first covenant, or suffered them to be used in breach of the second."

The first covenant was that

- I "the lessee will not without the lessors' previous licence in writing use the premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling-house wherein no business of any kind is carried on."

The second material covenant was:

"That the lessee will not without the lessors' previous licence in writing . . . do or suffer to be done in or on the demised premises anything which may in the judgment of the lessors be or grow to the annoyance of the lessors or any

of their tenants or of any of the occupiers of any contiguous or adjoining premises or of the public or neighbourhood."

The learned lord justice continued :

"It is not suggested that there is any difference between the words 'permit' and 'suffer' in this context, and I treat them as having the same meaning. It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent. It is not suggested that the appellants themselves used the premises wrongly; the facts are that they let them to MacIntosh and MacIntosh let them in separate tenements to the several undertenants. What is said is that the appellants permitted the premises to be used contrary to the terms of the covenant. To my mind, the word 'permit' means one of two things, either to give leave for an act which, without that leave, could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it. Acts which fall short of that, though they be acts of sympathy or assistance, do not amount to permission at any rate in the covenants with which we are dealing. . . . The gravamen of the charge against the appellants is that they took no proceedings to obtain possession against the undertenants. The appellants answer that there is authority for holding that under the Rent Restrictions Act, 1915, these undertenants would have been entitled to remain in possession, and that under the Act of 1920 it is extremely doubtful whether possession could be recovered against them; that in any case the court would have a discretion to stay or adjourn the proceedings, and that the appellants have power to apply under s. 27 of the Housing and Town Planning Act, 1919, to the county court for permission to convert these premises into and let them as separate tenements. For my part, I am inclined to think that in certain circumstances a man may permit the continuance of an act if he can prevent it by taking legal proceedings and refrains from doing so. I can imagine a simple case, where a bailee, having agreed with the owner of a chattel not to permit any third person to have possession of it, is deprived of it by a third person; where he knows the third person is in possession of the chattel, and that a writ claiming a specific return of it could have but one result; if he refrained from taking proceedings I suggest that he might be held to have permitted the third person to have possession. But all the circumstances must be taken into account; and where there is a reasonable doubt whether legal proceedings to stop an act would be successful—where, for example, a person takes legal advice and comes to the conclusion that he could not reasonably expect legal action to be successful—there he does not permit the act by abstaining from legal proceedings."

That statement by ARKIN, L.J., was approved and followed and applied by LAWRENCE, J., in *Atkin v. Rose* (1), where he said this ([1923] 1 Ch. at p. 532) :

"In these circumstances the first question which falls to be determined by the court is whether the defendant Rose has 'permitted or suffered' Goodman to use or exercise in or upon some part of the demised premises the trade or business of a hairdresser, within the meaning of the covenant contained in the lease of March 24, 1919, and has consequently committed a breach of that covenant. In my judgment the defendant Rose has permitted or suffered and is still permitting and suffering the carrying on of the hairdressing business and, therefore, has committed, and is still committing, a breach of his covenant. In my opinion, it is plainly within the power of the defendant Rose to stop

A the business which Goodman is carrying on. It is true that, in order to do so, he may have to commence and prosecute the appropriate legal proceedings. It is also true that it cannot be affirmed, as a general proposition, that a covenantor under such a covenant is committing a breach of the covenant, whatever the facts may be, unless he takes legal proceedings to prevent or stop the continuance of the prohibited business. Every case must depend upon its own circumstances. In the present case, however, it is proved that the defendant Cohen could have no defence to an action brought by the defendant Rose, and that there are no facts which would render it unreasonable for the defendant Rose to bring an action against the defendant Cohen which could have but one result. In these circumstances, I am of opinion that, so long as the defendant Rose abstains from taking the proper steps for preventing the business from being carried on, he is permitting or suffering the business to be carried on."

I do not think I need read any other part of the judgment.

With those cases in mind, what are the special circumstances in this case? I have already held that Mrs. Porter would have committed a clear breach of the covenants in the lease if she had been an assignee. She has committed a clear breach of the covenants contained in her underlease. The matter was, however, brought to the defendant Miss Reed's attention from time to time. As early as April 5, 1928, her attention was called to the question of 37, Alleyn Park, by the secretary and general manager of the governors. On April 4, 1929, the solicitors to the governors wrote to her and asked her to inform them whether the house was occupied by more than one tenant, "as any such subdivision of the premises into tenements would be considered a breach of covenant." That was answered by her solicitors, who apparently had made inquiries and had been told that they were occupied by one tenant only. Further correspondence ensued. In April, 1930, the general manager wrote to the defendant, Miss Reed, giving formal notice that they required to enter upon the premises and asking for a day to be fixed, and an inspection was ultimately held in May, 1930. As a result the solicitors for the governors wrote to Miss Reed's solicitors and told them that:

F "Upon inspection of the premises it was found that a breach of covenant was being committed by letting the house in floors as furnished suites, and we have been instructed to serve a notice of breach of covenant. The notice has been sent to the estates secretary and general manager for service by delivery on the premises. . . ."

G No step was taken, however, by Miss Reed, even, I think, to inspect the premises or to have them inspected on her behalf to see what was being done, and in those circumstances this action was instituted. In the circumstances, I am of opinion that this case is covered by the decision of LAWRENCE, J., in *Atkin v. Rose* (1). I am satisfied that there was a clear breach by Mrs. Porter of both the covenants in the underlease, and that Miss Reed had no difficulty whatever in seeing that that breach did not continue. It was her duty under the covenant to take the necessary legal proceedings to stop what Mrs. Porter was doing, and if she had taken those proceedings there would have been no doubt whatever as to their result. The proper notice for forfeiture has been given and it has not been complied with. There is, as I have said, a breach by Miss Reed of the covenants in the headlease which has made the right to re-enter by the governors effective, and in those circumstances the plaintiffs are entitled to an order for possession of the premises and for mesne profits as from Oct. 15, 1930. They are also entitled to an order for the sum which is due in respect of the arrears of rent down to Oct. 14, 1930, when the writ was issued.

Solicitors: *Druces & Atlee; Reed & Reed; Herbert A. Phillips; Edward Mackie & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

CIVILIAN WAR CLAIMANTS' ASSOCIATION, LTD. v. R.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), November 19, 1931]

[Reported [1932] A.C. 14; 101 L.J.K.B. 105; 146 L.T. 169; 48 T.L.R. 83; 78 Sol. Jo. 813]

Crown—Treaty—Payment by foreign State of reparations for injury to British subjects—Crown neither trustee nor agent for subjects.

The association, which was formed in 1925, and was the assignee of the claims of certain British civilians who had suffered loss or damage in person or property during the 1914–18 war, presented a petition of right claiming on behalf of their assignors payment of their claims out of the sums received or to be received by His Majesty under the Treaty of Versailles by way of reparations. On demurrer,

Held: when the Crown was negotiating a treaty with the head of another State it was inconsistent with its sovereign position that it should act as trustee or agent for its nationals, and it cannot be charged as so acting unless it has expressly declared that it does so act; in the present case there was nothing which indicated that the Crown had expressly assumed that position, and there were no circumstances from which the law might impose on it the position of either trustee or agent; and, therefore, the petition must be dismissed.

Rustomjee v. R. (1) (1876), 2 Q.B.D. 69, applied.

Notes. In *German Property Administrator v. Knoop*, [1933] 1 Ch. 439, the same principle was held to apply to the German government, it being held that in the London Agreement of 1929 and the Hague Agreement of 1930 there was nothing to show that the German government was thereby expressly or by necessary implication purporting to act as agent or trustee on behalf of its nationals so as to give them a right of action.

Applied: *German Property Administrator v. Knoop* (1932), 49 T.L.R. 109. Referred to: *Republic of Italy v. Hambro's Bank, Ltd.*, [1950] Ch. 314.

As to treaties, see 7 HALSBURY'S LAWS (3rd Edn.) 286–289; and for cases see 11 DIGEST (Repl.) 620–621.

Case referred to:

(1) *Rustomjee v. R.* (1876), 2 Q.B.D. 69; 46 L.J.Q.B. 238; 36 L.T. 190; 25 W.R. 333, C.A.; 1 Digest 277, 91.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.J.J.), affirming a decision of ROCHE, J., whereby it was ordered that judgment be entered for the Crown upon the Crown's amended demurrer to the appellants' amended petition of right.

The amended petition of right alleged that the appellants were a company which was formed in March, 1925, for the purpose of obtaining compensation for civilians in the United Kingdom who had suffered loss or damage in person or property during the war of 1914–18 from hostile aircraft, submarines, bombardments, internments, or other enemy action on the part of Germany or her allies; that the appellants were the assignees of certain sums of money alleged to have been due from His Majesty and His Majesty's government to certain persons, firms, and corporations who had suffered injury, loss, and damage owing to the aggression of Germany; and that notice in writing of the assignments had been given to His Majesty and to His Majesty's government. It was further alleged that His Majesty's Ministers had from time to time led the claimants to believe that, upon fulfilment of certain conditions, money would be obtained from Germany or other where and used for the compensation of the claimants, and reliance was placed upon statements of His Majesty's Ministers as to the policy of the government in relation to damage caused to civilians by enemy aggression, and upon a Royal Proclamation

A of Sept. 7, 1916, commanding and enjoining certain of His Majesty's subjects having claims against enemy governments to make returns of those claims to the Directors of the Foreign Claims Office, or its successor, the Reparation Claims Department of the Board of Trade. It was further alleged that under art. 232 of the Treaty of Versailles the claims of the claimants were a preferential and prior charge on the reparations received by His Majesty, and that certain sums had been received by
B His Majesty on account of reparations; and, further, or alternatively, that sums not yet received were from time to time payable by Germany to His Majesty on account of reparations.

Paragraph 54 of the amended petition was as follows :

C "By the conduct of your Majesty through Royal Proclamations and through your Foreign Claims Office and Reparations Claims Office and through your Prime Minister and other Ministers in inviting the claimants to submit their claims, which invitation was accepted by all the claimants who suffered detriment thereby, and were put to considerable expense in complying with the terms of the claim forms, your suppliants submit that the moneys had and received from Germany by your Majesty or your Majesty's government . . .
D having been received and being held for and on behalf of and/or to the use of the claimants, your Majesty and your Majesty's government . . . have become and now hold the said money as agent or agents and/or trustee or trustees for the claimants, and, further, your Majesty and your Majesty's government are estopped from denying such agency and/or trust."

E The appellants submitted that the moneys had and received from Germany were held by His Majesty as agent or trustee for the claimants, and they asked for: (i) Payment to the appellants of the amount due to each of the claimants who had assigned their claims to the appellants, with interest, and (ii) alternatively, (a) payment to the appellants of a rateable proportion of all sums received by or on behalf of His Majesty on account of reparations; and (b) a declaration that the appellants were entitled in law to be paid a rateable proportion of the sums not yet received
F by His Majesty on account of reparations as and when so recovered. The Crown demurred to the petition on the ground that it was not maintainable and disclosed no ground of claim cognizable by the court. ROCHE, J., ordered judgment to be entered for the Crown, following the decision of the Court of Appeal in *Rustomjee v. R.* (1). The Court of Appeal affirmed the decision of ROCHE, J., and the association appealed.

G *Serjeant Sullivan, K.C., D. N. Pritt, K.C., and Cyril Radcliffe* for the appellants. *The Attorney-General (Sir William Jowitt, K.C.) and Colin Pearson* for the Crown.

LORD BUCKMASTER.—During the late war there were many subjects of His Majesty who suffered damage to person and to property owing to aircraft and
H bombardment from the sea. Claims immediately arose in respect of the injuries that had been so suffered, and were brought at once before the notice of His Majesty's government. On Feb. 4, 1915, and again on March 31, 1915, the Prime Minister stated that the government had undertaken to give relief for damage caused by the raids which had then taken place. Again, on Feb. 17, 1915, it was stated by the Chancellor of the Exchequer that payment of relief for damage caused
I by aircraft would be made out of Imperial funds. Following this, on Sept. 7, 1916, a proclamation was issued calling upon all people who had suffered and had claims against enemy persons or governments to make returns of their claims to the proper officers. The appellants represent a number of people who suffered such damage and whose claims they have purchased, and their case, as formulated in a petition of right which they have presented, is that the Crown has received from Germany moneys in respect of this damage, and that it is, consequently, either an agent or a trustee for them for the moneys so received, or that the moneys, at any rate, have been received by the Crown as moneys had and received to their use.

It is plain from what I have stated that up to 1917 nothing had happened to support any such claim at all, for all that had then occurred was that the claimants had been told that they were to file their claims and statements had been made that the moneys would be made good out of the national funds—indeed, at that moment, whatever might have been hoped, the issue of the war was uncertain, and it was impossible to know what might be the issue. On July 13, 1917, the Prime Minister, in answer to a memorial asking that full compensation should be made for such losses out of national funds, stated that he accepted in principle the case so made. Up to this time the payment contemplated was out of the funds of this country, but finally, on Jan. 8, 1918, President Wilson made his celebrated speech containing what are called the fourteen points, and when the armistice was granted it was upon the terms that Germany should make compensation for all damage done to the civilian population of the allies and their property by land, by sea, and from the air. Following upon that there was a discussion before the Peace Conference as to what these moneys might include, and ultimately the treaty itself was signed, and that contained what are the material provisions for the present purpose.

First, in art. 231 there was an affirmation by the allied and associated governments, accepted by Germany, that Germany was responsible for causing all the loss and damage to which the allied governments and their nationals had been subjected, and by art. 232 it was provided that compensation should be made in the following words :

“The allied and associated governments recognise that the resources of Germany are not adequate after taking into account permanent diminutions of such resources which will result from other provisions of the present treaty to make complete reparation for all such loss and damage. The allied and associated governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the allied and associated Powers and to their property during the period of belligerency of each as an allied or associated Power against Germany by such aggression by land, by sea and from the air and in general all damage as defined in Annex I hereto.”

It is known that, associated with the specific damage caused on the sea and by aircraft and bombardment to our people at home during the war, there were included in the claims for damages against Germany large sums representing the damage that was suffered in payment of pensions to soldiers' widows and similar matters, which were in a different category from the damage of the nature I have already mentioned; but the whole was collected together into one group claim, and there was no separated and specific claim under one head or another, so that one whole claim was put forward and approved by the Reparations Commission to represent the total claim against Germany under that head. Moneys have undoubtedly been received in respect of that claim, and it is in respect of those moneys that the present proceedings are brought.

In the first place, to establish that anyone was a trustee of that fund in the circumstances I have mentioned is, to my mind, to attempt an impossible task. I can see no evidence whatever of an acceptance of trusteeship on the part of the government, or assertion of trusteeship on the part of the people who suffered damage, nor anything up to the time when the money was received to show that the conception of trusteeship was in the minds of anyone in any form whatever. Indeed, the original statements that were made were made of the readiness to compensate out of the national funds at home, and nobody suggests that the government were trustees of those funds for this purpose. Finally, when the moneys were received, it is said that from and after that moment the Crown became a trustee. I have pointed out in the course of the argument, and I repeat, that, if that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights must include, among other things, a claim for an account of the moneys that were received, of the expenses incurred, and the way in which the moneys have

A been distributed. Such a claim presented against the Crown in circumstances such as these would certainly have no precedent, and would, as it appears to me, invade an area which is properly that belonging to the House of Commons. That the money was received by the Crown as agent, it seems to me, can no more be established than that the money was received by it as trustee. In fact, the trusteeship is the agency stated in other words. If it was not a trustee, neither was it an agent; nor can I see that in any sense it received these moneys as money had and received to the use of the people whose claims were made. The people whose claims were made were not considered by Germany on making the payment at all. The terms of the treaty were that Germany should pay the sum necessary to satisfy the claims of various people who had suffered, and it was left to the governments themselves, as between them and their nationals, to determine how that money was to be distributed.

C Therefore, my Lords, on general principle, I should have thought that the petition must fail, but the general principle is immensely strengthened by *Rustomjee v. R.* (1), for there a case similar in many respects to this, although, of course, not exactly identical, arose for consideration in the Queen's Bench Division. It was a case of a British subject who had had a claim for debt against a group of Chinese D merchants, which, owing to Chinese disturbance, had been dissolved, and the debts had been lost. When a treaty was made between Great Britain and China, a sum of money representing \$3,000,000 was paid to the British government on account of the debts that were so due to British subjects from these Chinese merchants, and it appears to me that in that respect the case is closely analogous. There were claims from the British subjects which were gathered together and amounted to a E total of \$3,000,000 and those \$3,000,000 so constituted were paid over to the British government. Thereupon one of the alleged creditors issued a petition of right and made precisely the claim that is made here, that the Crown was either an agent or a trustee, or that the money was money had and received to his use. There can be no doubt that the learned judges expressed themselves upon that claim in extremely emphatic terms. COCKBURN, C.J., seemed to think that it was strange F that any such claim should have been made at all, and BLACKBURN, J. (who subsequently became LORD BLACKBURN), pointed out that such a claim made a little earlier might have led to very disastrous consequences. LUSH, J., stated the matter in what I regard as the most simple and the most accurate form of all. He said this (1 Q.B.D. at p. 497):

G "It seems to me that the relation which is pressed upon us here never existed in this case between the Crown and the subject, and is one which cannot exist in any State like ours between the Sovereign and the subject."

I should like to pause here for a moment to point out that that is a relationship which arises by reason of a treaty having been made in the circumstances there set out, and he adds:

H "No doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China; but then the distribution when made would be, not the act of an agent accounting to a principal, but the act of the Sovereign in dispensing justice to her subjects. For any omission of that duty the Sovereign cannot be held responsible. The responsibility would rest with the advisers of the I Crown, and they are responsible to Parliament, and to Parliament alone."

That appears to me to be a perfectly exact and accurate way of stating what the true position is, and it completely covers the present case. Attempts were made to distinguish that authority both on the ground of the difference in the circumstances which led to the case coming before the court, and on the ground which I found it more difficult to apprehend, that something had happened since the decision of that case that had in some way changed the constitutional relationship of the Sovereign and the subject. I can find nothing to support such a view and I can see no reason why such a change should have taken place. In my opinion,

the quotation I have made from that judgment is as applicable to this case as it was applicable to the case then before the court, in the days when it was decided, and, so regarded, it defeats this claim. A

LORD WARRINGTON.—I concur.

LORD ATKIN.—I concur. It has to be remembered that this House is dealing in this case with a demurrer to a petition of right in which the facts alleged in the petition must be taken to be true for the purposes of the argument. But even making that assumption, it appears to me, for the reasons that have been stated by the noble Lord on the Woolsack, that the petition does not disclose a cause of action, for it discloses the action taken by the Crown in receiving this sum of money in circumstances which make it impossible to impute to the Crown the position either of a trustee or of an agent. In other words, when the Crown is negotiating with another Sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the State, unless indeed the Crown chooses expressly to declare that it is acting as agent. There is nothing, so far as I know, to prevent the Crown from acting as agent or trustee if it chooses deliberately to do so. In the circumstances of this case there appears to me to be nothing which indicates that the Crown expressly assumed the position of agent or trustee, and I think the circumstances negative the idea that the Crown ever did intend to occupy that position and negative any circumstance from which the law might impose upon it the position either of agent or of trustee. It appears to me that *Rustomjee v. R.* (1) and the principles laid down therein, limited, as they ought to be, to the circumstances of that case and applied to the circumstances of this case, are perfectly correct. I agree that the appeal should be dismissed. B C D E

LORD TOMLIN.—I concur that this appeal should be dismissed.

LORD MACMILLAN.—I also concur.

Appeal dismissed.

Solicitors : *Russell & Arnholz ; Treasury Solicitor.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*] F

A

STENING v. ABRAHAMS

[CHANCERY DIVISION (Farwell, J.), January 27, 28, 1931]

[Reported [1931] 1 Ch. 470; 100 L.J.Ch. 278; 145 L.T. 18]

B

Landlord and Tenant—Covenant—Covenant “not to part with the possession of the demised premises or any part thereof”—Licence to erect advertisement hoarding against wall.

By a lease dated Feb. 29, 1922, the lessees covenanted (inter alia) not to “part with the possession of the demised premises or any part thereof.” In September, 1929, the lessees granted an exclusive licence for seven years to erect an advertisement hoarding against the front wall of the premises, and the hoarding was duly erected.

C

Held: a lessee cannot be said to part with the possession of any part of the premises unless his agreement with, e.g., a licensee wholly ousts him from the legal possession of that part, and if there is anything in the nature of a right to concurrent user there is no parting with possession; therefore, in the present case, the grant to the licensees of a right to use the wall for the erection of an advertisement hoarding was not a breach of the covenant as the lessees remained to a large extent in possession of the wall.

D

Notes. Referred to: *Gee v. Hazleton*, post, p. 485.

As to covenants against parting with possession, see 20 HALSBURY'S LAWS (2nd Edn.) 345–346, para. 416; and for cases on the subject see 31 DIGEST (Repl.) 412–413, 5416–5424.

E

Cases referred to:

- (1) *Abrahams v. MacFisheries, Ltd.*, [1925] 2 K.B. 18; 94 L.J.K.B. 562; 133 L.T. 89; 81 Digest (Repl.) 416, 5454.
- (2) *Chaplin v. Smith*, [1926] 1 K.B. 198; 95 L.J.K.B. 449; 134 L.T. 393, C.A.; 31 Digest (Repl.) 417, 5460.
- (3) *King v. David Allen & Sons, Billposting, Ltd.*, [1916] 2 A.C. 54; 85 L.J.P.C. 229; 114 L.T. 762, H.L.; 30 Digest (Repl.) 542, 1763.
- (4) *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 274; 144 L.T. 331; 29 L.G.R. 241, C.A.; 12 Digest (Repl.) 421, 3250.
- (5) *Frank Warr & Co., Ltd. v. L.C.C.*, [1904] 1 K.B. 713; 73 L.J.K.B. 362; 90 L.T. 368; 68 J.P. 335; 52 W.R. 405; 20 T.L.R. 346; 2 L.G.R. 723, C.A.; 30 Digest (Repl.) 534, 1702.
- (6) *Jackson v. Simons*, [1923] 1 Ch. 373; 92 L.J.Ch. 161; 128 L.T. 572; 39 T.L.R. 147; 67 Sol. Jo. 262; 31 Digest (Repl.) 418, 5473.

F

G

Witness Action.

The plaintiffs were the owners of a house, 34, The Quadrant, Richmond, Surrey.

H

By a lease dated Feb. 1, 1922, the plaintiffs' predecessor in title demised the house to the defendants for twenty-one years from Dec. 25, 1921, at an annual rent of £200, with a premium of £300. One of the covenants by the defendants was:

“Not to assign underlet or part with the possession of the demised premises or any part thereof without the previous consent in writing of the lessor.”

I

There was also a covenant not to do anything to annoy the lessor or his successors in title or the occupants of adjoining houses.

The defendants occupied the ground floor of the house as a shop. The first and second floors were composed of long rooms with windows both in front and at the back.

By a memorandum dated Sept. 20, 1929, the defendants gave A.A. Sites, Ltd., a licence in the following terms:

“... the exclusive right to use for the purpose of suspending fixing and exhibiting advertisement bill-boards, or hoardings, or displaying advertisements on

our premises from the shop fascia upwards at 34, The Quadrant, Richmond, Surrey, with uninterrupted access to the same . . . at a rental of £78 per annum inclusive. This arrangement shall date from Sept. 28, 1929, and be for a period of seven years, and the company are to have the option of continuing the same for a further period of five years and thereafter from year to year until six months' notice shall be given expiring on the usual quarter day, provided always that the superior landlords raise no legal objection to this agreement or any part thereof . . . Provided always that if owing to the action of any authority the exhibition of advertisements is found to be impossible or impracticable, or in the event of this country being engaged in any serious war, or in the event of any civil disturbance, then this arrangement shall be forthwith cancelled. Also if the effective display of any such advertisements shall at any time be obscured, then the said rent shall cease until such obstructions be removed . . . Provided also that the premises are not required by the superior landlords who may terminate the lease of the premises by three months' notice should their own premises be required by the Southern Railway for extension or rebuilding."

A.A. Sites, Ltd., began to put up the hoarding on Sept. 26, 1929. The plaintiffs protested against its erection, but in spite of such protests the hoarding was completed. It was a substantial erection, the base of which rested on the fascia of the shop and went up to three or four feet above the roof of the house. It was at a distance of two or three inches from the wall of the house to which it was secured by nails and battens fastened to the stucco and extended the whole width of the house. It was fastened to the roof by wires. It was covered with various kinds of advertisements, and it was admitted that it was a disagreeable object.

On Nov. 27, 1929, the plaintiffs commenced this action for a declaration that the erection of the hoarding was a breach of several covenants in the lease, including the covenant not to part with possession, and for a mandatory injunction to remove it, and for damages. The defendants denied that there was any breach of any covenant.

In March, 1930, the Richmond Corporation, who were the local authority, objected to the erection on the grounds that no plans for the hoarding had been submitted to them, and that in some respects it did not comply with their byelaws. In consequence of this, after some discussion, the hoarding was removed on Oct. 14, 1930, before trial. The holes in the stucco were filled up and the wall re-painted at a total cost to the defendants of less than £5.

As, however, the defendants still insisted on their right to grant a licence for the erection of a hoarding which complied with the byelaws, the plaintiffs continued the action to determine the rights of the parties.

Sir Herbert Cunliffe, K.C., and *P. M. Walters*, for the plaintiffs, referred to *Abrahams v. MacFisheries, Ltd.* (1) and *Chaplin v. Smith* (2).

Archer, K.C., and *Bernstein*, for the defendants, referred to *King v. David Allen & Sons, Billposting, Ltd.* (3); *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.* (4); *Frank Warr & Co., Ltd. v. L.C.C.* (5); and *Jackson v. Simons* (6).

FARWELL, J., after stating the facts and deciding that, as to two other covenants, there had been no breach, continued: The next question is whether the defendants have broken the covenant against parting with possession of any part of the premises. The plaintiffs say that, by giving A.A. Sites, Ltd., the right to use the front of the wall for an advertisement hoarding, the defendants have parted with the possession of that front and a three-inch stratum of air outside it.

I must entirely disclaim any attempt to define the meaning of parting with possession generally. It must always be a question of fact, and the construction of the particular agreement in each case, and it cannot be determined by looking at the document alone.

But, in my view, a lessee cannot be said to part with the possession of any part

A of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of a right to concurrent user there is no parting with possession. Retention of a key may be a negative indication, and the authorities show that nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to parting with possession. The fact that the agreement is in the form of a licence is immaterial, as the licence may give the licensee so exclusive a right to legal possession as to amount to a parting with possession.

B Now, does the present licence exclude the defendants from any part of the premises? No doubt it gives the licensees the exclusive right to use the wall for an advertisement hoarding. No one else, including the defendants, can use the wall for that purpose. On the other hand, the defendants remain to a large extent in possession of the wall. The plaintiffs contend that the front of the wall is wholly in the control of the licensees. That is not the true view. The right of the licensees to put up their advertisement hoarding does not prevent the defendants from using the wall, so long as they do not interfere with their licensees. Suppose the licensees determined to cease their user for a period. The defendants could certainly repair the wall without the leave of the licensees. Merely to give the licensees a right to use the wall for this particular purpose is not a parting with possession within this covenant. I do not decide that in no case could such a licence amount to a parting with possession. I am limiting my judgment exclusively to the facts and the licence in this particular case. The plaintiffs, therefore, fail on this covenant.

D [His Lordship then considered whether there had been a breach of the covenant against annoyance, and on this covenant he held that the defendants had committed a breach. He, therefore, made a declaration to that effect, but as the plaintiffs did not ask for an injunction none was granted, but the plaintiffs were given the costs of the action.]

Solicitors: *Bolton, Jobson & Yate-Lee*; *W. Ewart Craigen*.

E [Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

Re MORGANS (DECEASED)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 11, 1931]

[Reported 145 L.T. 392; 47 T.L.R. 452]

Intestacy—Grant of administration—Discretionary grant—Next-of-kin renouncing administration but agreeing to appointment of nominees—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 162 (1) (as amended by Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9).

B

The next-of-kin of the deceased, who had died intestate, were unable to agree on any one or more of themselves administering the estate. Being sui juris, they signed an act of renunciation, in which they consented to two nominees, who were well known to the deceased and who had been named as executors and trustees in a draft will which the deceased had never executed, being nominated to take out letters of administration, subject to the approval of the court under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), as amended by the Administration of Justice Act, 1928, s. 9.

C

Held: in the "special circumstances," under s. 162 (1) of the Act of 1925, the court would grant letters of administration to the two nominees.

D

Notes. As to the discretionary power of the court to grant administration, see 16 HALSBURY'S LAWS (3rd Edn.) 224-227, paras. 410-415; and for cases on the subject see 23 DIGEST (Repl.) 172-173, 1922-1941. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), as amended, see 9 HALSBURY'S STATUTES (2nd Edn.) 777.

E

Cases referred to:

- (1) *In the Goods of Hopkins* (1875), L.R. 3 P. & D. 235; 44 L.J.P. & M. 42; 33 L.T. 320; 39 J.P. 696; 23 Digest (Repl.) 173, 1934.
- (2) *In the Goods of Minshull* (1889), 14 P. & D. 151; 58 L.J.P. 69; 61 L.T. 257; 38 W.R. 80; 23 Digest (Repl.) 173, 1935.
- (3) *In the Goods of Potter, Potter v. Potter*, [1899] P. 265; 68 L.J.P. 97; 81 L.T. 234; 23 Digest (Repl.) 173, 1936.

F

Motion for a grant of letters of administration.

M., who died intestate at Cefn-Coed, Merthyr Tydfil, on March 26, 1931, a bachelor without living parents, left an estate of about £3,000. The applicants were two gentlemen who had been nominated to take out letters of administration, subject to the approval of the court, by the next-of-kin of the deceased, who were unable to agree on any one or more of themselves administering the estate, but were unanimously agreed on the applicants taking a grant. The applicants were friends of the deceased, who had named them as executors and trustees in a draft will which he was about to execute on the very day he died. The next-of-kin, a brother and sister and children of a deceased brother of the intestate, who were sui juris, had all signed an act of renunciation, in which they consented to the two applicants taking a grant.

G

H

Section 162 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

"In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof . . . and any such administration may be limited in any way the court thinks fit."

I

For the original proviso to s. 162 (1), there was substituted by s. 9 of the Administration of Justice Act, 1928, the following:

"Provided that—(a) where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the deceased, if they make an application for

- A the purpose . . . ; and (b) if, by reason of the insolvency of the estate of the deceased or any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient. . . ."
- B *William Latey* for the applicants.—This was rather an exceptional application, because the law required, as a general rule, that a grant should be made to next-of-kin or a creditor of the deceased. He had to satisfy the court that there were "special circumstances" within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), as amended. The reasons why a grant to the applicants seemed eminently sound and desirable were: (i) the next-of-kin's inability to agree as to one or more of themselves acting; (ii) their confidence in the applicants, who also had the confidence of the deceased; (iii) the avoidance of possible litigation, expense and delay; (iv) the unwillingness of the applicants to take any part in administration unless clothed with full powers by a grant to them; and (v) the convenience of venue, the applicants being on the spot where the assets were concentrated and the next-of-kin living in scattered parts of the country. The court was given a wide discretion by the Act of 1925 as amended, which, on that point, practically re-enacted s. 73 of the Court of Probate Act, 1857. In *In the Goods of Hopkins* (1), SIR J. HANNEN, P., allowed old age and infirmity of those interested in intestacy to rank as "special circumstances" justifying a grant to a stranger. A similar grant was made in *In the Goods of Minshull* (2), and in *In the Goods of Potter* (3), SIR GORELL BARNES made a similar grant in circumstances which bore a close resemblance to those in the present case. Though in the earlier days of LORD PENZANCE the court took a more rigid view of "special circumstances," the tendency in more recent times had been for the court to exercise its discretion in a progressively lenient manner.
- E
- F **LANGTON, J.**—We must not extend the discretion too far, but I think that the special circumstances in this case justify an order in the terms of the motion, which I accordingly make.

Solicitors: *Beamish, Hanson, Airy & Co.*, for *Gwilym James, Llewellyn & Co.*, Merthyr Tydfil.

[Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.]

MILLS CONDUIT INVESTMENTS, LTD. v. DENHOLM (OR LESLIE)

[COURT OF APPEAL (Lord Hanworth, M.R., Scrutton, Lawrence, Greer, Slesser and Romer, L.J.J.), June 17, 1931]

[Reported [1932] 1 K.B. 233; 100 L.J.K.B. 685; 145 L.T. 585;
47 T.L.R. 514]

Moneylender—Loan—Rate of interest—Statutory rate exceeded—Consent to judgment—Burden of proof—Moneylenders Act, 1900 (63 & 64 Vict., c. 51), s. 1—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 10.

The Moneylenders Act, 1927, s. 10 (1), provides: "Where, in any proceedings in respect of money lent by a moneylender . . . it is found that the interest charged exceeds the rate of 48 per cent. per annum . . . the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable . . ."

The appellants, who were registered moneylenders, brought an action against two makers of a joint and several promissory note for £466 13s. 4d., being £400 for the principal and the balance interest at the rate of 200 per cent. per annum. One of the makers of the promissory note failed to enter an appearance, but against the other the appellants obtained an order from the master that, unless he paid £400 within a certain time, they should be at liberty to sign final judgment against him for that amount and that he should be at liberty to defend as to the balance of the claim on certain conditions. He later agreed to consent to judgment being entered for the full amount claimed. The appellants applied to the master for leave to sign judgment, but consent was refused on the ground that there was no proof that the interest was not harsh and unconscionable. On appeal from the order of the judge in chambers affirming the master's order,

Held: although there had been consent to judgment, the court was charged, under the Moneylenders Act, 1927, s. 10, to presume that the interest charged, being in excess of 48 per cent. per annum, was excessive and that the transaction was harsh and unconscionable; the consent to judgment did not prove the contrary; and, therefore, the appeal must be dismissed.

Notes. Considered: *Parkfield Trust, Ltd. v. Dent*, post, p. 720; *Nihalchand Navalchand v. McMullan*, [1934] 1 K.B. 171. Referred to: *B. S. Lyle, Ltd. v. Chappell* (1931), post, p. 446; *Re A Debtor (No. 591 of 1934)*, *Ex parte The Debtor v. Petitioning Creditors and Official Receiver*, [1935] All E.R. Rep. 823.

As to the presumption that interest charged by a moneylender is excessive, see 23 HALSBURY'S LAWS (2nd Edn.) 202-203, para. 306; and for cases on the subject see 35 DIGEST 215, 406-410. For the Moneylenders Act, 1900, s. 1, see 16 HALSBURY'S STATUTES (2nd Edn.) 370; and for the Moneylenders Act, 1927, s. 10, see *ibid.* 392.

Case referred to:

(1) *Wade v. Simeon* (1845), 13 M. & W. 647; 14 L.J.Ex. 117.

Appeal from an order of MACNAGHTEN, J., in chambers.

The appellants, a firm of registered moneylenders carrying on business in Conduit Street, London, claimed against the defendants Leslie and Denholm, as makers of a joint and several promissory note dated Feb. 28, 1931, being as to £400 principal and as to £66 13s. 4d. interest from Feb. 28 to March 31, 1931, payable to the appellants or order on March 31, 1931. The interest charged was at the rate of 200 per cent. per annum. A note or memorandum of the contract was made and signed by the borrowers, and they were supplied with a copy of this document on Feb. 28, 1931. The appellants claimed interest on £466 13s. 4d. at the rate of

A 200 per cent. from March 31, 1931, until payment or judgment. The respondent Robert Denholm alone entered an appearance. The appellants having applied for leave to sign final judgment, MASTER BALL, on April 17, 1931, made an order under R.S.C., Ord. 14, that, unless the respondent Denholm paid to the appellants' solicitors £400 within four days, the appellants should be at liberty to sign final judgment against him for that sum, and that he should be at liberty to defend as to the balance of the appellants' claim on condition that the action be entered in the short cause list for trial by a judge alone. Subsequently, negotiations took place between the parties, with the result that the respondent Denholm was prepared to consent to judgment for the full amount of the claim. An application was accordingly made that, notwithstanding the master's order of April 17, the appellants should be at liberty to sign final judgment against the respondent Denholm

C "for the amount claimed and interest, if any, and costs, to be taxed, execution to be stayed until May 4, 1931." That application came before MASTER MOSELEY on April 27, and he made this order: "Consent refused as no proof that interest is not harsh and unconscionable." That order having been affirmed by MACNAGHTEN, J., the Judge in Chambers, the appellants appealed by leave to the Court of Appeal. The Crown intervened as the matter was one of public importance.

D *The Attorney-General (Sir William Jowitt, K.C.) and Wilfrid Lewis for the Crown.*

Sir Patrick Hastings, K.C., and H. J. Wallington for the appellants.

Melford Stevenson and Basil Blagden for the respondent.

LORD HANWORTH, M.R.—This is an appeal from an order of MACNAGHTEN, J., of May 5. I will come to the terms of his order in a moment. The action was commenced by a writ dated April 2, brought by the appellants, who are registered moneylenders, against two defendants as makers of a joint and several promissory note dated Feb. 28, 1931, for a sum of £466 13s. 4d. payable on March 28, 1931. By reason of the terms of the Moneylenders Act and the rules, it was necessary for the appellants to set out something more than would be ordinarily contained in a specially endorsed writ. Particulars of the claim are, therefore, set out as follows: The principal sum claimed is £400. The interest from the date of the making of the promissory note, namely, Feb. 28, down to its due date, March 31, 1931, is inserted as a separate item £66 13s. 4d., and those two sums together make up the total amount sued for. Then some individual particulars are inserted. First, the appellants are licensed moneylenders. The loan was made on Feb. 28, 1931. The money actually loaned was £400, and the interest charged is 200 per cent. per annum.

G I need not read more of the particulars which are set out. An application was made by the appellants for judgment under R.S.C., Ord. 14, and on April 17 an order was made by MASTER BALL in the usual form:

H "Upon reading the affidavits it is ordered that unless the [respondent] Robert Denholm pays to the [appellants'] solicitors the sum of £400 within four days from the date of this order the [appellants] be at liberty to sign final judgment against the said [respondent] for the said sum. . . . It is ordered that the said [respondent] be at liberty to defend this action as to the balance (that is to say, the interest) on condition that the action be entered in the short cause list for trial by a judge alone."

I It will be observed that an order is made against the respondent Denholm only. The reason for that is that, although the two defendants were served, the respondent Denholm alone entered an appearance. That order separates the principal sum and the interest, enables judgment to be obtained for the principal, but orders the issue which arises on the interest to be tried in the short cause list and by a judge alone. The reason for that order I will explain shortly. After that order had been made, it appears that the appellants and the respondent Denholm approached one another, with the result that the respondent was prepared to consent to judgment

for the full amount claimed in the action without taking advantage of the liberty A
given to him under the order of April 17 to have the question of the amount of
interest tried before a judge alone. In consequence of that consent, a second
application was made to MASTER MOSELEY

"that notwithstanding the order of MASTER BALL of April 17 the [appellants] B
be at liberty to sign final judgment against the [respondent] Denholm for the
amount claimed and interest if any and costs to be taxed. Execution to be
stayed until May 4, 1931."

There is endorsed on that order "Take order as by Master" and signed by the
solicitors for the respondent Denholm. Some comment was made by the Attorney-
General in reference to the procedure indicated by the fact that a fresh application C
was made to the master, although MASTER BALL had, by his order of April 17, dealt
with the matter. It may be that, on an appropriate occasion, a question will arise
whether that procedure of making a fresh application was right or wrong. I do not
to-day pause to inquire or to express any opinion on it, but an application was made
and it came before MASTER MOSELEY. He made an order in these terms: "Consent D
refused as no proof that interest is not harsh and unconscionable." It is said that
he made that order in consequence of some conclusion reached after discussion
among the masters. I say again nothing about that, because I do not know the
facts relating to it. What is before this court is that the master refused his consent
to the making of the order asked for, because there was no proof that the interest
was not harsh and unconscionable. That order was made, although the respondent
Denholm had expressed his willingness to consent to the judgment being entered E
for the full amount, subject only to the condition that the execution should be
stayed until May 4, that is, for nine days later than the application was presented.
The master having refused his consent, an appeal was taken to MACNAGHTEN, J.,
sitting in Chambers. His judgment is in these terms:

"It is ordered that this appeal be dismissed as in my opinion the master was F
right having regard to the provisions of s. 10 of the Moneylenders Act, 1927,"

and he ordered that the appellants be at liberty to appeal to the Court of Appeal.
Pursuant to that leave to appeal, the appellants gave notice of appeal, dated
May 15, and that appeal now comes before this court.

The question to be determined is whether or not MACNAGHTEN, J., was right. It
will be observed that MACNAGHTEN, J., makes reference to s. 10 of the Moneylenders
Act, 1927. That section says: G

"(1) Where, in any proceedings in respect of any money lent by a moneylender
after the commencement of this Act . . . it is found that the interest charged
exceeds the rate of 48 per cent. per annum . . . the court shall, unless the
contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act,
1900, that the interest charged is excessive and that the transaction is harsh
and unconscionable. . . ." H

It will be observed that that section is directory. It definitely says that, in given
circumstances, where the court charged with any proceedings in respect of any
money lent by a moneylender finds that the interest charged exceeds 48 per cent.,
the court is directed, unless the contrary is proved, to presume for the purposes of
s. 1 of the Moneylenders Act, 1900, that the interest so charged is excessive and
that the transaction is harsh and unconscionable. Turning then to the Money- I
lenders Act, 1900, s. 1 provides:

"(1) Where proceedings are taken in any court by a moneylender . . . and
there is evidence which satisfies the court that the interest charged is excessive,
or that the amounts charged for expenses, inquiries, fines, bonus, premium,
renewals, or any other charges, are excessive, and that, in either case, the
transaction is harsh and unconscionable, or is otherwise such that a court of
equity would give relief, the court may re-open the transaction. . . ."

- A By sub-s. (2) it is provided that any court in which proceedings might be taken for the recovery of money lent may exercise the like powers to those conferred by the section, and may entertain any application by the borrower or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived. It is quite plain on looking at the two sections that s. 10 of the later Act was intended to amplify and enlarge the power of the court, or
- B rather to insist that the court should take a particular course, because it requires the court, where the interest charged exceeds the rate of 48 per cent., to presume, for the purpose of s. 1 of the Act of 1900, that the interest charged is excessive, and the transaction is harsh and unconscionable. Both sections refer to proceedings, and in s. 10 the expression is "any proceedings in a court." The reference seems quite clearly to point to proceedings of any nature brought in a court which
- C has jurisdiction to deal with moneylenders' claims and proceedings which are taken and followed according to the rules of procedure which are made in such court. There does not appear to be any limitation on those proceedings, nor is there any limitation on the word "court," for, by the Interpretation Act, 1889, the Supreme Court, the Court of Appeal, the High Court, and the like are given specific meanings. MACNAGHTEN, J., has held that the master was right in the course he took,
- D having regard to the provisions of s. 10 of the Moneylenders Act, 1927, that is to say, that it was the duty of the master, on the facts which came to his knowledge by the particulars endorsed on the statement of claim, to take note of the amount of interest charged per annum, and from those facts to presume that the interest so charged was excessive, and that the transaction was harsh and unconscionable. It is said that, although that presumption has to be made and is made, yet, by
- E reason of the consent which the respondent Denholm gave, the duty of the master was to give effect to that consent and to order judgment accordingly, subject only to the condition that execution was not to issue until after May 4. We do not take that view. A consent, of course, may be given by a party to another party, but that consent does not alter the duty of the court. It does not limit the powers of the court, nor is the duty laid on the court diminished by the consent of the party.
- F In *Wade v. Simeon* (1), to which our attention was called by the Attorney-General, the observation which was made in the course of the argument by ALDERSON, B., said (13 M. & W. at p. 649):

"It is open to the court, at any time before judgment signed and execution executed, to see that that which is done under the authority of the court shall not be done unjustly."

- G In the present case, although the parties may be in agreement, there is a duty incumbent on the court to carry out the terms of s. 10. The court is charged to presume that, in the circumstances of the present case, the interest charged is excessive, and the transaction is harsh and unconscionable. It cannot be claimed
- H that the authority of the court must be given to a transaction which is, in its opinion, harsh and unconscionable, merely because there is a consent to a particular course given by the defendant.

It seems, therefore, that the order made by the learned judge was quite right. It cannot be said that a consent of the party, or one of the parties, is a sufficient proof to comply with the words "unless the contrary is proved" contained in s. 10, and, equally, it must be plain after the case that I have read—and, indeed, it could be supported in many other cases—that the duty of the court still remains, whatever the parties themselves may consent to, and, in the exercise of the duty so charged on the court or a judge, including a master and the judge in chambers, they have a right and duty to say that a consent of the parties is not sufficient proof within s. 10 of the Moneylenders Act, 1927.

For these reasons, the appeal must be dismissed.

SCRUTTON, L.J.—I agree.

LAWRENCE, L.J.—I agree.

GREER, L.J.—I agree, and I should like to add just one word, and that is this. I do not understand that this appeal raises the question whether, in every case in which it appears that more than 48 per cent. is claimed for interest by a money-lender, the master is bound, as a matter of law, to refuse to give leave to enter judgment. If that were the question, I should require time to consider my judgment on it, but the question is, not whether the master was bound to make the order that he did make, but whether the order that he did make on the facts of this case was wrong. I cannot come to the conclusion that the order that the master made which was complained of to the judge, and the order the judge made confirming the order of the master, were in any respect wrong. For these reasons, I agree with the judgment delivered by the Master of the Rolls. A

SLESSER, L.J.—I agree with the judgment as stated by the Master of the Rolls, and I have nothing more to add. C

ROMER, L.J.—I agree that the appeal should be dismissed for the reasons stated by the Master of the Rolls.

Appeal dismissed.

Solicitors: *Woolfe & Woolfe; Walker, Rowe & Clark; Treasury Solicitor.* D

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

B. S. LYLE, LTD. v. CHAPPELL

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.J.J.), November 13, 16, 30, 1931] E

[Reported [1932] 1 K.B. 691; 48 T.L.R. 119; 73 L.Jo. 28]

Moneylender—Memorandum—Allocation of money lent to repay previous loan—Money “lent”—Application by lender to purpose authorised by borrower—No actual transfer to borrower—Costs—Moneylender’s costs—Excessive interest charged—Order for no costs or against moneylender—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6 (1). F

On April 25, 1930, moneylenders lent to a borrower £150 at 105 per cent. interest for six months, repayable by six instalments of £42 10s. each. On Oct. 22, three days before the end of the six months, the borrower had repaid only £85, which left him owing £170 principal and £34 interest on the unpaid instalments. On that date, in accordance with an agreement come to by the parties, the moneylenders gave the borrower a cheque for £200 which he endorsed and returned to them, this sum being credited to the borrower and treated as settling the transaction of April 25. The borrower then signed a promissory note for £300, repayable by sixty instalments of £5, and also a memorandum which stated that he agreed to borrow £200 which he requested the moneylenders to allocate in settlement of the transaction of April 25, the balance of £100 being for interest. G

Held: when the time for the repayment of the original loan had expired and that time was extended on the altered terms there was a fresh loan, and as the memorandum set out all the terms of the new agreement and was signed by the borrower before the fresh loan was made the requirements of s. 6 of the Moneylenders Act, 1927, were satisfied, and the contract was enforceable. H

Per SCRUTTON, L.J.: As a general rule a moneylender who is found to have charged harsh or unjustifiable interest should not get any costs of the trial I

A which establishes what he is entitled to. In some cases the borrower may be given costs against the moneylender plaintiff who has tried to recover harsh interest and has failed.

Per GREER, L.J. : Money is "lent" within the meaning of s. 6 if, though not actually handed over by the lender to the borrower, it is applied by the lender in any way authorised by the borrower.

B **Notes.** Considered : *Temperance Loan Fund, Ltd. v. Rose*, [1932] All E.R.Rep. 690; *Lancashire Loans, Ltd. v. Black*, [1933] All E.R.Rep. 201; *B. S. Lyle, Ltd. v. Pearson and Medlycott*, [1941] 3 All E.R. 128. Distinguished : *Dunn Trust, Ltd. v. Feetham*, [1935] All E.R.Rep. 280. Applied : *Re British Games, Ltd.*, [1938] 1 All E.R. 230. Referred to : *Egar v. Langham Investments, Ltd.*, [1938] 1 All E.R. 193.

C As to the form of a moneylending contract, see 23 HALSBURY'S LAWS (2nd Edn.) 190-192; and for cases see DIGEST Supps., tit. Money and Moneylending, case 353a et seq. For Moneylenders Act, 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 377. Cases referred to :

(1) *Dunn Trust, Ltd. v. Teal* (1928), unreported.

D (2) *Credit Co. v. Pott* (1880), 6 Q.B.D. 295; 50 L.J.Q.B. 106; 44 L.T. 506; 44 J.P. 571; 29 W.R. 326, C.A.; 7 Digest 48, 220.

(3) *Parsons v. Equitable Investment Co., Ltd.*, [1916] 2 Ch. 527; 85 L.J.Ch. 761; 115 L.T. 194; 60 Sol. Jo. 639, C.A.; 7 Digest 49, 256.

(4) *Re Harmony and Montague Tin and Copper Mining Co., Ltd., Spargo's Case* (1873), 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153; 21 W.R. 306; 9 Digest (Repl.) 90, 399.

E (5) *Richardson v. Harris* (1889), 22 Q.B.D. 268; 37 W.R. 426; 5 T.L.R. 178, C.A.; 7 Digest 48, 249.

(6) *Mills Conduit Investments, Ltd. v. Denholm (or Leslie)*, ante, p. 442; [1932] 1 K.B. 233; 100 L.J.K.B. 685; 145 L.T. 585; 47 T.L.R. 514, C.A.; Digest Supp.

F **Appeal** by the plaintiffs from an order of SWIFT, J.

The plaintiffs, B. S. Lyle, Ltd., a firm of registered moneylenders, brought an action against the defendant, Sidney William Chappell, to recover £204 alleged to be money lent and interest thereon. The claim was against the defendant as maker of a promissory note, dated Oct. 22, 1930, for £300, repayable by weekly instalments of £5 each, the rate being stated to be 85.2 per cent., with a proviso that should default be made in the payment of any instalment the whole of the balance of the sum advanced and interest should forthwith become due and payable. There was default in payment of the first instalment, and the £204 claimed represented the amount of principal and interest which thereupon became due. On April 25, 1930, the defendant had borrowed £150 at £105 interest for six months from the plaintiffs, in respect of which he signed a promissory note for £255 and gave six cheques in their favour of £42 10s. each. The interest was stated to be 240 per cent. The third of these cheques was dishonoured. The plaintiffs thereupon approached the defendant with a view to some arrangement being made that would help the defendant to pay off his account, and on Oct. 22, 1930, it was orally agreed between the plaintiffs and the defendant that the latter should be relieved from the liability which he was under to the plaintiffs in exchange for signing a new promissory note for £300, the note now sued on. The transaction was carried out by the plaintiffs handing to the defendant a cheque for £200, which he endorsed and handed back to the plaintiffs, who treated it as settling the first transaction, and by the borrower signing a promissory note for £300 and a memorandum agreeing to borrow £200, the sum of £100 being interest, on the terms of the promissory note. The memorandum concluded :

"I hereby authorise and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour, dated April 25, 1930."

SWIFT, J., held that there was no loan on Oct. 22, 1930; that there was an attempt to deceive the court and the plaintiffs' auditors; and that the plaintiffs had failed to comply with the requirements of s. 6 of the Moneylenders Act, 1927, under which the memorandum must be signed before the money is lent. The plaintiffs appealed.

By Moneylenders Act, 1927, s. 6 (1):

"No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be."

Stuart Bevan, K.C., Comyns Carr, K.C., and Robert Fortune for the plaintiffs.
Croom-Johnson, K.C., and C. S. Rewcastle for the defendant.

Cur. adv. vult.

Nov. 30. The following judgments were read.

SCRUTTON, L.J.—SWIFT, J., has dismissed an action by moneylenders against a borrower on a promissory note on the ground that there is no sufficient memorandum of the transaction under s. 6 of the Moneylenders Act, 1927. The moneylenders appeal.

The two parties had been concerned in moneylending transactions for some years. On April 25, 1930, the moneylenders lent the borrower £150 at £105 interest for six months repayable by six monthly instalments of £42 10s. each. The interest was stated to be 240 per cent., a rate which under s. 10 of the Act of 1927 would be deemed to be *prima facie* harsh and unconscionable, so that on taking legal proceedings, whether the borrower consented to judgment or not, the moneylender must prove that the rate was not harsh and unconscionable. The loan was secured by a promissory note under which, in default of any instalment, interest ran on the instalment. The memorandum of this loan and the promissory note have been destroyed, the transaction being entered in the ledger as "settled" by the events next to be mentioned. The borrower did not pay his instalments punctually, and when the six months were expiring had paid only two instalments, and those late. This left him owing £170 on the promissory note and interest, said to be £34, on the instalments in default. This latter amount does not seem to have been checked or verified. The ledger shows on the debit side £255, the amount of the promissory note, and five entries of £42 10s.; on the credit side seven entries of £42 10s. To this are added £30 on the debit side, described as "additional interest," making in all £497, and on the credit side £200, not described at all, making also £497, and the transaction is then described as "settled." What in fact happened was that further time was given by treating the indebtedness on Oct. 22 as £200—£170 principal, being £255, less £85 paid, adding £30 for interest on instalments in default, and then agreeing that it should be paid by sixty weekly instalments of £5, beginning on Oct. 27, 1930, making £300 in all, £100 being charged for interest on the £200, the rate being stated to be 85·2 per cent., which also is to be deemed to be harsh and unconscionable under s. 10 till the contrary is proved. It seems obvious that, by reason of the provisions of ss. 7, 15 (2), and Sched. I to the Act of 1927, compound interest is being charged on this transaction, both on the £30 additional interest and on that portion of the £170 not repaid, which would represent the amount appropriated to interest under s. 15 (2). The transaction was carried out by the moneylenders handing to the borrower a cheque for £200 which the borrower endorsed and handed back to the moneylenders, who treated it as settling the first transaction, and by the borrower's signing a promissory note for

A £300, repayable by sixty weekly instalments of £5, commencing on Oct. 27, 1930, and a memorandum agreeing to borrow £200 with the sum of £100 for interest upon the terms of the promissory note. The memorandum concluded :

"I hereby authorise and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour, dated April 25, 1930."

B SWIFT, J., took a very unfavourable view of the transaction. He held that there was no loan on Oct. 22, that there was an attempt to deceive the court and the moneylenders' auditors, that there were really only substituted terms of repayment for an old loan which the moneylenders could not get paid on the terms originally agreed. I see no reason for taking such an unfavourable view of the transaction.

C The memorandum may be insufficient without imputing fraud, and the suggestion that the plaintiffs' manager had said that the memorandum was in the form in which it was, on legal advice, to deceive the plaintiffs' auditors—a most extraordinary statement—is, I think, a misunderstanding of the statement that it was "for the purposes of the auditors." The moneylenders were in this difficulty: first, they, or their legal advisers, took the view that there could not be a legal memorandum of a renewal of a loan on altered terms, because the Act required a memorandum before the money was lent or the security was given, which they read as referring to the original loan or security, and not to the terms substituted later. Secondly, they had to consider a judgment of CHARLES, J., in *Dunn Trust, Ltd. v. Teale* (1), in which he held that where an old debt purported to be settled by a new loan a statement to this effect must appear in the memorandum.

E As to the first point, I find it difficult to believe that Parliament intended to render renewals of loans or of the securities for them on altered terms impossible by requiring that a memorandum of the alteration should be signed before the original loan was made. In my opinion, when the time for payment of the original loan has expired without complete repayment and the time for repayment is extended on altered terms, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of s. 6 might be better, but I cannot think that Parliament intended to render renewals impossible. As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan on the altered terms, when the fact that this is being done is shown on the face of the second memorandum.

F G The question of a new loan being used, either in whole or in part, to repay an old loan has been frequently considered under the Bills of Sale Acts and the clause therein requiring the consideration to be truly stated. Where the bill of sale stated that a sum of money was now paid, and in fact either the sum had not been actually paid, but used to discharge an old loan, or had been handed over, but at once handed back to the lender, the result of the authorities of which *Credit Co. v. Pott* (2) is the principal, is stated by LORD COZENS-HARDY, M.R., in *Parsons v. Equitable Investment Co., Ltd.* (3) as follows ([1916] 2 Ch. at p. 530):

H I "Now the following propositions seem to me to be established by the authorities. In the first place, a sum of money paid by the bill of sale holder at the grantor's request to a creditor or another person is properly described as a payment to her. . . . In the second place, if there is a sum of money due from the grantor to the bill of sale holder less than the sum professed to be advanced, the retention of that sum and payment of the difference only to the grantor may be treated as payment of the whole sum to him. This proceeds on the well-known principle of which *Re Harmony and Montague Tin and Copper Mining Co., Ltd., Spargo's Case* (4) is an illustration, namely, that it is not necessary to go through the form of handing the entire loan to the grantor and for her then to return the amount to be retained. Such a transaction would be within a plea of payment under the old law. In the third place, this doctrine has no application unless the amount retained is at the time due and

payable. It will not justify the retention of an amount secured by bills or acceptances not yet due. In the fourth place, the retention by the bill of sale holder of moneys not yet due is, in the language of Fry, L.J., in *Richardson v. Harris* (5), the taking of a bonus 'which does not appear on the statement of the consideration.' In the present case it seems to me that the defendants have done exactly that which in *Richardson v. Harris* (5) this court said could not be done, and on that ground I think the bill of sale is void."

It was attempted to be said that the amount retained was not yet due, because there had been no legal proceedings to decide whether the interest, *prima facie* harsh and unconscionable, could be justified. But while the decision of the full Court of Appeal in *Mills Conduit Investments, Ltd. v. Denholm (or Leslie)* (6) was that the consent of the borrower did not entitle the lender to judgment, there is no objection to the borrower agreeing to pay and paying sums agreed to be due without legal proceedings, subject to any question of afterwards re-opening accounts. On the memorandum itself, I think that an agreement to borrow is justified by an agreement to re-lend on fresh terms, using the sum to settle the original debt. This transaction is disclosed on the face of the memorandum, in pursuance of the decision of CHARLES, J., which it is safer to follow, though the bills of sale cases suggest it is unnecessary. It is further said that, while the borrower authorises the repayment, the lender does not bind himself to accept it. I do not think that that is an accurate view of the effect of the memorandum.

In my opinion, therefore, the decision of SWIFT, J., in dismissing the action on the ground that there is no sufficient memorandum, is erroneous, and I do not think he was justified in finding any attempt to deceive the court. But the amount due still remains to be fixed. The case must go back for a new trial, in which the effect of the two *prima facie* harsh rates of interest, 240 per cent. and 85.2 per cent., will have to be considered, and the question of compound interest investigated. The plaintiffs must have the costs of the appeal. The costs of the first trial must be referred to the judge who hears the new trial. In my opinion, as a general rule, a moneylender who is found to have charged harsh or unjustifiable interest should not get any costs of the trial which establishes what he is entitled to. In some cases the borrower may be given costs against the moneylender plaintiff who has tried to recover harsh interest and failed.

GREER, L.J.—This is an appeal from the judgment of SWIFT, J., in an action in which the plaintiffs, who are moneylenders, claim from the defendant a sum of £204 due under the terms of a promissory note dated Oct. 22, 1930. The defendant put in a defence whereby several grounds of defence to the action were set out. The only one with which this court is concerned is the one pleaded in para. 7 of the defence, to the effect that s. 6 of the Moneylenders Act, 1927, had not been complied with, and that, therefore, the promissory note, being a contract for the repayment of money lent, was unenforceable.

The facts material to this issue proved at the trial are that the defendant had, on April 25, 1930, obtained an advance from the plaintiffs of £150, and had signed a promissory note stating the terms of the advance as the sum of £255, repayable by six monthly instalments of £42 10s. At the time when the promissory note, the subject-matter of this action, was signed, he had paid only two instalments—that is to say, £85—leaving £170 due in respect of the promissory note for £255, and a further sum for interest which amounted to a few shillings over £30. The plaintiffs' representative, Mr. Scott, approached the defendant and pointed out to him that, as he obviously could not meet the instalments, some arrangements ought to be made that would help him to pay off his account and straighten out his affairs. In stating the facts in the course of his judgment, the learned judge says this:

"On Oct. 9, 1930, the plaintiffs were unable to get any money out of the defendant. He had failed in his payments, and it was obvious that he could not pay, and on Oct. 9 the plaintiffs wrote him a letter in which they said that they had a proposal to make to him which would help him to pay off his account and

A straighten out his affairs. At that time the plaintiffs were despairing of getting money out of the defendant on the basis of the old contract, and were suggesting means of easing the situation. The plaintiffs' manager, Mr. Scott, who had everything to do with the transactions, said that there was a telephone conversation and that arrangements were made over the telephone. He (his Lordship) was satisfied of what happened—whether it was on the defendant's own initiative, or whether, as his counsel had said, he was 'chivied' into it, he could not say. It was clearly established by the evidence that on Oct. 22, in whatever circumstances it was made, there was an agreement between the plaintiffs and the defendant that the latter should be relieved from the liability which he was under to the plaintiffs in exchange for signing a new promissory note for £300, including £100 interest, the whole amount to be repayable by sixty instalments of £5 a week. There was then the existing debt owing by the defendant to the plaintiffs, who thought it was hopeless to get their money. A new bargain was made, and for the old debt and the security for the debt there was substituted the promissory note for £300."

D It appears from this that the learned judge found that, before the documents which we have to consider were signed, it had been agreed that the defendant was to be relieved of the liability which he was under in the existing state of things, and he was to sign a promissory note for £300, including £100 interest, the whole amount to be repayable by sixty instalments of £5 per week. This arrangement, it seems to me, could not be carried out without in some way discharging the old liability. A mere renewal or giving further time to meet the old liability would not have met the situation. This was the position of the parties when Mr. Scott brought the document of Oct. 22 to the defendant for signature. There does not seem to me to have been any final agreement before the document was signed as to how the relief from the old debt which had been agreed to by the parties should be effected, and nothing had happened which would in any way prevent the parties from carrying out the suggested arrangement in whatever manner they were both prepared to agree to. In my view, the document signed by the defendant, which appears E in the correspondence, is an agreement by him to discharge whatever was due on the promissory note of April 25 by his borrowing from the plaintiffs a sum of £200 and authorising them, instead of physically handing over the money to him, to pay themselves the £200. The moneylenders seem to have thought it necessary or desirable that they should physically hand over a cheque for £200 to the defendant and get it back again, but there is nothing in the agreement to the effect that this should be done, and, in my judgment, it was not essential that the agreement should be carried out in that way. If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at £200, it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would, according to H the authorities, have been unnecessary to go through the form of handing over the money: see *Credit Co. v. Pott* (2).

I cite this case for the principle involved in the decision, though the questions involved in bills of sale cases are not the same as the questions involved in money-lending cases. The question in a bill of sale case is whether a statement that the money was paid in a bill of sale is a true statement or not, and this is not necessarily the same as the question whether the memorandum of contract is a sufficient memorandum under s. 6 of the Moneylenders Act, 1927. The principle for which I refer to *Credit Co. v. Pott* (2) is that which is stated in the judgment of LORD SELBORNE, L.C. (6 Q.B.D. at p. 298), where he quotes with approval the following statement from MELLISH, L.J., in *Spargo's Case* (4) (8 Ch. App. at p. 414):

"It is a general rule of law that in every case, where a transaction resolves itself into paying money by A to B, and then handing it back by B to A, if the parties meet together and agree to set one demand against the other they

need not go through the form and ceremony of handing the money backwards and forwards." A

In the later bill of sale cases, like *Richardson v. Harris* (5), it was held that the consideration was not truly stated if only part of it was the set-off of an existing debt, and the rest of it was either a settlement of amounts expected to become due in the future, or an agreed sum which was not a liquidated debt before the date of the bill of sale. In the present case we are not troubled with the question whether a statement that the money was paid is a true statement. The amount of the old debt was agreed either at the time of or before the signature, at something less than what it really was, and it was part of the agreement that the lesser sum of £200 should be withheld by the lenders as payment for the amount agreed to be due. B

In my judgment, the oral agreement made, as found by the learned judge, that the defendant had been relieved from his liability, could not be carried out by a renewal of the old debt with a grant of further time to pay it, plus additional interest. It could be carried out only by some method whereby the old debt would be extinguished and a new one created. The method of doing this was agreed by the defendant with the plaintiffs when he signed the memorandum of Oct. 22. There was nothing fraudulent or deceptive about this document, nor was it, in my judgment, a sham. It appears to me to be a truthful record of the way in which the parties agreed that the old debt, agreed at £200, should be extinguished by a fresh borrowing of £200 to be used for the discharge of the old debt, and by terms as to the method of payment of the new obligation created by the new loan and the agreement in respect of it. In my judgment, the document of Oct. 22 signed by the defendant is a sufficient memorandum of a contract for the repayment by the defendant as the borrower of £200 lent to him on Oct. 22, 1930, within the meaning of s. 6. It appears to have been held by CHARLES, J., in *Dunn Trust, Ltd. v. Teale* (1), that unless money was actually handed over by the lender to the borrower, it could not be said that any note or memorandum was signed before the money was lent. In my judgment, this is taking too strict a view of the meaning of s. 6. I think money is lent within the meaning of that section if it is applied by the lender to the purposes of the borrower in any way which the borrower authorises. C D E F

I think the learned judge was wrong in stopping this case, as he did, on the ground of the absence of any memorandum such as is required by s. 6, and that there must be an order for a new trial, as there are other defences and a counter-claim for relief to be investigated before any judgment can be given either for the plaintiffs or for the defendant. G

SLESSER, L.J.—In this action the plaintiff company, a firm of registered moneylenders, sued the defendant to recover £204 as money lent and interest thereon, in circumstances stated by my Lord, which I do not repeat in detail.

The claim was against the defendant as maker of a promissory note in favour of the plaintiffs, dated Oct. 22, 1930, for £300, repayable by weekly instalments of £5 each, with a proviso that, should default be made in the payment of any instalment, the whole of the balance of the sum advanced and interest should forthwith become due and payable. There was default in payment of the first instalment, and the £204 claimed represents the amount of principal and interest which thereupon became due. On April 25, 1930, the defendant had borrowed £150 from the plaintiff company, in respect of which he signed a promissory note for £255 and gave six cheques in their favour for £42 10s. each. The third of these cheques was dishonoured, and, on Oct. 9, 1930, the plaintiff company wrote to the defendant offering a means which it was suggested would help him to pay off his account. According to the learned judge, on Oct. 22 it was orally agreed between the plaintiff company and the defendant that the latter should be relieved from the liability which he was under to the plaintiffs in exchange for signing a new promissory note for £300, including £100 interest, the whole amount to be repayable by sixty instalments of £5 per week. H I

A In my judgment, this agreement of Oct. 22, 1930, was an agreement for a loan on new terms, one of which terms was that the defendant should use £200 in settlement of his earlier promissory note of April 25, 1930, the remaining £100 being interest at the rate of 85·2 per cent. per annum. The defendant has pleaded as one of his defences s. 6 of the Moneylenders Act, 1927, which requires, inter alia, that a note or memorandum in writing shall be signed by the borrower before the

B money is lent or the security given, which note or memorandum shall contain all the terms of the contract as set out in sub-s. 2 of that section. If this be not done, the contract for the repayment by the borrower is declared to be unenforceable. In my view, in this case the plaintiffs exactly complied with the requirements of the section. The note or memorandum which was made and signed personally by the borrower before the money was lent or the security given exactly sets out all

C the terms of the contract. In particular, it states that the defendant authorised and requested the plaintiffs to allocate the whole of the above advance of £200 in settlement of his promissory note in their favour dated April 25, 1930. I am unable to see in these circumstances how there was a scheme to deceive the court. There is evidence to the effect that the moneylenders handed a cheque for £200 to the defendant and received it back again. This procedure, though probably unneces-

D sary: see *Credit Co. v. Pott* (2); was not improper, nor can I see that it was calculated to deceive any tribunal which might have to decide whether there was a loan or not. In *Dunn Trust, Ltd. v. Teale* (1) the defendant had borrowed from a moneylending company (M. Dunn, Ltd.) £210. M. Dunn, Ltd., went into liquidation, and Mr. Teale borrowed £500 from a new firm, under the same management (Dunn Trust, Ltd.), £210 of which was made out to Mr. Teale in a cheque, which he handed back in payment of the old debt. The other £290 he kept. Men-

E tion of this liquidation of the old debt did not appear in the memorandum of the contract. In so far, in the learned judge's view, as it was a vital part of the contract of loan that the £210 transaction in payment of the old should take place, CHARLES, J., held that the term as to the £210 should have been incorporated in the memorandum, which, without it, did not contain all the terms of the contract,

F and so for failure to comply with s. 6 the contract for repayment was unenforceable. Section 6 provides that the memorandum must be signed before the money is lent. If the terms on which the money is lent are subsequently varied by agree-

G ment between the parties, but there is no further loan, difficulty may arise in that the contract containing the variation of the terms cannot be signed before the money is lent, as the varied contract was, ex hypothesi, not in existence at that time. The method employed in the present case may have been devised as a means to overcome this difficulty and to comply with s. 6 of the Act and as a means to avoid the failure to incorporate all the terms of the loan which caused CHARLES, J., in the case to which I have referred, to hold that the requirements of s. 6 were not satisfied. In any event, the memorandum here appears to me to be an accurate statement of the agreement between the parties and as such is unimpeachable.

H The learned judge, without hearing that part of the defence and counter-claim which dealt with the defendant's counter-claim to have the transaction re-opened and an account taken, and for relief, and with that part of the defence which said that the interest was excessive and the transaction harsh and unconscionable, gave judgment for the defendant, with costs, on the ground of the plaintiff company's failure to comply with s. 6 as above stated. As this course, in my view, was wrong,

I there must be a new trial in order that the other matters raised in the defence may be investigated, and the appeal must be allowed on the terms stated by my Lord.

New trial ordered.

Solicitors: M. A. Jacobs; Good, Good & Co.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

INSTITUTION OF CIVIL ENGINEERS v. INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 11, 12, June 8, 1931]

[Reported [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 47 T.L.R. 466; 16 Tax Cas. 158]

B

Income Tax—Charity—Institution of Civil Engineers—Advancement of mechanical science—Benefits to members subsidiary and incidental to main purpose—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 37 (1) (b).

C

The Institution of Civil Engineers was founded in 1818 and incorporated by royal charter in 1828. The object for which it was founded was "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man." The charter conferred power on general meetings to make byelaws, but declared that "no resolution or byelaw shall on any account or pretence whatsoever be made by the . . . body politic and corporate in opposition to the general scope, true intent, and meaning of this our charter. . . ." A supplemental charter dated Feb. 24, 1922, recited that "the institution has continuously throughout its existence actively carried out the main object of its original charter and fostered and increased the knowledge of the art and science of the profession of civil engineering. . . ." The byelaws were directed to securing that the members of the institution should possess certain qualifications, and designed to fix and maintain a high standard of knowledge and experience among all members. The institution conducted examinations for persons desiring to be admitted as students or elected as members or associate members and provided a library for the use of members, associates and students, but did not provide any of the amenities usually associated with a club. It awarded prizes, and an outstanding activity was the publication of papers, lectures and abstracts intended for the dissemination of knowledge of special value to those engaged in civil engineering. Members had the right to take and use the title of member of the Chartered Institution of Civil Engineers. The byelaws laid down rules of professional conduct, and provided for the payment of subscriptions by members. Membership of the institution carried prestige, but was not necessary to enable a person to practise as a civil engineer. The institution claimed exemption from income tax under the Income Tax Act, 1918, s. 37 (1) (b).

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Held: the institution was entitled to exemption because it was established for charitable purposes only within s. 37 (1) (b), the benefits to members being subsidiary and incidental to the main purpose, and not constituting a collateral purpose of the institution.

I.R. Comrs. v. Forrest (1) (1890), 15 A.C. 334, applied.

Notes. The Income Tax Act, 1918, s. 37 (1) (b), was replaced by the Income Tax Act, 1952, s. 447 (1) (b).

Applied: *Royal College of Nursing v. St. Marylebone Corpn.*, [1958] 1 All E.R. 129; *Institute of Fuel v. Morley*, [1955] 3 All E.R. 843. Considered: *Honourable Company of Master Mariners v. I.R. Comrs.* (1932), 17 Tax Cas. 298. Explained: *British Launderers Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority*, [1949] 1 All E.R. 21. Considered: *Institute of Fuel v. Morley*, [1955] 1 All E.R. 161. Referred to: *Battersea Metropolitan Borough v. British Iron and Steel Research Association*, [1949] 1 K.B. 434; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital*, [1950] 2 All E.R. 466; *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984.

I

A As to exemption from tax of a body established for charitable purposes only, see 20 HALSBURY'S LAWS (3rd Edn.) 605-607, paras. 1181, 1182; and for cases on the subject see 28 Digest 82-84, 469-483.

Cases referred to:

- B** (1) *Re Duty on Estate of Civil Engineers Institution* (1887), 19 Q.B.D. 610; 56 L.J.Q.B. 576; 36 W.R. 523; reversed (1888), 20 Q.B.D. 621; 57 L.J.Q.B. 353; 599 L.T. 282; 52 J.P. 549; 36 W.R. 598, C.A.; affirmed sub nom. *I.R. Comrs. v. Forrest* (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 39 W.R. 33; 6 T.L.R. 456; 3 Tax Cas. 117, H.L.; 38 Digest 496, 503.
- C** (2) *R. v. Income Tax Special Comrs., Ex parte Headmasters' Conference. Ex parte Incorporated Association of Preparatory Schools* (1925), 41 T.L.R. 651; 69 Sol. Jo. 780; 10 Tax Cas. 73, D.C.; 28 Digest 83, 471.
- (3) *General Medical Council v. I.R. Comrs., English Branch Council of the General Medical Council v. I.R. Comrs.* (1928), 97 L.J.K.B. 578; 139 L.T. 225; 44 T.L.R. 489; 13 Tax Cas. 819, C.A.; Digest Supp.
- D** (4) *Geologists' Association v. I.R. Comrs.* (1928), 14 Tax Cas. 271, C.A.; Digest Supp.
- (5) *General Nursing Council for Scotland v. I.R. Comrs.*, 1929 S.C. 664; 14 Tax Cas. 645; Digest Supp.
- (6) *Beaumont v. Oliveira* (1869), 4 Ch. App. 309; 38 L.J.Ch. 239; 20 L.T. 53; 33 J.P. 391; 17 W.R. 269, L.J.J.; 8 Digest (Repl.) 346, 272.
- E** (7) *R. v. Institution of Civil Engineers* (1879), 5 Q.B.D. 48; 49 L.J.M.C. 34; 42 L.T. 145; 44 J.P. 265; 28 W.R. 253, D.C.; 38 Digest 497, 508.
- (8) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 304; 67 L.J.Q.B. 80; 77 L.T. 627; 62 J.P. 53; 14 T.L.R. 136, D.C.; affirmed, [1898] 1 Q.B. 809; 67 L.J.Q.B. 540; 78 L.T. 441; 62 J.P. 357; 14 T.L.R. 351, C.A.; 38 Digest 499, 540.
- F** (9) *Re Royal College of Surgeons of England*, [1899] 1 Q.B. 871; 68 L.J.Q.B. 613; 80 L.T. 611; 47 W.R. 452; 15 T.L.R. 317; 43 Sol. Jo. 416; sub nom. *Royal College of Surgeons of England v. I.R. Comrs.*, 4 Tax Cas. 344, C.A.; 39 Digest 299, 781.
- (10) *Art Union of London v. Overseers of Savoy*, [1894] 2 Q.B. 609; 63 L.J.M.C. 253; 71 L.T. 40; 59 J.P. 20; 42 W.R. 690; 10 T.L.R. 576; reversed, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 45 W.R. 34; 12 T.L.R. 377, H.L.; 38 Digest 498, 525.
- G**

Appeal by the taxpayer, the Institution of Civil Engineers, from an order of ROWLATT, J., made on a Case stated under the Finance Act, 1925, s. 19, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

H At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on March 19, 1930, the Institution of Civil Engineers (hereinafter called "the institution"), being aggrieved by a decision of the Commissioners of Inland Revenue on a claim made by the institution for exemption from Income Tax under the provisions of s. 37 (1) (b) of the Income Tax Act, 1918, for the years ending April 5, 1927, 1928 and 1929, applied to have its claim for exemption heard and determined by the Special Commissioners.

I The institution was founded in 1818 and was incorporated by Royal Charter dated June 3, 1828. The object for which the institution was founded was

"the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man."

By a supplemental charter dated Aug. 3, 1887, the institution's powers of purchasing and holding lands, tenements and hereditaments were extended. By a

supplemental charter dated March 20, 1896, the institution was empowered to pass byelaws altering and enlarging the composition of the council of the institution and the method of recording the votes of the members of the institution at elections to the said council. By a supplemental charter dated Feb. 24, 1922, a member and an associate member of the institution was empowered to take and use the name, title of, or describe himself as a Member or an Associate Member (as the case might be) of the Chartered Institution of Civil Engineers. An alteration was made in the method of voting at special general meetings of the institution, and provision made for voting by all corporate members on proposals for alteration of byelaws or regulations. A B

The object of the institution as defined by s. I of the byelaws was the advancement of mechanical science and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. C

The institution consisted of members, associate members, associates entitled to the privileges of corporate membership, and honorary members. It also had attached to it associates not entitled to the privileges of corporate membership and students not entitled to such privileges.

Section IV of the byelaws laid down certain rules as to professional conduct to be observed by all corporate members of the institution. The direction and management of the concerns of the institution were vested in the council. The regulations as to the constitution of and election to the council were set out in s. VIII of the byelaws. D

The annual subscription, transfer and entrance fees and life composition fee payable by members, associate members and associates and the annual subscription payable by students were at rates fixed by the council from time to time. The rates at present in force were set out on a printed leaflet attached to s. VII of the byelaws. E

Examinations were held for persons desirous of being admitted as students or elected as members or associate members, and the council were empowered to frame regulations for such examinations. No certificates were granted in respect of passes in these examinations, the results being merely recorded in connection with the applications for membership or studentship. F

The institution awarded a number of medals, premiums, prizes and scholarships for which persons who were not members of the institution were eligible to compete equally with members except in certain cases in which the award was provided out of trust funds under conditions laid down by the testator or donor expressly limiting eligibility to members or students of the institution. The institution also awarded one examination prize out of a trust fund; eligibility for this prize was not confined to candidates who belonged to the institution. Scholarships were also awarded for educational purposes out of trust funds bequeathed or given to the institution. Eligibility for these scholarships was, in some cases, confined to students of the institution or the children of members by the terms of the bequest or gift. G

The property and effects of the institution were vested in the corporate members for the time being for the use of the body politic and corporate solely in furtherance of the public and scientific objects contemplated in the charters. The institution possessed and maintained a valuable library, which (subject to such variations as the council may direct) was open daily for the use of all members, associates, and students of the institution. The library contained many plans of important public works as well as scientific books and publications and was of great advantage to consulting engineers and others using it. Though under the byelaws the library was open to members only, members of the public, that is to say persons who were not members of the institution, were permitted to use the library free of charge and considerable use was made of this privilege. The council had power to grant the use of the rooms of the institution to any society for purposes analogous to those of the institution and to any persons who might be desirous of having lectures delivered on subjects connected with the objects of the institution. H I

A The session of the institution commenced annually in November and continued until the end of the following April.

The meetings of the institution were as follows :

(a) The annual general meeting, at which the annual report of the council together with the annual statement of accounts was presented and considered, and the council and auditors of the institution for the ensuing year were elected. (b) **B** Ordinary meetings which were held once a fortnight during the session or more often if found necessary. At these meetings communications on engineering and scientific subjects were read and discussed. (c) Special general meetings of corporate members only for the purpose of making, altering and establishing byelaws or for any other special business. The council had power to arrange for supplementary meetings for the discussion of engineering subjects.

C Every corporate member of the institution had the privilege of introducing at every ordinary meeting one stranger. The public at large was not admitted, but in practice strangers who were particularly interested in any subject which was to be discussed were admitted on request. Members of the public availed themselves of this privilege. Invitations to attend ordinary meetings were sent out to other societies and papers were accepted for discussion from members of other societies **D** and persons who were not members of the institution and such of these papers as were of merit were published by the institution and sent out to members of other societies.

The following publications were produced by the institution :

(a) Minutes of proceedings, in which were published papers read at meetings and the discussions thereon. The bound volumes of these proceedings could not be **E** purchased by the public. (b) Selected engineering papers, being those original papers not deemed to be suitable for discussion which were ordered by the council to be published. (c) Reports of lectures. Up to 1889 the institution had published thirty lectures. Since 1889 they had published seventy-three. (d) Engineering abstracts, from the current periodical literature of engineering and applied science published outside the United Kingdom. (e) Reports of engineering conferences. **F** (f) Reports on the education and training of engineers.

All the foregoing publications with the exception of bound volumes of the minutes of proceedings could be obtained by members of the public at large, in many cases gratis, in other cases at stated prices, in no case at a profit. Any individual paper contained in the bound volumes of the minutes of proceedings could be obtained by members of the public gratis.

G The minutes of proceedings of the institution were supplied free of charge to all corporate members of the institution paying the full annual subscription. Presentation copies of the minutes of proceedings and selected engineering papers were supplied gratis to many societies, universities and libraries both in the United Kingdom and abroad. In some cases such societies, universities and libraries supply to the institution gratis copies of their transactions. The engineering abstracts were **H** available to members of the public at less than cost price. Since the institution was established upwards of £400,000 had been spent by the institution on its publications.

The institution had been and was consulted by various government departments and public bodies on matters relating to engineering and had constantly been asked by such departments and bodies to nominate members to sit on committees. It **I** was consulted by (among others) the committee for the preservation of St. Paul's Cathedral. Members of the institution had sat without reward on a number of public committees on engineering subjects.

A committee of the institution dealing with "the deterioration of structures exposed to sea water" received financial aid from the government, and this is the only instance in which financial assistance has been received by the institution towards payment of the actual out-of-pocket expenses.

Mr. W. W. Grierson, the president of the institution, gave evidence before the

commissioners and, in addition to proving many of the facts hereinbefore set forth, A stated :

(a) Membership of the institution was not necessary to enable a person to practise as a civil engineer. Many eminent civil engineers were not members of the institution. For example, among those holding higher positions in the technical engineering departments of the four railway groups about two-thirds only were members. He did not think that other things being equal a man who was a member of the institution would have a professional advantage over a man who was not. He gave as instances in which the post of chief engineer had been filled by appointment of a man who was not a member of the institution, one of the ministries and three cities in Great Britain. B

(b) Membership of the institution carried a certain amount of prestige, but he did not consider it had helped him professionally. C

(c) He agreed that the expectation of professional advantage was one of the reasons which prompted him to join and would probably be one reason why others joined the institution.

(d) The institution did not arbitrate on disputes between members.

(e) The president of the institution in his personal capacity sometimes nominated, on request, engineers for some public work. Such requests had been received from (among others) the India Office, the Admiralty, the War Office, the Ministry of Transport, Oxford University, National Physical Laboratory, and the Ministry of Agriculture and Fisheries. The individual nominated was not always a member of the institution. D

(f) In 1912 it sent a letter to the Prime Minister of the day calling attention to the need of employing competent engineers for public works. The said letter was set out at pages 16-22 of the printed report of the council of the institution, session 1912-13. E

(g) The membership of the institution numbered about 10,000 persons.

A benevolent fund for the benefit of members and their families was established in 1864 by individual members of the institution.

It was contended on behalf of the institution that : (a) the institution was a body of persons established for charitable purposes only ; (b) its income was applicable to and was applied to charitable purposes only ; (c) it was entitled to the exemption claimed. F

It was contended on behalf of the Inland Revenue Commissioners (inter alia) : (a) That while the work of advancing mechanical science which the institution performed was a charitable purpose, it was not the only object which the institution pursued. (b) That a substantial object of the institution was the benefit of its members by way of professional advantage. (c) That the institution was not, therefore, established for charitable purposes only, and accordingly was not entitled to the exemption conferred by s. 37 (1) (b), Income Tax Act, 1918. G

Having considered the arguments and evidence adduced before the commissioners, they decided as follows :

"Though we are satisfied that the main object of the institution is the general advancement of mechanical science, we find that a substantial part of its object is to benefit the members of the institution. In the face (for example) of the Supplemental Charter of Feb. 24, 1922, and the Report of the Council for the year 1926-27 (see para. 2 on p. 345), we cannot treat the benefit of members as a negligible object of the institution nor can we regard the benefits conferred upon members as merely incidental to the main purpose of the institution. The appeal therefore fails." H I

The institution immediately on the determination of the appeal declared to the commissioners its dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Finance Act, 1925, s. 19, and the Income Tax Act, 1918, s. 149. ROWLATT, J., dismissed the appeal, holding that the institution was not established for charitable purposes only. The institution appealed to the Court of Appeal.

A *A. M. Latter, K.C., and Cyril King* for the institution.

The Solicitor-General (Sir Stafford Cripps, K.C.) and Reginald Hills for the Crown.

Cur. adv. vult.

June 8. The following judgments were read.

B **LORD HANWORTH, M.R.**—The Institution of Civil Engineers was founded in 1818 and was incorporated by royal charter dated June 3, 1828. The object for which it was founded was

C “the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man.”

The charter conferred the power on general meetings of the institution of making and establishing

D “such byelaws as they shall deem to be useful and necessary for the regulation of the said body politic and corporate, for the admission of members, for the management of the estates, goods, and business of the said body politic and corporate, and for fixing and determining the manner of electing the president, vice-presidents and other members of the council,”

and other details of administration. It was also declared that

E “no resolution or byelaw shall on any account or pretence whatsoever be made by the said body politic and corporate in opposition to the general scope, true intent, and meaning of this our charter or the laws or statutes of our realm.”

Supplemental charters were granted on Aug. 3, 1887, and on March 20, 1896, respectively, to extend the powers of the institution in purchasing and holding lands, and for enlarging the composition of the council and the method of recording the votes of members at elections to the council. By another supplemental charter,

F dated Feb. 24, 1922, a member and an associate member of the institution was empowered to take and use the name, title of, or describe himself as a Member or an Associate Member—as the case might be—of the Chartered Institution of Civil Engineers; an alteration was made in the method of voting at special general meetings of the institution, and provision was made for voting by voting papers, and not personally, by all corporate members, on proposals for alteration of byelaws or regulations. This charter recited that

G “the institution has continuously throughout its existence actively carried out the main object of its original charter and fostered and increased the knowledge of the art and science of the profession of civil engineering, and has in various ways set out in the petition taken all possible steps to secure that persons before being admitted as corporate members of the institution shall possess such knowledge as should be possessed by a competent civil engineer and should be of good reputation.”

H The charter also recites that, notwithstanding that the institution is one of the oldest chartered professional bodies and is the representative body of civil engineers in Great Britain, there is nothing to prevent any person who chooses so to do from calling himself a civil engineer. Then in the operative part of the charter the right to take and use the title of Member of the Institution of Civil Engineers or Associate Member of the Institution of Civil Engineers is conferred.

I The byelaws are directed to securing that the members of the institution, whether full members, associate members or associates entitled to the privileges of corporate membership, shall possess certain qualifications. Candidates for election into the class of associate members are to possess the stipulated qualifications and to have passed certain examinations. In short, these byelaws and regulations are designed to fix and maintain a high standard of knowledge and experience among all the members.

The institution provides a library for the use of members, but does not provide what may be termed club amenities. It awards a number of prizes, some of which are provided out of its own funds, and many out of trust funds which have been assigned to it for administration. An outstanding activity of the institution is the publication of papers, lectures, transactions, abstracts, and the like, all intended for the dissemination of knowledge of special value to those who are engaged in civil engineering. On this head the institution has since it was established spent upwards of £400,000. A B

The full story and activities of the institution are set out in the Case and it is unnecessary to repeat them in this judgment. The institution claims that it is a body of persons established "for charitable purposes only," and as such entitled to the exemption from income tax allowed under s. 37 (1) (b) of the Income Tax Act, 1918. The Crown admitted that the work of advancing mechanical science which the institution performed was a charitable purpose within the above section; but they claim that that was not the only object or purpose which the institution pursued—that a substantial object of the institution was the benefit of its members by way of professional advantage, and, therefore, that it fails to satisfy the conditions laid down in s. 37. C

The commissioners were satisfied that the main object of the institution is the general advancement of mechanical science, but found that a substantial part of its object is to benefit the members of the institution. They held that the benefit of members could not be treated as a negligible object of the institution and that the benefits conferred on members were not merely incidental to the main purpose of the institution. They therefore rejected the claim of the institution. ROWLATT, J., on appeal confirmed this decision and hence the appeal to this court. D E

ROWLATT, J., decided that the present case falls into line with *R. v. Income Tax Special Comrs., Ex parte Headmasters' Conference. Same v. Same, Ex parte Incorporated Association of Preparatory Schools* (2); *General Medical Council v. I.R. Comrs., English Branch Council of the General Medical Council v. I.R. Comrs.* (3); *Geologists' Association v. I.R. Comrs.* (4); *General Nursing Council for Scotland v. I.R. Comrs.* (5), in which the claimants were held not entitled to the immunity because their objects were not "only" those that are comprised by the word "charitable." There was in each case some other purpose personal and advantageous to the members. F

As ROWLATT, J., has said, there may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds, without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only. G

I confess that I have a difficulty in attaching the same weight as was given to it by the commissioners and the learned judge, to the fact that members of the institution can attach letters as suffixes to their names. The requirements of the institution whereby its members have to possess an adequate qualification does not appear to me to connote an advantage, amounting to a collateral purpose in the sense above, to the institution. That its members should bring a certain knowledge and capacity for learning to the institution seems only to confirm its purpose of the general advancement of mechanical science and knowledge. Whether the members are to be easily distinguished by letters attached to their names, or are generally held in estimation by belonging to the society, seems a matter of small moment to the present decision. It is not unknown that belonging to one or another college in our ancient universities carries with it a distinction; and a suffix after the name only serves to identify the qualification thus possessed with less effort to an inquirer. H I

The commissioners attach importance to a statement made in the report of the council for the year 1926-27 relating to the fact that the protection of the interests of members is engaging the council's earnest attention. In its context this seems

A to relate to endeavours to prevent "any impairment of the liberty of professional practice now enjoyed by members, or of the standing which their qualifications attested by the institution give them"; and to this a note that the members ought to help themselves, seems to prevent the inference that the institution is acting as a trade union on behalf of its members, and not rather with a view to the preservation of the position held by members.

B It must be remembered that they were entrusted from the first with carrying out the main object of the institution. There is no doubt that full publicity is given to the researches and information made and obtained by the members. This is a not unimportant feature: see *Beaumont v. Oliveira* (6); and no profit is distributed to the members.

C The question of law that arises on these matters of fact is this—do these other activities represent a collateral or independent purpose, or are they subsidiary and incidental to the main object for which the institution was started and incorporated? Before answering these questions it is important to recall that this institution has figured in several proceedings in the law courts, and in cases which have been reported in the books, where a number of expressions are recorded that fell from eminent judges on the purpose and work of the society.

D In the first, *R. v. Institution of Civil Engineers* (7), it was held

"not to be released from paying its rates under the Act which gave exemption to land and buildings belonging to any society instituted for the purpose of science exclusively."

E That decision, however, appears not to be consistent on this point with *I.R. Comrs. v. Forrest* (1). Two conditions had to be fulfilled in order to obtain exemption from the rates. The institution failed in the condition which required it to be supported "wholly or in part by annual voluntary contributions" and the other feature which thus was not essential, appears to conflict with the views expressed by LORD WATSON and LORD MACNAGHTEN in *Forrest's Case* (1) (15 App. Cas. at pp. 348, 353), and see per HAWKINS, J., in *Royal College of Music v. Westminster Vestry* (8) ([1898] 1 Q.B. at p. 313), where he holds the decision as to the rates to be overruled.

F In 1887 the question arose whether the institution was liable to the duty imposed on the annual value, income or profits of property belonging to a body corporate under the Customs and Inland Revenue Act, 1885, s. 2, which contained an exemption in favour of

G "property appropriated and applied for any charitable purpose, or for the promotion of education, literature, science or the fine arts."

H In *Re Duty on Estate of Civil Engineers Institution* (1) it was held that the appellants did not come within the exemption. This decision was reversed by a majority of the Court of Appeal, and this latter decision was affirmed by a majority of the House of Lords. LORD HALSBURY in a dissenting speech disclaimed that any importance attached to the adverb "exclusively." If the property was in fact appropriated and applied to science, it was so, and the adverb could not alter or attach a different measure to that fact. LORD WATSON (15 App. Cas. at p. 349) seems to accept the principle that, if not exclusively, yet certainly in the main, and as its chief object, the income is devoted to science, the exemption in the case before him could be held to have been deserved. He says (15 App. Cas. at p. 350):

I "The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object. Membership is not required for admission to the profession of a civil engineer; it confers no rights or privileges in the practice of that profession, over which the institution neither has, nor professes to have any power of control. . . . The discussion of mechanical and engineering problems, by the members of the

institution, cannot fail to elicit information and speculation of value to the profession at large, and of advantage to all interested in the various departments of the science, for whose use everything read or spoken by members is recorded in the printed minutes, and constitutes a substantial addition to the sum of human knowledge. It occurs to me that, if anyone were asked to say what would be a more efficient method of promoting engineering science than that which the institution has adopted, he would have difficulty in making a satisfactory reply."

LORD MACNAGHTEN propounds the question which has to be answered in this case. He says (15 App. Cas. at p. 354):

"Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?"

And he sums up the position as follows (15 App. Cas. at p. 356):

"I cannot conceive in what better way the promotion of mechanical science, and in particular of those branches of mechanical science which lie within the province of civil engineering, could be effected. I cannot doubt that by means of the discussions on the papers read at the ordinary meetings of the society much new light has been thrown on scientific questions, and much knowledge, which would otherwise have perished, has been preserved. I see no trace of a selfish or illiberal spirit in the proceedings of the society, nor do I find anything to lead me to suppose that its property and income are applied otherwise than bona fide for the promotion of science. The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that

'that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineer.' "

It is argued that the charter of 1922 and the statement in the report of 1926-7 serve to cancel these opinions and to prove that now there is a collateral purpose carried on by the institution. I cannot think so. Such a view seems to ignore the broad lines indicated in the two speeches quoted above in which incidental advantages to members are not overlooked, but which nevertheless indicate the true character attaching to the institution. This view appears to have commended itself to ROMER, L.J., in *Re Royal College of Surgeons of England* (9) ([1899] 1 Q.B. at p. 883). He speaks of the institution as having only one main object and purpose.

I.R. Comrs. v. Forrest (1) has received further interpretation. In *Art Union of London v. Overseers of Savoy* (10) A. L. SMITH, L.J., quotes a passage from the speech of LORD WATSON (15 App. Cas. at p. 334) and comments ([1894] 2 Q.B. at p. 627):

"I understand by this that, if the other object be an object distinct from and not connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts but, if the other object be only a means to one end, i.e., as in this case . . . then the society has a sole and exclusive object, and not another object subsidiary thereto."

A. L. SMITH, L.J., differed from the majority of the court in the Court of Appeal, but in the House of Lords his view was upheld (*Overseers of Savoy v. Art Union of London* (10)). LORD MACNAGHTEN points out ([1896] A.C. at p. 313) that where a society is incorporated and its purpose defined by charter or statute, it is not right to confuse the purpose of the society with the object of individual members in joining it. And LORD SHAND affirms the same distinction. Finally, LORD

A MACNAGHTEN in *Forrest's Case* (1) does not overlook the advantages that may enure to the members of the institution. His words are (15 App. Cas. at p. 354):

B "It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

C After these careful criticisms and incisive analyses of the object and purpose of the institution and the effect of membership on engineers who belong to it, the House of Lords held that it was exempt as being carried on for the promotion of engineering science, and not for the promotion of the professional interest or advantage of the members.

D In my judgment this court cannot overlook, but must give effect to the opinion of the House of Lords; expressed, it is true, in relation to another statute, but based on reasoning which applies to the present case: and must hold that the institution comes within the exemption allowed under the Income Tax Act, 1918, s. 37 (1) (b).

The appeal must be allowed with costs here and below, and the assessments discharged.

LAWRENCE, L.J.—The question in this case is whether the Institution of Civil Engineers is a body of persons established for charitable purposes only and therefore exempt from income tax under the Income Tax Act, 1918, s. 37 (1) (b).

E The answer to this question depends on whether the institution is established solely for the advancement of the science of civil engineering (an admittedly charitable purpose), or whether one of the purposes for which it is established is to benefit civil engineers in order to enable them to practise their profession to greater advantage. It is unnecessary to recapitulate the circumstances under which the institution was established or to state the nature of its activities, as these are fully set forth in the Case and summarised in the judgment delivered by the Master of the Rolls.

G The question to be determined is by no means easy, and is one on which different minds may well take different views, but the reasoning of LORD MACNAGHTEN in *I.R. Comrs. v. Forrest* (1) (although that case was concerned with the interpretation of an enactment which differs in language from the relevant enactment in the present case) has led me to the conclusion that this appeal ought to be allowed.

Previously to the decision in *Forrest's Case* (1) the purpose for which the institution was established had come under consideration in *R. v. Institution of Civil Engineers* (7). In that case the Divisional Court held that the institution was not a society established for the purpose of science exclusively within s. 1 of the Scientific Societies Act, 1843. Under that Act, a society, in order to obtain immunity from

H parochial rates, had to comply with two conditions: first, the society had to be instituted exclusively for the purposes of science, literature, or the fine arts; and, secondly, it had to be supported in whole or part by annual voluntary contributions.

The case came before the Divisional Court on a Case stated by the Middlesex Quarter Sessions. According to the report no reference was made either in the Case or by counsel, or by the court in the second condition. This may have been

I due to the fact that at that date certain cases had determined that the annual subscriptions of the members of such a society were voluntary contributions within the meaning of the Act. Whatever may have been the reason, however, the case was decided solely on the ground that the primary purpose for which the society was established was not the promotion of the science of engineering generally but the edification and instruction of its members with the view to enabling them the better to practise their profession as civil engineers and consequently that the institution was not established exclusively for the purpose of science. It is important to observe that although the Act of 1843 contains the word "exclusively,"

the Divisional Court considered that the point which it had to decide was substantially the same as the point which LORD MACNAGHTEN considered to be decisive in *Forrest's Case* (1).

In the case before the Divisional Court, *R. v. Institution of Civil Engineers* (7), FIELD, J., puts the point as follows (5 Q.B.D. at p. 52):

"If the advancement and acquisition of science taken generally is the main and substantial object of the association, then the necessary concomitant of advantage and enjoyment to the individual does not destroy the exemption. And, in like manner, if the primary and substantial purpose of the institution is the advantage and gain of a particular body of professional men exercising a professional art by which to earn their livelihood, the fact that those objects are gained by the discussion and promotion of such science as if applied to their art will advance their individual and professional interests will not protect the society from taxation."

In *Forrest's Case* (1) LORD MACNAGHTEN states the point which the House of Lords had to decide as follows (15 App. Cas. at p. 354):

"Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?"

In my opinion the answer given by the Divisional Court to the question propounded by FIELD, J., is inconsistent with the answer given by the majority in the House of Lords to the question propounded by LORD MACNAGHTEN in *Forrest's Case* (1). The fact that LORD MACNAGHTEN, although disagreeing with the reasoning on which the conclusions reached by the Divisional Court was based, yet agreed in the conclusion itself, may perhaps be explained on the ground that in his opinion the institution was not wholly or partly supported by annual voluntary contributions. LORD WATSON was plainly not satisfied with the view taken by the courts that the annual subscriptions of the members were voluntary contributions within the meaning of the Act of 1843 (15 App. Cas. at p. 348). This point was eventually set at rest by the decision of the House of Lords in *Overseers of Savoy v. Art Union of London* (10). LORD HALSBURY, in his dissenting judgment in *Forrest's Case* (1), when comparing the Act of 1843 with the Act of 1885, said of the latter Act (15 App. Cas. at p. 340):

"The omission of the word 'exclusively' means nothing, since its existence or non-existence could add nothing to the true construction of the words that are there."

It is evident from the way in which FIELD, J., framed the question which he had to decide in the Divisional Court that he was of the same opinion as LORD HALSBURY as to the weight to be attached to the word "exclusively." On the other hand, both LORD WATSON and LORD MACNAGHTEN lay emphasis on the difference of language between the two enactments. In this connection it is useful to refer to what LORD MACNAGHTEN subsequently said in the *Art Union of London Case* (10) (which was concerned with the interpretation of the Act of 1843 ([1896] A.C. at p. 313):

"It has been held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose 'exclusively.' This mode of construction may be admissible when the society is not incorporated, and its purpose is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it."

HAWKINS, J., in his judgment in *Royal College of Music v. Westminster Vestry* (8), affirmed by the Court of Appeal, came to the conclusion that the effect of the judgment of the House of Lords in *Forrest's Case* (1) was virtually to overrule the case of *R. v. Institution of Civil Engineers* (7). Having regard to the fact that the

A decision in the latter case was based entirely on the ground that the promotion of science was not the primary purpose for which the institution was established, I think that HAWKINS, J., was clearly right in his conclusion.

B The main contention on behalf of the Crown in the present case is that one of the purposes for which the society was established was to benefit civil engineers in their profession, and that, therefore, the institution was not established for charitable purposes only. The answer to this contention is, I think, to be found in the following passages of LORD MACNAGHTEN's judgment in *Forrest's Case* (1) (15 App. Cas. at p. 354):

C "It cannot, I think, be doubted that the institution has raised the standard of the profession and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps necessary consequence of the way which the institution does its work in the pursuit of science?"

and the answer to this question is summed up by LORD MACNAGHTEN as follows (15 App. Cas. at p. 356):

D "The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that

'that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineers.' "

E In view of the contention that the institution is not established for the promotion of science only because under the supplemental charter of 1922 a civil engineer is entitled to advertise the fact that he is a member of the institution by placing the initials M.I.C.E. after his name or otherwise, the following passage in the judgment of FRY, L.J., in *Forrest's Case* (1) (sub nom. *Re Duty on Estate of Civil Engineers Institution*, 20 Q.B.D. at p. 631) is peculiarly apposite:

F "It has been pressed upon us that the membership of this society is of pecuniary value to engineers, and I have no doubt that that is the case; but the observation does not appear to go far. It is obvious that membership in many bodies formed for the cultivation of science is of pecuniary value to certain classes of persons. A fellowship in the Royal Society is undoubtedly of pecuniary value to medical men, to engineers, chemists and others; nevertheless it is plain that the object of that society is the promotion of science."

G Bearing in mind that the original charter of 1828 clearly states the only purpose for which the institution was established, and that this purpose has never been added to or varied by any of the supplemental charters, and further bearing in mind that the House of Lords has decided that this purpose is for the general advancement of the science of civil engineering, it follows in my judgment that the institution is established for a charitable purpose only notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established, but being incidental to and consequent on the way in which the institution carries out the charitable purpose for which alone it was established.

I For the reasons stated, I agree that this appeal ought to be allowed.

ROMER, L.J.—The question to be decided on this appeal is whether the Institution of Civil Engineers is a "body of persons" established for charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1) (b), the expression "body of persons" being defined by s. 237 of the Act to mean, amongst other things, a body corporate, which the institution undoubtedly is.

In order to answer this question, it is necessary to ascertain in the first place the meaning of the word "only" as used in the subsection. On this point there is

some authority. In *R. v. Institution of Civil Engineers* (7) a divisional court consisting of FIELD, J., and MANISTY, J., was called on to decide whether the institution was a society instituted exclusively for the "purposes of science, literature, or the fine arts" within the meaning of s. 1 of the Act 6 & 7 Vict., c. 36, and so fulfilling one of the conditions of exemption from rateability. FIELD, J., after stating what was the meaning of the word "science" in the section, described the question for determination to be whether the advancement and acquisition of science taken generally was the main and substantial object of the association. If so, he said, then the necessary concomitant advantage and enjoyment to the individual does not destroy the exemption. The court came to the conclusion that in the case of the institution the advantage and enjoyment conferred on the individual members was not merely "concomitant," but was the primary or at any rate a distinct object, and accordingly held that the institution was not exempt from rateability. This conclusion I shall have to consider later on. For the moment I am merely concerned with the meaning that was given to the word "exclusively," a word, of course, that is synonymous with "solely" or "only." It is clear that some such meaning must be attributed to these words. Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer on its holder personal advantages of considerable value to him in his profession or in his social standing. He may, for instance, have an exclusive right to affix to his name a certain designation, and will be known to the public as a person belonging to the society. He may have to observe disciplinary rules laid down with a view to ensuring that he does not bring discredit on other members of the society. But in such cases, although the securing of such advantages to the members may in a sense be regarded as one of the objects of the society, such object is merely concomitant or incidental to the real object of the society; and if that real object be charitable, the society is established for charitable purposes only. This was the view taken by LORD WATSON in the later case of *I.R. Comrs. v. Forrest* (1), a case in which the objects of the institution were once more subjected to the scrutiny of the courts. The question in that case was whether the property of the institution came within the exemption contained in the Customs and Inland Revenue Act, 1885, s. 11 (3), as being property which, or the income or profits whereof, "shall be legally appropriated and applied . . . for the promotion of . . . science." It was not, therefore, necessary to consider whether the institution was one of which the income was applied solely for the promotion of science, although as I read the case, the House of Lords decided that it was, as I shall point out later. But in the course of his speech LORD WATSON had occasion to consider the meaning of the word "exclusively" in s. 1 of the Act of 1843. He said this (15 App. Cas. at p. 348):

"Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption."

This language in LORD WATSON'S speech was explained by A. L. SMITH, L.J., in *Art Union of London v. Overseers of Savoy* (10). After quoting the passage he said ([1894] 2 Q.B. at p. 627):

"I understand by this that, if the other object be an object distinct from and not connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts, but, if the other object be only a means to the one end, that is, as in this case a lottery whereby to draw money from the public for the promotion of the fine arts, then the society has a sole and exclusive object, and not another object subsidiary thereto."

The emphasis here laid on the difference between an object that, although subsidiary to the main object of a society is nevertheless distinct from it, and an object that

A is merely a means to the end of carrying out the main object, was repeated when the case came before the House of Lords, sub nom. *Overseers of Savoy v. Art Union of London* (10). LORD HERSCHELL said ([1896] A.C. at p. 306):

"Whatever view may be taken of the means employed to accomplish this end, I see no reason to doubt that the society was instituted for the purposes of the fine arts exclusively within the meaning of the statute,"

B the statute being in that case s. 1 of the Act of 1843. LORD MACNAGHTEN said that he agreed with the view that A. L. SMITH, L.J., had expressed, though he did not in terms refer to the particular view that I have cited. But a few lines earlier he had said ([1896] A.C. at p. 313):

C "It has been held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose 'exclusively.' This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it."

D This passage in LORD MACNAGHTEN'S speech not only throws light on the meaning of the word "exclusively." It seems to indicate that he would have been of opinion that the Institution of Civil Engineers was established exclusively for the purposes mentioned in its charter. But this is not a matter of inference to be drawn from LORD MACNAGHTEN'S speech in the *Art Union Case* (10). It was, in my opinion, actually so decided by the House of Lords in *Forrest's Case* (1), to which I have already referred for another purpose.

E It is true, as I have already stated, that the word "exclusively" was not used in the Act that was being then considered. It is equally true that both LORD WATSON and LORD MACNAGHTEN, in distinguishing *R. v. Institution of Civil Engineers* (7),

F did so on, amongst other grounds, that in the statute in question there, the word "exclusively" was employed. LORD MACNAGHTEN, indeed, intimated that if the language of the Act of 1885 had been the same as that of the Act of 1843, the fact that the founders of the society were not insensible of the advantages which such an institution was likely to confer on its members in their professional capacity would have been a formidable objection. But he did not have to consider, and did not consider in fact, the question whether such an objection would have been

G successful. In my opinion, however, it necessarily follows, from what he and LORD WATSON did decide, that the word "exclusively" or "solely" would have made no difference. It had been argued for the appellants in that case that when the charter and the byelaws of the institution were looked at, it appeared that the main, the primary, object of the institution was to promote the interests of the profession of engineers, and not to increase scientific knowledge. For the purpose of dealing with this argument, LORD WATSON considered in detail the charter and the byelaws and, having done so, said (15 App. Cas. at p. 350):

I "The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science, because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object";

and a little later,

"I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged."

In conclusion, he said :

"I have accordingly come to the conclusion that the income of the institution is, in fact, applied, not for the professional ends of individuals, but for 'promotion of science' in the proper sense of the words; and in that view, I entertain no doubt that such income is 'legally appropriated' within the meaning of the Act, because the purposes to which it is applied are the same with those prescribed by the charter of incorporation."

LORD MACNAGHTEN said (15 App. Cas. at p. 354) :

"The question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage? It cannot, I think, be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage, and probably of pecuniary advantage, to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

It is quite clear, looking at the rest of LORD MACNAGHTEN'S speech, that in his opinion the result he referred to was not the purpose of the society, but was merely an incidental consequence such as he had described.

But if the advantage to the members is not the purpose of the society, but merely an incidental consequence of the way in which it promotes science, then it seems to me that the society was established for "the promotion of science" only unless I have misunderstood the meaning of the word "only," as used in s. 37 of the Act of 1918. It is, moreover, to be observed, as pointed out by LORD HALSBURY in his dissenting judgment, that the omission of the word "exclusively" from the Act of 1885 means nothing. If part of the property or income of the society was legally appropriated or used for a purpose other than the promotion of science, then it was impossible to say that the society came within the exemption granted by s. 11 of the Act of 1885. "The property" and "the income and profits" in that section must mean the whole property and the whole of the income and profits. As the society was held to be entitled to the exemption, it must therefore have been because the majority of the house considered that the property and income and profits of the society were solely appropriated and applied for the promotion of science.

In my opinion, HAWKINS, J., was justified in saying, as he did in *Royal College of Music v. Westminster Vestry* (8) ([1898] 1 Q.B. at p. 313), that the effect of the judgment in the *Forrest Case* (1) was virtually to overrule the judgment of FIELD, J., and MANISTY, J. As regards that judgment, LORD MACNAGHTEN, while agreeing in the conclusion, said that he had some difficulty in accepting the proposition and following the reasoning on which the conclusion was based. The conclusion was that the institution was not entitled to exemption under the Act of 1843; and I think that LORD MACNAGHTEN meant no more than that the conclusion could be supported on the ground that the institution was not supported in whole or in part by "voluntary" contributions.

That the promotion of science is a charitable object is not disputed; and I accordingly arrive at the conclusion that the institution is a body of persons established for charitable purposes only.

It was argued before us that the question whether the society was or was not such a body of persons was a question of fact; and that this question had been decided by the commissioners in favour of the Crown. It is, however, a question that involves the ascertaining of the proper construction to be placed on the charter and byelaws of the society; and is, therefore, a question of law, or at any rate a mixed question of law and fact. Nothing that has been effected by the charter of 1922 has any bearing on that question of construction; and I have no reason to

A suppose that the existing byelaws are different in any material respect from what they were when the House of Lords gave its decision. The proper construction to be placed on the society's charters and byelaws must, therefore, be taken to be the one that was adopted by the House of Lords in *Forrest's Case* (1), and is one that the commissioners, in my opinion, were bound to follow.

For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Hargrove & Co.*; Solicitor of Inland Revenue.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

HORSFIELD *v.* BROWN

[KING'S BENCH DIVISION (Macnaghten, J.), July 29, 1931]

[Reported [1932] 1 K.B. 355; 101 L.J.K.B. 177; 146 L.T. 280;
96 J.P. 123; 30 L.G.R. 153; 29 Cox, C.C. 422]

E *Justices—Husband and wife—Maintenance order—Enforcement of order—Warrant for apprehension of husband in default—Words “unless the said sum and all costs and charges be sooner paid” omitted—Validity of warrant—Warrant not in possession of constable at time of arrest—Legality of arrest—Tender to constable of sum due—Refusal—Subsequent detention by constable—Liability for arrest and detention after tender—Constables' Protection Act, 1750 (24 Geo. 2, c. 44), s. 6—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 44—Bastardy (Forms) Order, 1915 (S.R. & O. 1915, No. 208), Sched., Form No. 18, as amended by Bastardy (Forms) Amendment Order, 1921 (S.R. & O. 1921, No. 1883), r. 2.*

F A warrant, addressed to each and all of the constables of the county of C., was issued by a magistrate at D. in that county for the apprehension of the plaintiff, who had failed to comply with a maintenance order obtained against him by his wife. The warrant, which was in the form prescribed by the Bastardy (Forms) Order, 1915, stated that £19 17s. was payable by the plaintiff, but it omitted the words “unless the said sum and all costs and charges be sooner paid,” which, by the Bastardy (Forms) Amendment Order, 1921, were directed to be inserted in such a warrant. The warrant was delivered to the defendant, who was the superintendent of police at D., and the plaintiff was arrested, taken in custody through the streets, and placed in a cell, by a constable acting under B.'s orders. The constable did not have the warrant in his possession at the time of the arrest. Immediately after the arrest, the sum due was tendered by the plaintiff's father, but the defendant refused to accept the money. Later that evening the plaintiff's solicitor sent a letter to the defendant enclosing the money and demanding the plaintiff's release, but the defendant did not open the letter. The plaintiff was detained in the cell during the night, and on the following morning was brought before a court of summary jurisdiction, who discharged him on the solicitor's letter being opened. In an action by the plaintiff against the defendant for false imprisonment,

H **I** **Held:** (i) the warrant was invalid by reason of the omission of the words “unless the said sum and all costs and charges be sooner paid,” as, at the date when it was sought to enforce the order, the Bastardy (Forms) Amendment Order, 1921, was in force, and, therefore, s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, required that those words should be inserted in

the warrant; (ii) the arrest was illegal, because the constable had not the warrant in his possession at the time; (iii) the defendant was not protected by s. 44 of the Criminal Justice Act, 1925, as the warrant was invalid and as, in any case, the plaintiff was not charged with an "offence" within the meaning of that Act; (iv) the defendant was not protected by s. 6 of the Constables' Protection Act, 1750, in respect of the arrest, since he executed the warrant in an unlawful way, it not then being in his possession, but he was protected by that section in respect of the detention of the plaintiff at the police station after the tender of the sum due.

Per MACNAGHTEN, J.: If the constable acts in obedience to the warrant, then, though the warrant be an unlawful warrant, he is protected by the statute of 1750, but if the warrant be a lawful warrant and he executes it in an unlawful way then no action is maintainable against the magistrate, but an action is maintainable against the constable. . . . Constables, so long as they act in obedience to the warrant, cannot be made liable. Where the warrant is in the form in which it is in the present case the officers effecting the arrest are not bound to take the money tendered to them by their prisoner even though it be the full amount for which the warrant was issued.

Notes. Section 44 of the Criminal Justice Act, 1925, has been replaced by s. 102 (4) of the Magistrates' Courts Act, 1952.

As to enforcement of a maintenance order, see 12 HALSBURY'S LAWS (3rd Edn.) 499 et seq.; and for a constable's powers of arrest, see 25 HALSBURY'S LAWS (2nd Edn.) 323 et seq. For cases see 14 DIGEST (Repl.) 189 et seq. and 27 DIGEST (Repl.) 719 et seq. For Constables' Protection Act, 1750, Criminal Justice Act, 1925, and Magistrates' Courts Act, 1952, see HALSBURY'S STATUTES (2nd Edn.) vol. 18, p. 10, vol. 14, p. 934, vol. 32, p. 416, respectively. For Bastardy Forms Order, 1915 (as amended), see 3 ENCY. COURT FORMS 225-228 and 3 HALSBURY'S LAWS (3rd Edn.) 113, note (a).

Cases referred to:

- (1) *Galliard v. Laxton* (1862), 2 B. & S. 363; 31 L.J.M.C. 123; 5 L.T. 835; 26 J.P. 280; 8 Jur.N.S. 642; 10 W.R. 353; 9 Cox, C.C. 127; 121 E.R. 1109; 14 Digest (Repl.) 209, 1744.
- (2) *R. v. Chapman* (1871), 12 Cox, C.C. 4; 14 Digest (Repl.) 209, 1745.
- (3) *Codd v. Cabe* (1876), 1 Ex.D. 352; 34 L.T. 453; 40 J.P. 566; 13 Cox, C.C. 202; sub nom. *Cod v. Cabe*, 45 L.J.M.C. 101, D.C.; 14 Digest (Repl.) 209, 1746.
- (4) *Robson v. Spearman* (1820), 3 B. & Ald. 493; 106 E.R. 742; 3 Digest 404, 371.
- (5) *R. v. Richardson*, [1909] 2 K.B. 851; sub nom. *R. v. Richardson, Ex parte Sherry*, 79 L.J.K.B. 13; 101 L.T. 541; 73 J.P. 434; 25 T.L.R. 711; 22 Cox, C.C. 183, D.C.; 27 Digest (Repl.) 720, 6890.
- (6) *Money v. Leach* (1765), 3 Burr. 1742; 1 Wm. Bl. 555; 96 E.R. 320; sub nom. *Leach v. Money*, 19 State Tr. 1001; 38 Digest 72, 486.
- (7) *Price v. Messenger* (1800), 2 Bos. & P. 158; 8 Esp. 96; 126 E.R. 1213, N.P.; 38 Digest 73, 511.
- (8) *Atkins v. Kilby* (1840), 11 Ad. & El. 777; 4 Per. & Dav. 145; 9 L.J.M.C. 52; 113 E.R. 609; 38 Digest 72, 494.

Further Consideration of action tried at Manchester Assizes before MACNAGHTEN, J., and a special jury.

The plaintiff, Norman Varney Horsfield, claimed damages for false imprisonment from the defendant, James Brown, a superintendent of the Cheshire County Constabulary, who was in charge of the police in the borough of Dukinfield. The circumstances in which the claim arose are summarised in the headnote, and appear fully in the judgment. The warrant referred to was in the following form:

"In the County of Chester.—Petty Sessional Division of Dukinfield.—To each and all of the constables of the county aforesaid.—Whereas information and complaint have this day been made upon oath before me, the undersigned,

A one of His Majesty's justices of the peace for the county aforesaid, by Phyllis Gwendoline Horsfield of 11, Crescent Road, Dukinfield, in the county aforesaid (hereinafter called the complainant) that by an order duly made in that behalf by the court of summary jurisdiction sitting at Dukinfield in the county of Chester, on the 10th day of January, 1929, one Norman Varney Horsfield, of 190, King Street, Dukinfield, in the county of Chester, clerk, the husband of
B the complainant, was ordered to pay from thenceforth to the complainant through Mr. Allen Howard, under the provisions of s. 30 (1) of the Criminal Justice Administration Act, 1914, the weekly sum of £1, together with the weekly sum of 2s. 6d. for the maintenance of each of the two children named in the said order while under the age of sixteen years, and should also pay to the complainant the sum of 12s. 6d. for the costs of the court and of the com-
C plainant incurred in obtaining such order, and that the payments directed to be made by the said order have not been made according thereto by the defendant, and that there is now in arrear for the same of the sum of £19 12s. 6d. These are, therefore, in His Majesty's name to command you and every of you the said constables forthwith to apprehend the defendant and convey the defendant before the court of summary jurisdiction sitting at the Court Room, Chapel
D Street, Dukinfield, in the county first aforesaid, to answer the premises, and to be dealt with according to law. Given under my hand and seal this 6th day of February, 1931, at Dukinfield in the county first aforesaid. Arrears, £19. Costs on order, 12s. 6d.; warrant, 2s. Cost of execution of warrant, 2s. 6d. Total, £19 17s. (Signed) H. D. BRYCE, Justice of the Peace for the county first aforesaid."

E The jury returned a verdict for the plaintiff except that they found in favour of the defendant on one issue raised by an allegation of the plaintiff that after he had been discharged by the court of summary jurisdiction he was not allowed to go free, but was compelled to return under restraint to the police station. They assessed the damages for the arrest at £175, and the damages for the detention at the police
F station after the tender of the sum due at a further £175.

Hemmerde, K.C., and W. F. N. Perry for the plaintiff.
Neville Laski, K.C., and C. T. B. Leigh for the defendant.

MACNAGHTEN, J.—This action was brought by the plaintiff against the defendant, the superintendent of police at Dukinfield, in Cheshire, to recover damages for false imprisonment. It raises questions of some importance with regard to the
G enforcement of maintenance orders made under the Summary Jurisdiction (Married Women) Act, 1895.

The facts which gave rise to the plaintiff's claim, so far as they are material for the purpose of determining the questions of law arising in the case, were not in dispute. On Aug. 4, 1925, the plaintiff married his wife, Phyllis Gwendoline Hors-
H field, and there are two children of the marriage. After living with her for about three years the plaintiff separated from his wife and went to live with his parents at Dukinfield. Thereupon Mrs. Horsfield took proceedings against the plaintiff before the magistrates at Dukinfield to obtain a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, and on Jan. 10, 1929, she obtained
I an order for the payment of the weekly sum of 25s. for the maintenance of herself and her two children. Section 9 of that Act provides as follows:

"The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

[His Lordship referred to s. 4 of the Bastardy Laws Amendment Act, 1872, which provided for the enforcement of affiliation orders—now dealt with by the Magistrates' Courts Act, 1952, ss. 64, 74—and continued:] The plaintiff failed to comply

with the order which had been made against him, and on Feb. 6, 1931, Mrs. A
Horsfield made complaint on oath before Mr. H. D. Bryce, one of the magistrates
at Dukinfield, that the sum of £19 12s. 6d. was then in arrear under the order.
Thereupon Mr. Bryce issued a warrant addressed to each and all of the constables
of the county of Chester commanding them forthwith to apprehend the plaintiff and
convey him before a court of summary jurisdiction at Dukinfield to be dealt with
according to law. The warrant showed on the face of it the total sum payable by B
the plaintiff, namely, £19 17s., being as to £19 12s. 6d. the arrears of maintenance
due to Mrs. Horsfield, and as to 4s. 6d., the costs of the warrant and its execution.
By s. 6 (1) of the Affiliation Orders Act, 1914 [repealed by Justices of the Peace
Act, 1949], it is provided as follows:

"The Local Government Board may issue such new or altered forms of pro- C
ceedings in matters of bastardy as they shall deem necessary or expedient for
giving effect to the existing Acts relating to such proceedings as amended by
this Act."

Pursuant to the provisions of that Act, the Local Government Board issued a
statutory order entitled "The Bastardy (Forms) Order, 1915" (S.R. & O. 1915,
No. 208), prescribing (inter alia) the form of warrant for the apprehension of a D
putative father under s. 4 of the Bastardy Laws Amendment Act, 1872; and by
another statutory order entitled "The Bastardy (Forms) Amendment Order, 1921"
(S.R. & O. 1921, No. 1383), the Minister of Health, as successor to the Local
Government Board, in pursuance of the powers conferred on him by the Affiliation
Orders Act, 1914, directed that this form should be amended by the insertion of E
the words "unless the said sum and all costs and charges be sooner paid" after the
words "to answer the said complaint." The warrant issued by Mr. Bryce was in
the form prescribed by the former statutory order (S.R. & O. 1915, No. 208): it did
not contain the words prescribed by the amending statutory order (S.R. & O. 1921,
No. 1383): and one of the questions of law to be considered in this case is whether
the omission of the words "unless the said sum and all costs and charges be sooner
paid" rendered the warrant invalid. F

The warrant was duly delivered to the defendant, Mr. James Brown, the superin-
tendent of police at Dukinfield, and on the afternoon of Monday, Feb. 23, one of
the constables stationed at Dukinfield, Samuel Thomas Jones, in accordance with
directions given to him by the defendant, arrested the plaintiff at his father's house
in that town and took him in custody through the streets to the police station, a G
distance of about 500 yards. At the time when the constable effected the arrest,
the warrant was in the possession of the defendant, at the police station, and the
question, therefore, arises whether—assuming the warrant was valid—the fact that
at the time of the arrest the warrant was at the police station and was not in the
possession of the constable making the arrest rendered the arrest illegal. At the
police station the plaintiff was by order of the defendant placed in one of the cells H
and there he remained until the next morning when he was brought before the
magistrates and discharged. In the meantime, however, Mr. Horsfield, senior, had
bestirred himself to procure the plaintiff's release. Having ascertained that the
amount due on the warrant was £19 17s., he consulted Mr. Grundy, a well-known
Manchester solicitor, who resided at Dukinfield. In accordance with the advice
given to him by Mr. Grundy, Mr. Horsfield, senior, went at once to the police
station and tendered £19 17s. to the defendant, and asked for his son's release. I
If the warrant had contained the words "unless the said sum and all costs and charges
be sooner paid" the defendant would, no doubt, have accepted the money and
released his prisoner; but, since the warrant did not contain those words, he refused
to do so; and in taking this course he was fortified by the opinion of the clerk to
the magistrates, whom he had consulted on the matter. Mr. Grundy, on hearing
from Mr. Horsfield, senior, that the defendant would not accept the money and
release the plaintiff, sent a formal letter to the defendant enclosing £19 17s., and
demanding the plaintiff's release; but the defendant did not think fit to open the

A letter, and the plaintiff spent the night in the cell. The following morning the clerk to the magistrates took steps to convene a court. Two magistrates were brought to the police court, which adjoins the police station. The plaintiff was brought from the cells and charged in the words of the statute "that he had neglected or refused to pay" the £19 17s. To this charge the plaintiff replied that the defendant had received that sum on the previous evening. The defendant traversed this allegation, but admitted that he had received a letter which might contain the money. So the letter was produced and opened, and it was found to contain £19 17s. in lawful money. The magistrates then ordered the immediate release of the plaintiff, as by law they were bound to do. The plaintiff alleged that after he had been discharged by the magistrates he was not allowed to go free, but was compelled to return under restraint to the police office, where some property which had been taken from him when he was arrested was restored to him; but the jury returned a verdict for the defendant on that issue. Since it might eventually be established that the arrest of the plaintiff was lawful, but that his detention at the police station after the tender of the money due from him was unlawful, or that the arrest was unlawful, but that his subsequent detention was lawful, I directed the jury to assess the damages for the arrest and for the subsequent detention separately. The jury assessed the damages for the arrest at £175, and they assessed the damages for the detention at the police station at the like sum. The circumstances of the case well warranted substantial damages such as the jury awarded.

The first question which arises in this case is: Was the warrant issued by Mr. Bryce invalid by reason of the omission of the words "unless the said sum and all costs and charges be sooner paid"? Must those words be inserted in a warrant issued for the enforcement of a maintenance order made under the Summary Jurisdiction (Married Women) Act, 1895? The words of s. 9 of the Act of 1895 are:

"The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

Counsel for the defendant contended that the word "is" in that section refers to the date when the Act received the Royal Assent, July 6, 1895, and that this section should be read as meaning that the payment of any sum of money directed to be paid by any order under that Act may be enforced in the same manner as the payment of money under an order of affiliation was enforceable on July 6, 1895. On the other side it was argued that the word "is" does not refer to the date when the Act was passed, but to the date when it is sought to enforce the order, and, in my view, that construction of the section is the right one. The statutory order (S.R. & O. 1921, No. 1383) which directs that a warrant issued under s. 4 of the Bastardy Laws Amendment Act, 1872, must contain the words "unless the said sum and all costs and charges be sooner paid" also provides that nothing in the Order is to invalidate any warrant previously issued—a provision which certainly implies that a warrant issued after the date of the order which does not contain those words would be invalid.

I, therefore, think that the warrant issued by Mr. Bryce ought to have contained the words prescribed by the statutory order (S.R. & O. 1921, No. 1383), and that the omission of those words rendered the warrant invalid. But even if the warrant for the arrest of the plaintiff had been a valid warrant, his arrest was wrongful, because by the common law the constable could not lawfully make the arrest unless he had the warrant with him at the time. In *Galliard v. Laxton* (1), a case which was tried in the Court of Queen's Bench, the headnote is:

"A police constable, who makes an arrest under a warrant from a justice of the peace for disobedience to a bastardy order, is bound to have the warrant in his possession at the time; and this although the warrant was in the possession of his superior officer at the station house, and although the officer making the arrest was not called on to show it."

The judgment in that case was delivered by WIGHTMAN, J., and he concludes by **A** saying :

"We are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that, not having it, they were not justified in making the arrest."

The decision in that case was followed by the late LORD HANNEN (then HANNEN, **B** J.) at the Hertford Assizes in *R. v. Chapman* (2), and was referred to again in *Codd v. Cobe* (3). The court on that occasion consisted of BRAMWELL, B., MELLOR, J., and DENMAN, J. It was a Case stated by the justices of the peace for Devonshire under the Summary Jurisdiction Act, 1857. The appellant, Codd, had been summoned to answer an information charging him with trespass in pursuit of **C** conies, and as he did not appear in obedience to the summons a warrant was issued for his apprehension. The respondent was a police officer to whom the warrant was directed, and he, not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him. The court held that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty, because the warrant was not in the possession of the respondent at the time of the attempted arrest. BRAMWELL, B., **D** said (1 Ex.D. at p. 355) :

"The warrant to arrest the appellant had been issued in respect of an offence punishable upon summary conviction; and I think that *Galliard v. Laxton* (1) is in point to show that, as regards the possession of the warrant by a police officer at the time of taking into custody, no difference exists between arrest upon civil process and arrest for crime other than felony. In the judgment **E** delivered in the case which I have mentioned, the distinction is drawn between arrest for felony and arrest upon other grounds; and the reason is that a police officer can always arrest and detain a person whom he reasonably suspects to have committed felony, but, as a general rule, subject to certain exceptions mostly created by statute, he cannot arrest without warrant a person not charged with felony. I have always held it to be clear law that a person not **F** charged with felony shall have the opportunity of seeing the warrant when he is taken into custody; and I should have arrived at the conclusion that the present appellant is entitled to judgment, even although there had been no authority in his favour. We have consulted some of the other judges, and they agree with us that the decision of the justices cannot be upheld. Although the appellant displayed great violence, yet it is not expressly found by the justices that he used more force than was necessary to prevent his apprehension, which was unlawful; and, therefore, as the case stands, he has not been **G** guilty in law of even a common assault."

MELLOR, J., and DENMAN, J., gave judgments to the same effect, DENMAN, J., concluding his judgment by saying that the respondent, the constable, was not acting in the execution of his duty, and the information was not proved, and therefore the **H** conviction must be quashed.

Then it is said that, although by the common law Constable Jones was not entitled to arrest the plaintiff, the provisions of s. 44 of the Criminal Justice Act, 1925, justified him in doing so. That section provides :

"Any warrant lawfully issued by a justice for apprehending any person charged with any offence may be executed by any constable at any time notwithstanding that the warrant is not in his possession at that time, but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest." **I**

In order to avail himself of the provisions of that section, it is, therefore, necessary for the defendant to show that the warrant was a warrant lawfully issued by a justice, and also that the person to be apprehended was a person charged with an "offence" within the meaning of that statute. I have already decided that the

A warrant issued by Mr. Bryce was not a valid warrant; and I think that the plaintiff was not a person charged with an "offence" within the meaning of the Criminal Justice Act, 1925. The statute, it is to be observed, is a statute that deals with the administration of criminal justice to the exclusion of any other subject; and in such a statute, the word "offence" would seem to import an act or omission punishable under the criminal law. The plaintiff had not committed any crime. All that was charged against him was that he had neglected or refused to pay the weekly sum which he had been ordered to pay to his wife. His failure to comply with that order was not punishable by any court in any way. *Robson v. Spearman* (4) establishes that a warrant for the commitment of the putative father of a bastard child, under the bastardy law then in force (which in this respect was similar to the Act of 1872), until he should pay a sum due for the maintenance of the child and the legal accustomed fees, or until he should be otherwise delivered by due course of law, was bad, because under the statute the magistrate had no power to commit a putative father to prison for a longer period than three months. Counsel, in support of the view that the plaintiff was a person charged with an "offence," relied on the judgment of LORD ALVERSTONE, C.J., in *R. v. Richardson, Ex parte Sherry* (5). In that case, it was held that, although justices before making an order for maintenance in favour of a wife under the Summary Jurisdiction (Married Women) Act, 1895, ought to have evidence of the husband's means, if he fails to comply with that order they have jurisdiction to commit him to prison for such non-compliance notwithstanding that they had no evidence of his means at the date when the payment accrued due. In the course of his judgment the Chief Justice said ([1909] 2 K.B. at p. 856):

"The order committing the man to prison for non-payment is in the nature of a criminal conviction, the disobedience of the earlier order being treated as a contempt which may be purged by payment. That this is so seems clear from the language of s. 54 of the Summary Jurisdiction Act, 1879, which provides that

"This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information."

That Act deals with two classes of proceedings, in one of which the proceedings are in their nature civil and are founded upon a complaint, and in the other of which the proceedings are criminal and are founded upon an information, and the section expressly says that the enforcement of a bastardy order shall belong to the latter class."

I do not think the Chief Justice meant that the failure or neglect of the husband to comply with an order for the payment of alimony to his wife was a criminal offence.

Non-compliance with an order for alimony made by the High Court is no crime, and it would be strange if non-compliance with a similar order made by justices were to be regarded as a criminal offence. I think that the Chief Justice only meant that proceedings for enforcement of an order made by justices were similar to proceedings in the case of offences which are triable summarily.

But then it was said that, if the defendant was not protected by the Criminal Justice Act, 1925, he could avail himself of the protection afforded by s. 6 of the Constables Protection Act, 1750. That section provides:

"No action shall be brought against any constable, head-borough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace,"

until demand has been made of the warrant, and then, if it be found that he has acted merely in obedience to the warrant, there may be an action against the

magistrate if the warrant was invalid or unlawful, but no action should be maintainable against the constable. It is true that the warrant issued by Mr. Bryce commanded all the constables of Cheshire, and, therefore, Constable Jones may be said to have been acting "in obedience to the warrant," when he arrested the plaintiff. But the constable, in executing the warrant, was bound to act in accordance with the law. He had no right to execute the warrant at any time, or in any place, or in any manner forbidden by law. The view that was put forward by counsel for the plaintiff is, I think, right. If the constable acts in obedience to the warrant, then, though the warrant be an unlawful warrant, he is protected by the statute of 1750, but if the warrant be a lawful warrant and he executes it in an unlawful way, then no action is maintainable against the magistrate, but an action is maintainable against the constable. I think that proposition is established by the decision of LORD MANSFIELD in *Money v. Leach* (6), where he said (3 Burr. at p. 1768):

"Where the justice cannot be liable the officer is not within the protection of the Act."

In *Price v. Messenger* (7) LORD ELDON, C.J., of the Court of Common Pleas, said (2 Bos. & P. at p. 161):

"The public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected. In such cases, therefore, the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper."

In that case, the constables having seized certain goods which were not included among the things they were directed to search for and seize, it was held that they had no defence to the claim of the person to whom the goods belonged for damages for wrongfully seizing his goods. *Atkins v. Kilby* (8), too, shows that constables, so long as they act in obedience to the warrant, cannot be made liable. That case also shows that where the warrant is in the form in which Mr. Bryce issued it here the officers effecting the arrest are not bound to take the money tendered to them by their prisoner, even though it be the full amount for which the warrant was issued.

With regard to the claim for damages for unlawful imprisonment at the police station, it appears to me that, although the warrant was invalid, the defendant is entitled to the protection of the statute of 1750, for in detaining the plaintiff at the police station, even after tender of the full amount due on the warrant, the defendant was acting in obedience to the warrant. The language of the warrant is clear and precise: it ordered that the plaintiff should be arrested and should be brought before the court of summary jurisdiction at Dukinfield. In those circumstances it may be that the plaintiff can maintain an action against the magistrate, but he cannot, in my opinion maintain any action against the defendant.

The result is that the plaintiff is entitled to the damages awarded in respect of his wrongful arrest by Constable Jones, but is not entitled to the damages awarded in respect of his subsequent imprisonment at the police station. There must be judgment for the plaintiff for £175 and costs.

Judgment for plaintiff.

Solicitors: *Lancashire, Humphreys, & Grundy*, Manchester; *Barlow & Co.*, Stockport.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

A

MILLICHAMP v. MILLICHAMP

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Langton, J.), October 18, 1931]

[Reported 146 L.T. 96; 95 J.P. 207; 75 Sol. Jo. 814; 26 L.G.R. 671; 29 Cox, C.C. 391]

B

Justices—Husband and wife—Maintenance order—Wilful neglect to maintain—Wife's refusal to share mother-in-law's home—Husband's first duty to wife. Husband and Wife—Matrimonial home—Husband's first duty to provide home for wife.

C

An engaged couple agreed that, after marriage, they would live with the husband's mother at her house. After the marriage differences arose between the wife and her mother-in-law which resulted in the wife's leaving the husband. The wife summoned the husband for wilful neglect to provide her with reasonable maintenance. The husband offered to take her back to the mother's house.

Held: the husband's first duty was to provide his wife with a home according to his circumstances; he had failed in that duty by putting his mother first; and, therefore, his wife was entitled to a maintenance order.

D

Notes. Distinguished: *Jackson v. Jackson*, [1932] All E.R.Rep. 553. Considered: *Grubb v. Grubb* (1934), 150 L.T. 420; *McGowan v. McGowan*, [1948] 2 All E.R. 1032.

As to a husband's duty to provide his wife with a home, see 12 HALSBURY'S LAWS (3rd Edn.) 261-262, para. 498; and for cases on the subject see 27 DIGEST (Repl.) 701-702, 6710-6712.

E

Appeal from a maintenance order made by Cheshire justices.

In January, 1931, the wife took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that her husband, a cable worker, had wilfully failed to provide her with reasonable maintenance. After the summons had been adjourned with a view to an arrangement, there was a final hearing by the justices on May 27, 1931. The wife said that she was married to the husband on June 25, 1930. She was aged twenty-six. Before the marriage she arranged to live with her husband's mother, because the latter was ill, in order to look after her. She went there with her husband after the marriage. When, in September, her mother-in-law recovered from her illness there was trouble. The mother-in-law said she did not want her (the wife) and told her to clear out. She said that she wanted her son and had first claim on him. The wife went to her brother-in-law's house, but her husband got her to go back. There was more trouble, and the mother-in-law never gave her any peace. She was expecting a child, which was born in April, 1931. She again left home in December, 1930, and he had not supported her until an interim order was made by the justices in February, 1931, for £1 a week. She was quite prepared to live with her husband, but

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not with his mother. In cross-examination, she said that her husband had done all he could for her while they were living at his mother's house. He had never asked her to go back. The husband said that, before the marriage, his wife suggested that they should look after his ailing mother, who was aged sixty-six years. They had been courting for over three years, and his wife knew beforehand all about the accommodation. His mother had a pension of 10s. a week, and his earnings of £2 6s. a week had been reduced to just over £2. His wife left him in August, 1930, but no one had told her to go. She complained of his mother's grumbling. He wanted her to come back, and he did not want to shirk his obligations. The arrangement was to live with his mother as long as she lived, and not merely while she was ill. Throughout his wife had been at fault and his mother was quite right. He had made his promise and he could not agree to anything but living with his mother. He had asked his wife to come back.

I

The justices made an order against the husband for the payment of 15s. a week to the wife for herself and 5s. a week for the child. The wife was granted custody.

The justices' reasons for finding wilful neglect were (i) knowing of his wife's approaching confinement, the inadequate bedroom accommodation, his mother's disagreements with his wife, and the impossibility of their living happily or comfortably together at his mother's house, he refused to make reasonable arrangements; (ii) the separation was caused by such refusal; (iii) he did not intend to change the conditions under which the wife was expected to live with him at his mother's house. A

The husband appealed on the grounds that the evidence did not justify the decision, and that the wife had deserted him and refused to return to him. B

C. Marshall-Reynolds for the husband.

The wife was not represented.

LORD MERRIVALE, P.—The parties were married in June, 1930, after a long courtship in the expectation, and under the promise, that they should share their home with the husband's mother, which they did. The wife says that the position became quite impossible, and that the mother behaved in such a way that it could not go on. She says: "My husband will not make a home apart from his mother. He relies on the old promise and insists on my living with his mother, and I cannot go on owing to the mother's behaviour. I have gone to my sister and I claim maintenance." The mother had a pension of 10s. a week, and the husband had an income of £2 6s. a week, which had fallen off by reason of difficult times. One cannot distribute the blame between these people, who were placed in a very tight fix. It is natural enough and creditable that this man feels his filial obligations to his mother. It is natural enough that the wife says she cannot really live under those conditions; the mother has made it impossible. Thus this impasse. The justices had to deal with the matter according to law, and to find whether or not the husband had, in breach of his duty, wilfully neglected to provide maintenance for his wife. They adjourned the case, but it could not be settled. They came to the conclusion that the husband had so neglected his duty. With every sympathy for the parties in this case, I have come to the conclusion that the decision was right. The husband submits that he has not neglected his duty. His first duty was to his wife. It could be limited by an arrangement, but his first duty was to provide her with a home according to his circumstances. The justices came to the conclusion that, by reason of the difficulty about his mother, he failed in that duty because he put his mother first, instead of putting his wife first, subject to such limitation as I have mentioned. The justices were right as to where the burden lies and as to whether the husband was relieved of it by what had happened. Looking at the husband's means, I think the order is somewhat larger than is warranted, leaving him with a very narrow maintenance. The wife's allowance will be reduced to 12s. a week, but the appeal fails on the main question. C
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LANGTON, J.—I agree.

Solicitors: *Stow, Preston & Lyttelton*, for *W. E. Hough*, Preston. H

[Reported by *WILLIAM LATEY, Esq., Barrister-at-Law.*]

PAYNE v. CARDIFF RURAL DISTRICT COUNCIL

[KING'S BENCH DIVISION (Lord Hanworth, M.R., and Lawrence, L.J., sitting as Divisional Court for Civil Paper), June 25, 1932]

[Reported [1932] 1 K.B. 241; 100 L.J.K.B. 626; 145 L.T. 545;
95 J.P. 173; 47 T.L.R. 532; 29 L.G.R. 507]

Highway—Street—Private street works—Payment of apportioned costs—Default in payment of instalment—Power of sale of urban authority—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), s. 13 (1)—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 101 (1) (i).

C Mortgage—Sale—Payment of debt by instalments—Default in payment of instalment.

The power of sale conferred on a mortgagee by s. 101 (1) (i) of the Law of Property Act, 1925, is not confined to a case where default has been made in payment of the whole of the mortgage debt. Where the debt is payable in instalments the power extends to where default has been made in payment of part of the debt.

Where a final apportionment has been made of the expenses of private street improvements under s. 12 (1) of the Private Streets Works Act, 1892, such expenses being made payable by instalments, under s. 13 (1) the premises become charged with the payment of the apportioned sum and the urban authority "shall, for the recovery of such sum and interest, have all the same powers and remedies . . . as if they were mortgagees having powers of sale . . ."

Held: the power of sale given by s. 101 of the Law of Property Act, 1925, includes power to sell the property as soon as any instalment is unpaid and is not only exercisable after the whole amount of the expenses have become due.

Notes. As to private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq.; and for cases see 26 DIGEST 539 et seq. For Private Street Works Act, 1892, see 11 HALSBURY'S STATUTES (2nd Edn.) 181; and for Law of Property Act, 1925, see *ibid.*, vol. 20, p. 427.

Cases referred to:

- (1) *Jenkins v. Jones* (1860), 2 Giff. 99; 29 L.J.Ch. 493; 2 L.T. 128; 6 Jur.N.S. 391; 8 W.R. 270; 66 E.R. 43; 35 Digest 503, 2333.
- (2) *Tottenham Local Board of Health v. Rowell* (1880), 15 Ch.D. 378; 50 L.J.Ch. 99; 43 L.T. 616; 29 W.R. 36; 24 Sol. Jo. 744, C.A.; 26 Digest 536, 2353.

Appeal by the defendant council from an order of His Honour Judge L. C. THOMAS in the Cardiff County Court, by which he directed that the council should be restrained from offering for sale the plaintiff's leasehold premises for the purpose of recovering or enforcing a charge for private street works executed by the council under the powers conferred by the Private Street Works Act, 1892, in respect of the plaintiff's premises until the sum expended by them in respect of such works should become due and payable.

A final apportionment of the amount of the expenses of executing the work was made in 1927 and the plaintiff's share was £48 2s. 8d., payable by yearly instalments. On May 30, 1930, a demand was made on the plaintiff for payment of three annual instalments due, which, not being paid, the council, under s. 14 of the Act, took proceedings to recover. The justices made an order for an immediate payment of £28 13s. 11d. and payment of the arrears at the rate of £3 a month, the whole to become due in the case of default in any one payment being made. Default was made, and a distress was put in, the warrant being returned marked "no effects." In December, 1930, the council gave notice of their intention to sell the plaintiff's premises, but offered to withdraw the notice on payment of the whole amount then due. The plaintiff tendered the amount due for the three yearly instalments and costs, but not the charges incurred in connection with the proposed

sale. That offer was refused. The plaintiff then began proceedings in the county court and the order appealed against was made.

By s. 12 (1) of the Private Street Works Act, 1892:

"When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be), and such final apportionment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875, including the power to declare any such expenses to be payable by instalments. (2) Within one month after such notice the owner of any premises charged with any expenses under such apportionment may, by a written notice to the urban authority, object to such final apportionment on the following grounds or any of them: (a) that the actual expenses have without sufficient reason exceeded the estimated expenses by more than 15 per cent.; (b) that the final apportionment has not been made in accordance with this section; (c) that there has been an unreasonable departure from the specifications, plans, and sections."

By s. 13 (1):

"Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under s. 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of four pounds per cent. per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver."

By s. 101 (1) of the Law of Property Act, 1925 (which has taken the place of the relevant provisions in the Conveyancing and Law of Property Act, 1881):

"A mortgagee . . . shall . . . have the following powers . . . (i) A power, when the mortgage money has become due, to sell . . . the mortgaged property . . . by public auction or by private contract . . ."

C. Erskine Simes and *Gwyn Rees* for the council.

Kirkhouse Jenkins, K.C., and *V. J. Lewis* for the plaintiff.

LORD HANWORTH, M.R.—This appeal raises a point which is no doubt of importance in a number of cases, and counsel for the plaintiff has presented the point as being a guide to future practice. The facts which I need state are few, and they can be simply set out. There were some works done upon a street by the rural district council of Cardiff. The plaintiff was a lessee of a portion of a frontage in Welwyn Road, where the street works were executed. When they were done, following out the procedure of the Street Acts, if I may so call them, there was an apportionment ordered to be made, and in 1927 the committee approved the final apportionment which had been made among the owners of the frontage on the street. On Feb. 7, 1927, they made an order that the payment of the sum so apportioned should be by annual instalments, acting for that purpose under the powers given to them by s. 257 of the Public Health Act, 1875. On Feb. 16, 1927, notice of the final apportionment was given to the plaintiff, and the charge to be made in respect of the apportioned sum was registered as a local charge under the Land Charges Act, 1925, s. 15. Section 11 of the Act provides that a land charge for securing money shall take effect as if it had been created by a deed of charge

A by way of legal mortgage. The effect of that was that in respect of the sum which had been apportioned as payable by the plaintiff, which was a sum of £48 2s. 8d., the council became in effect mortgagees of the property for the purpose of recovering the sum due from the plaintiff. On May 30, 1930, there were three annual instalments outstanding and unpaid. A demand for them was made, but payment was not forthcoming. On Sept. 8, 1930, proceedings were taken to recover this sum before the justices under s. 14 of the Private Street Works Act, 1892, and on Sept. 22, 1930, an order was made that there should be paid a sum of £28 13s. 11d., together with a sum of 8s. 6d. as costs, and a further order was made that payment of the arrears should be by instalments of £3 a month. The instalments again were not paid. On Oct. 27, 1930, there was an application made for a distress warrant, and a distress was put in upon the plaintiff's premises, but the return was that there were no effects. The plaintiff had adumbrated that that would be the result, because on July 5, 1930, he had written this letter :

D "I hereby give you notice that, if you do cause a warrant to be issued, you will be held liable for damages and action will be at once instituted. As you are aware, when I received the council's unauthorised demand for the alleged costs, I at once lodged formal objection to same. Two months later or two-and-a-half months after the event, I received at the instigation of the magistrates' clerk, what was alleged to be, but was not in fact, the magistrates' order, and notice of objection was duly lodged with him under date of June 18, and until this objection is disposed of you have no right to do as you suggest. Further, I am still waiting to hear from the magistrates' clerk as to his explanation refusing my notice of appeal against the magistrates' decision. I may say that, if the warrant be issued, it will be abortive as I have no effects to levy upon and a search for the month of September, 1923, will easily satisfy you as to this, not that same makes any difference to me with regard to any liability, as I am always ready and willing to pay whatever I owe; in this case, however, I claim not to owe the moneys, and until my case has been properly heard by a judicial court and decision given against me, I shall still hold that view."

F I have read that letter because it would appear quite clear that in respect of this apportionment payable by instalments there had been an appeal which had been decided and dismissed. There had been a demand for payment; there had been proceedings before the justices to recover the amount, which had proved unfruitful; there had been a distress warrant issued, which was again unfruitful; and with this letter before me I cannot help thinking that the parties were at arms length.

G The committee who look after the matter on behalf of the rural district council are bound, of course, in the interests of the ratepayers, whom they represent, to see that a liability of this nature is discharged, and on Nov. 28 the committee decided to enforce their rights by a sale under s. 13 of the Private Street Works Act, 1892. They were determined to put in force those powers. The resolution so to do was approved on Dec. 3. In the meantime, acting upon the instructions of the committee, the matter had been put in train so that when the action of the committee was approved and ratified by the resolution on Dec. 3, the notices of the sale were posted up and published in the newspapers. We have the notice which appeared in one of the newspapers, which indicated that there would be a sale of this property, which was charged and in effect mortgaged, for the purpose of the payment of this sum. On Dec. 3 a letter was written by the solicitors for the plaintiff to the solicitors for the council, which says :

I "In accordance with such resolution your clients sued Mr. Payne at the Whitchurch police court in September last for the sum of £28 13s. 11d. We do not know whether any portion of this sum has been paid; if not, we will arrange for payment forthwith of that sum upon hearing from you. As this is of vital importance to our client, we should feel obliged if you would let us hear from you in reply forthwith."

Now that sum, be it observed, is the amount of the three annual instalments plus A
a small sum for costs and interest. This is the reply on Dec. 3:

"As our Mr. Hardwicke informed you on the telephone, we cannot give you a
reply to-day, for we have to submit your letter to our clients for their
instructions."

On Dec. 4 the answer to that letter is written:

"Our clients instruct us to state that provided all the costs and charges, B
together with the private improvements and the interest, are paid they will
withdraw the instructions for sale. Particulars of the amounts are as follows:
Three instalments due, £20 12s. 6d.; interest, £8 1s. 5d.; cost of police court
proceedings, 12s. 6d.,"

which made a total of £29 6s. 5d. Then there is this:

"Estimated costs of advertising sale, £4; Messrs. R. H. Seel & Co.'s charges, C
£3 3s.; our charges, £3 13s. 6d.,"

which made a total of £40 2s. 11d. The rest of the letter shows that the question
of the costs of advertising was capable of some adjustment. On Dec. 5 this letter
was written on behalf of the plaintiff:

"We are in receipt of your letter of the 4th instant. We tender you herewith D
the sum of £29 6s. 5d., being the total of the first three items referred to in
your said letter"

—that is to say, the three instalments, interest, and cost of police court proceedings.

"Our client contends that the council is not justified in offering his property E
for sale by auction without an order of the court, and for that reason the last
three items in your said letter should not be charges against him. As our
client intends in any event to test the legality of the steps taken by your clients,
we shall be glad if you will let us know to-day whether your clients will with-
draw the sale until after the trial of the action shortly to be commenced by our
client, if not we must apply for an interim injunction in this action."

Counsel for the plaintiff said that, whatever was the actual position of the plain- F
tiff, it was a case in which he was entitled to the consideration of the council—
perhaps I might describe it as the merciful consideration of the council—and he
cited to us *Jenkins v. Jones* (1). But the facts in that case were not the same as
those in the present case. A tender was made, but the letter of Dec. 5 said this:

"Our client contends that the council is not justified in offering his property G
for sale by auction without an order of the court, and for that reason the last
three items in your said letter should not be charges against him. As our
client intends in any event to test the legality of the steps taken by your clients,
we shall be glad if you will let us know to-day whether your clients will with-
draw the sale until after the trial of the action . . ."

That really is not a letter written on behalf of a penitent suppliant who is anxious H
to receive the mercy which his kindly acts entitled him to receive.

The action was brought on Jan. 6, 1931, and on Feb. 3 the learned county court I
judge delivered his judgment, holding that in the circumstances the conduct of the
council had not been justified and that the plaintiff had been put to some trouble
and expense in consequence of the action of the council in the exercise of their
rights, and he awarded £10 10s. to the plaintiff. The learned county court judge
decided the matter on this point:

"In this case the point I have to direct myself to is when or whether the
mortgage money had become due, and I have decided that in fact and in law
it was not due."

Judgment, therefore, passed to the plaintiff, and from that judgment the council
appeal.

A It is not disputed that the apportionment had been made and that the sum to be paid was to be paid by annual instalments. When these proceedings were taken three instalments were unpaid, with a sum due for interest, and there was a total sum due in December to the council of £29 6s. 5d., and the question is whether or not the council had the right to proceed with the sale. The powers which were originally to be found in the Conveyancing and Law of Property Act, 1881, s. 15

B and following, are now to be found in the Law of Property Act, 1925, and the particular section which gives the power to sell is s. 101. There is a restriction on the exercise of that power to sell imposed by s. 103, which requires a notice to be served on the mortgagor in certain cases, but it is not required if, under para. (ii), some interest under the mortgage is in arrear and unpaid two months after becoming due. The interest which is claimed here is the interest which has accrued due

C in respect of the three instalments which ought to have been paid in the successive years after the apportionment had been made, in accordance with the terms of the apportionment and the order to pay by instalments. Therefore, at the date when these proceedings were taken for sale there was undoubtedly more than two months' interest in arrear. But it is said that, having regard to the terms of s. 101, the mortgagees had no power to sell in respect of a part of the mortgage money due;

D that what the section contemplates is a case where the whole of the mortgage money is due, so that there was no right on the part of the council to take into their hands the power to sell which is given by s. 13 of the Act of 1892. In a few words, the point we have got to decide is this: In the circumstances, where three instalments of mortgage money had become due and not the whole of that which was secured by the mortgage, was there power on the part of the mortgagee to sell? I find it

E impossible to attribute to the words which I have read a negation of the right to sell where the whole of the mortgage money has not become due. We are to treat the power to sell as if it had been one of the terms conferred by the mortgage deed. It is really admitted that if there is no power to proceed in respect of instalments due and unpaid, and if the rights of the mortgagee are postponed until such time as the total sum for which the mortgage stands has become due, the mortgagee has

F no power of exercising any rights of a mortgagee during that interval. If there was no power of sale where the whole of the mortgage money had not become due, the result would be both unfortunate and almost grotesque. It seems quite clear that the purpose of these words is not to cut down the right of a mortgagee, but if, as happens in accordance with the precedents to which our attention has been called, there is the power given to pay by instalments, so also there is a power

G when the mortgage money has become due—that is, the mortgage money which is to be paid at the date and in the manner provided for in the mortgage deed. In the circumstances of this case the mortgage money was to be paid just as if it was covenanted to be paid under a deed by instalments, and the right, therefore, of the council to proceed seems to be established.

H says: Our attention was also called to s. 103 of the Law of Property Act, 1925, which

“A mortgagee shall not exercise the power of sale conferred by this Act unless and until—(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof . . .”

I It is said by contrast that one might infer that s. 101 dealt with the totality of the mortgage debt, whereas s. 103 specifically referred to default in payment of a part thereof. I do not draw such an inference. It seems to me that s. 103 requires a notice to be served in cases where there has been not only a default in payment of the total sum, but also a default in payment of part of the mortgage debt. Therefore, contemplation of that subsection confirms the view that s. 101 refers to the mortgage debt or a part of the mortgage debt if the debt is to be paid by instalments. There is no authority on the point, but it may perhaps be useful to observe part of the judgment of BRETT, L.J., in *Tottenham Local Board of Health*

v. *Rowell* (2) (15 Ch.D. at p. 394). BRETT, L.J., seems to contemplate cases where the payment has to be made by instalments. He says: A

"So that, if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge were attempted to be put into force, it could only at the end of those seven years be put into force for the seven years' instalments in arrear, and then, if afterwards further instalments became in arrear, it must be put into force again." B

I am inclined to think those words are obiter; but if and so far as they are, they are at least observations made by a learned judge on a situation not very far different from the present, and they seem to contemplate the possibility of a mortgagee exercising his rights in respect of such instalments as had at the time accrued due.

For these reasons, therefore, I think the plaintiff misconceived his action, and he was not entitled to have an injunction to restrain the sale. On the other hand, the rural district council were entitled to proceed with the sale for the purpose of recouping themselves of the instalments with interest thereon which had accrued due. The effect of that will be that this appeal must be allowed, the judgment of the learned county court judge must be reversed, and there must be judgment in the action for the council with costs. With regard to the counter-claim, inasmuch as the defendants, for the reasons given in the course of the argument, have asked for too much, the counter-claim will be dismissed, without costs. C D

LAWRENCE, L.J.—I agree. The substantial question on this appeal is whether the council were justified in putting up the property for sale. The answer to this question, in my judgment, depends upon whether at that date the mortgage money under the charge had become due within the meaning of s. 101 (1) (i) of the Law of Property Act, 1925. If it had become so due, it is not disputed that the council had the power to sell the property without first giving the notice provided for by s. 103 as the interest was more than two months in arrear. The main contention by counsel for the plaintiff was that the power of sale conferred by s. 101 had not arisen and could not arise unless and until default had been made in payment of all the instalments payable under the charge. In my opinion, that contention is not well founded. I agree with the opinions expressed on this subject by JAMES, L.J., and by BRETT, L.J., in *Tottenham Local Board of Health v. Rowell* (2). JAMES, L.J., says (15 Ch.D. at p. 392): E F

"The only effect, according to my view of that, would be that the charge could not be enforceable as long as the usual instalments were paid, but would only be enforceable after the instalments had fallen into arrear." G

BRETT, L.J., after stating that the Act imposed a charge on the premises immediately the expenses had been incurred and that there was no limitation of time during which that charge was to remain effective, says this (15 Ch.D. at p. 394):

"Where the payment has come to be a payment by instalments, then I think that if the charge is to be made effective, it could only be made effective for instalments in arrear. So that, if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge were attempted to be put into force, it could only at the end of those seven years be put into force for the seven years' instalments in arrear." H

In my judgment, whenever in a case of such a charge the money payable under it has been ordered to be paid by instalments, then in default of the payment of an instalment the power of sale under s. 101 arises in respect of that instalment which has not been paid, which, in my opinion, is the mortgage money which has become due according to the tenor of the charge within the meaning of s. 101. I

The only other contention urged by counsel for the plaintiff in answer to this appeal was that there had been a sufficient tender by his client to prevent the exercise of the power of sale. That contention is met, in my opinion, by the fact that the tender itself was not made until after the expenses of putting the property

A up for sale had been incurred and it was only for an amount sufficient to cover the instalments in arrear, the interest due at that date, and a small sum for the costs, but did not include the expenses incurred by the appellants in putting the property up for sale. In these circumstances, the tender was wholly insufficient, and the appellants were entitled to proceed with the sale. For these reasons I agree that this appeal succeeds and ought to be allowed.

B [A declaration was made that the council were entitled to sell the property for the purpose of enforcing the charge in respect of the instalments and interest thereon due at the date of the present proceedings.]

Appeal allowed.

Solicitors: J. Murray Napier, for C. James Hardwicke & Co., Cardiff; D. J. Davies & Son, Cardiff.

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

D

GEE v. HAZELTON

E [KING'S BENCH DIVISION (Scrutton, Greer and Slessor, L.JJ., sitting as additional judges of the K.B.D.), June 23, 1931]

[Reported [1932] 1 K.B. 179; 100 L.J.K.B. 644; 145 L.T. 545;
95 J.P. 176; 47 T.L.R. 528; 49 L.G.R. 498]

Rent Restriction—Possession—Irrevocable licence granted by tenant to third person to use part of premises for business not that of tenant.

F The tenant of premises consisting of a dwelling-house and land to which the Rent Restrictions Acts applied granted a licence to a bill-posting company to erect hoardings on the land which had a frontage on a main road. On a claim by the landlord for possession of that portion of the land covered by the hoardings,

G **Held:** the Rent Restrictions Acts conferred no right of property on the tenant, but only the personal privilege of occupying a dwelling-house which fell within them; the tenant had granted the company an irrevocable licence to occupy and use part of the demised premises for the purposes of a business which was not that of the tenant; the use of the land under such a licence was as much relieved from the control of the tenant as if there had been an agreement for a tenancy; that was not a use to which the tenant was entitled to allow the land to be put without losing the protection of the Rent Restrictions Acts; and, therefore, the landlord was entitled to possession.

H Per SCRUTTON, L.J.: Once there is shown a paramount use, under an agreement, of part of land up to that time within the Rent Restrictions Acts for the purpose of the business of a person other than a tenant, that land is put outside the scope of the Acts.

I **Notes.** Section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not apply to "new control": see Rent and Mortgage Interest Restrictions Act, 1939, Sched. I. The words in the subsection, "either the annual amount of the standard rent or," have been repealed by the Rent Act, 1957.

As to the landlord's right to possession of a controlled house, see 23 HALSBURY'S LAWS (3rd Edn.) 813 et seq.; and for cases see 31 DIGEST (Repl.) 637 et seq., 695 et seq. For the Increase of Rent, &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

- (1) *Epsom Grand Stand Association, Ltd. v. Clarke*, [1919] W.N. 170; 147 L.T.Jo. 80; 35 T.L.R. 525; 63 Sol. Jo. 642, C.A.; 31 Digest (Repl.) 704, 7935.
- (2) *Wood v. Leadbitter* (1845), 13 M. & W. 338; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, 1771.
- (3) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.
- (4) *Phillips v. Hallahan*, [1925] 1 K.B. 756; 94 L.J.K.B. 694; 133 L.T. 236; 41 T.L.R. 407; 69 Sol. Jo. 444; 23 L.G.R. 440, D.C.; 31 Digest (Repl.) 649, 7529.
- (5) *Gidden v. Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27, D.C.; 31 Digest (Repl.) 649, 7530.
- (6) *Haskins v. Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; 47 T.L.R. 195; 29 L.G.R. 199, C.A.; 31 Digest (Repl.) 650, 7532.
- (7) *Stening v. Abrahams*, ante p. 437; [1931] 1 Ch. 470; 100 L.J.Ch. 278; 145 L.T. 18; 31 Digest (Repl.) 412, 5417.
- (8) *Taylor v. Pendleton Overseers* (1887), 19 Q.B.D. 288; 51 J.P. 613; 35 W.R. 762, D.C.; 31 Digest (Repl.) 119, 2590.

Appeal from an order of the judge of the Bromley County Court of Kent.

The plaintiff was the landlord, and the defendant was the statutory tenant, of a dwelling-house, land and premises known as No. 46, Croydon Road, Beckenham, which came within the Rent Restrictions Acts. The land had a frontage on the Croydon Road, and by agreements made in December, 1928, and December, 1929, the tenant let the land frontage to the Boro Bill-Posting Co. for a period of seven years at a rent of £55 10s. a year. Substantial hoardings were erected. The landlord claimed possession of that portion of the premises which was occupied and used as an advertising station together with mesne profits. The county court judge held that no sub-tenancy had been created by the agreements between the tenant and the bill-posting company, but that they amounted merely to a licence, and refused to make an order for possession. The landlord appealed.

A. T. Denning for the landlord.

B. H. Waddy for the tenant.

SCRUTTON, L.J.—The tenant occupies a house with a considerable quantity of land, and pays the landlord a rental of a little over £40, and she is receiving over £50 for allowing an advertising contractor to erect large hoardings on a portion of the land. If this plot is subtracted she still has a large quantity of land for a dwelling-house. The landlord has taken the view that she is using the plot of land on which the hoarding stands for a business other than her own, and, therefore, has put the plot of land outside the protection of the Rent Restrictions Acts. The tenant disputes this on the ground that she has not given a lease of that land, but only a licence. The learned county court judge accepted that view, and said that, as this is a licence and not a tenancy, the land is still within the protection of the Rent Restrictions Acts, and the tenant may go on paying the landlord the rent, keeping her dwelling-house for her use and receiving more than the rent she pays to the landlord for the use she allows to be made of the land. This case, in my view, does not raise the general question of advertising boards and stations, because they may vary very much according to the particular facts. Boards put on the wall of a house may raise a question very different from that raised where boards are erected on part of a garden which is either used for nothing else or only used for purposes very slight compared with its use by the advertising boards. The difficulty with the Rent Restrictions Acts was for a long time that neither Parliament nor the courts were clear whether the Acts were intended to give to the tenant a property which he could transfer to other people or whether—which is the view now well established, I think—that they confer a personal privilege only on

A the tenant occupying the dwelling-house. Since *Epsom Grand Stand Association v. Clarke* (1) was decided—I was a member of that court, and I doubt whether the court in the early stages of the Rent Restrictions Acts appreciated fully what it was doing—it has been established that so long as the tenant dwells in the dwelling-house, it will not be taken out of the Acts merely because he uses part of the dwelling-house for his own business. It has been established that if the tenant B dwelling in the dwelling-house lets part of it furnished, that part goes out from the protection of the Acts. It has been established that if the tenant ceases to live in the dwelling-house, though he is letting it to members of his family, again it goes out of the Acts. It has been established also that if the tenant lets the dwelling-house to another person for business purposes, it goes out of the Acts.

C In the present case the tenant made two very odd agreements. I am suspicious whether they were intentionally made odd in order to avoid the Rent Restrictions Acts. One of them, dated Dec. 5, 1928, was a contract by which the tenant, called the licensor, agreed to grant, and the licensee to take,

D “the exclusive right of posting and maintaining advertisements . . . by boards, signs, or posters upon the — of the licensor situate and known as — in the county of — upon the terms and conditions following.”

The agreement is to remain in force for a term of seven years,

“subject to the licensees being at liberty at any time during the term of the agreement or within twenty-one days of the termination to remove all fixtures . . . belonging to them on the said advertising position.”

E There has not been any advertising position stated at all. The next agreement, dated Dec. 12, 1929, is somewhat more definite. It confers the exclusive right of posting upon vacant land frontage of the licensor “situate and known as ninety feet additional frontage Croydon Road.” Nothing was known as “90 feet additional frontage Croydon Road,” and nothing is said whatever of the depth to which the land goes back from the frontage. Anyhow, there are those two agreements, and

F they give the advertising company an irrevocable licence to erect advertising boards, position undefined, and to maintain them for seven years and at any time to bring the advertising company’s workmen over the soil in order to re-post bills and repair or re-erect the structure. It seems to me quite clear on those facts that the tenant has given another person an irrevocable licence to occupy and use some of the land for the purposes of a business not that of the tenant, and it would seem to me

G fairly clear that that was never a use which the tenant was entitled to make of land within the Rent Restrictions Acts, and which should keep the land within the purview of the Acts. The learned county court judge seems to have taken the view that once you have a licence and not a tenancy, the tenant has done nothing by granting a licence, because he has reserved some amount of possession to himself, and a very vague reference was made in the court below to a quantity of cabbages

H which were said to be growing somewhere under the shelter of the large advertising board. I think the learned judge in deciding that, as it was only a licence and not a sub-tenancy, the land remained under the protection of the Rent Restrictions Acts went back into what I may call the *Wood v. Leadbitter* (2) days of the views taken by a licence. When you get a man with an irrevocable licence involving his occupation of parts of land, the use of that land under the licence is as much relieved I from the control of the tenant as if there was an agreement of tenancy.

There have been controversies in rent restriction cases whether you are to look at the agreement under which the land is used or at the actual user of the land. When the agreement and the actual user differ, which is to be treated as the more important? I think that the authorities show that one must look at the agreement rather than at the actual use, but here the agreement and the actual user are the same. The tenant has granted possession to use this land for the purpose of somebody else’s business, taking a reward for it. Some of the authorities speak of paramount use. I can conceive in some cases of advertising boards that different

views may be taken when the advertising station consists of a board put on a dwelling-house. There the paramount use of the wall is as the wall of the dwelling-house, apart from the difficulty of defining what you are to get possession of when you ask for possession of an advertising station attached to a wall. Here there is no difficulty of that sort. The part of the property as to which the licence is given is nothing to do with the dwelling-house; it is a small part of a large garden round a dwelling-house. I have no doubt on these facts that the paramount use of the land, whatever it may be, is the business of advertising, and the growing of cabbages, the extent of which and the number of which and the space occupied by which the tenant did not take the slightest trouble to prove, is a very minor use of the land as compared with the huge advertising board for which the tenant is getting £50 a year.

In my view, therefore, the learned county court judge was wrong in law when he took the view that once shown it was a licence and not a tenancy the property still remained within the Acts. Once there is shown a paramount use, under an agreement, of part of land up to that time within the Rent Restrictions Acts for the purpose of the business of a person other than a tenant, that land is put outside the scope of the Acts. Therefore, I think the learned county court judge came to a wrong conclusion.

The only remaining question is how much of the land is to go out of the Acts. The parties seem to have understood what they were dealing with, and at the trial evidence was produced by the plaintiff of a plan showing the amount of land necessary to maintain and deal with this hoarding. A plan was produced to us and we were told that it was agreed; at any rate, the tenant never took the slightest trouble to prove anything to the contrary. If he had cabbages of value, he gave no evidence where they grew, and what land they occupied; he was content to leave it to the plan and the figures, and I think this court will be doing ample justice, therefore, if it makes an order declaring that the land on the plan bordered pink is now outside the province of the Rent Restrictions Acts and possession must be given of it to the landlord. I desire to say that I am perfectly satisfied that the Rent Restrictions Acts were never intended to enable a tenant to make this profit out of land having so little to do with his dwelling-house. That is going back to the theory of property and departing from the theory now established of a personal right to go on living in a dwelling-house. The tenant's dwelling-house is unaffected, the tenant's pocket will be affected, but that is because the Rent Restrictions Acts were not intended to enable the tenant to make a profit by letting the land to somebody else and allowing it to be used for somebody else's business. The appeal, therefore, must be allowed with costs and the order I have indicated made.

GREER, L.J.—I have come to the same conclusion. The questions we have to determine in this case, like almost all the questions that depend upon the interpretation of sections of the Rent Restrictions Acts and their application to proved facts, are not without difficulty. The facts of the case so far as they are proved by uncontradicted evidence are as follows. By two agreements in December, 1928 and 1929, the premises, to use a neutral term, were dealt with in such a way as to give to a bill-posting company an absolute right of user of the land surrounded by the pink line on the plan that was produced. The first agreement is dated Dec. 5, 1928, and it gives, so far as it can give, the right of user thereof for seven years, and thereafter if not determined by a six months' notice. The rights are described in cl. 4 of the agreement in these terms:

"The said Boro Bill-Posting Co. and agents or assigns to have at all times free and uninterrupted access to the, and user of the, said advertising position for the above purposes. Should the advertising position become obscured or where (if necessary) way-leave or access is not granted, this agreement to become void at once."

- A In strictness that is not a lease of the land, but is a lease of rights over the land, that is to say, the free and uninterrupted access to the advertising position and the free and uninterrupted user of the advertising position for the purpose of posting bills. The other agreement, which relates to an additional portion of the land in respect of which rights were granted by the tenant to the bill-posting company, again refers to that which is granted as at all times free and uninterrupted access
- B to and user of the said advertising position for the above purposes. In order to carry out such an agreement it would be necessary that the land should remain in such a state that at all times the bill-posting company would have free and uninterrupted access and user of the advertising position whatever that may mean. When the case came on for trial a plan was produced and put in by the landlord who was claiming possession, with the statement which was accepted by the
- C tenant's representatives, that the land bounded by a pink line on the plan which was put in, was land in respect of which the bill-posting company had the right to free and uninterrupted access and free and uninterrupted user. There was some evidence that some cabbages or other plants belonging to the tenant were on a part of this land, but the existence of those vegetables was subject to the right of the bill-posting company to the free and uninterrupted user of the bill-posting position.
- D I regard the case as depending upon the uncontradicted evidence that the land outlined by the pink line on the plan was the bill-posting position to which the action had reference and over which the rights were granted by the agreement. On those facts we have to consider the application of s. 12 (2) of the Rent Restrictions Act, 1920, subject to the fact that at the time we are considering it the Act had ceased to apply to premises used for business, trade or professional
- E purposes, except as mentioned in s. 12 (2) (ii). It is to be observed that in s. 13 (1) the words which are used to apply the Act to business premises are not the words, "let as business premises," but "used for business, trade or professional purposes," and when s. 13 (3) says that "this section shall continue in force until June 24, 1921," the statute meant that it shall not continue in force as regards business premises beyond that date, and it is just as if the Act had said that after that date
- F the Act shall not apply to any premises used for business, trade or professional purposes except provided by s. 12 (2). That section provides that the Act applies to a house as defined by the standard rent where either the annual amount of the standard rent or the rateable value does not exceed certain figures, and it is submitted that this house comes within that general clause notwithstanding the fact that it included a great deal of land which possibly might have a value largely in
- G excess of the value of the house. The case was conducted entirely upon the basis that the house was a house which, with its garden, was within the provisions of the Rent Restrictions Acts.
- The Act provides that, although it applies to those premises, there are to be certain exceptions which are covered by provisos. The first proviso is that the Act shall not apply, save as expressly provided, to a dwelling-house bona fide let at a
- H rent which includes payments in respect of board, attendance, or use of furniture. It was long ago decided in *Prout v. Hunter* (3) that that is not confined to a house which is let by the landlord who is seeking possession at a rent which includes payment for board, attendance, or use of furniture, but includes and takes out of the Act a house which the tenant has sub-let for a rent which includes payment in respect of board, attendance, or the use of furniture. By proviso (ii):
- I "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

It is clear, I think, that the object of that subsection was that a person who occupied a dwelling-house was not to be excluded from the benefits of the Act by reason of the fact that he or she has himself or herself used a portion of the dwelling-house for the purpose of his or her trade or professional purposes. There are in existence many small shops combined with a room of a dwelling-house which

are part of the dwelling-house, but used for business purposes. That section was intended to protect tenants from being excluded from such premises. By proviso (iii):

"For the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

The present case was conducted upon the basis that it came within the first part of that proviso, and, therefore, if the tenant had herself been a bill-poster and had erected a bill-poster boarding and done a bill-posting business on the corner of her land, it would have been difficult to say that that portion of the land was taken out of the Act.

But that is not what she did. She let what I think we are entitled to describe as the user of a defined portion of the premises to the bill-posting company. Reading s. 12 (2), proviso (ii) and also s. 13, one cannot help seeing that the proviso and the section are directed not so much to the terms of a lease, but to the user of the premises either for the purpose of a dwelling-house or for the purpose of business or professional purposes. It has been held in *Phillips v. Hallahan* (4), that if a portion of the premises is separately let for business premises to someone other than the tenant, that part is taken out of the Act. The question is, should the same answer be given if the land in question is not sub-let to a tenant who occupies as a tenant in the strict sense of the word, but there is a licence of exclusive user by the grantee which is not inconsistent with the rights of the grantor? Should there be the same answer as where there is an actual sub-tenancy of a defined portion of the land? It seems to me that the answer ought to be the same, and, in my judgment, that is the result of holding, as I think it has been held, that the decision of the judges who decided *Gidden v. Mills* (5) was correct. In that case there was a dwelling-house and a garage: the dwelling-house was sub-let, but the garage was retained by the tenant to use for business purposes. It was held that, because he was using the garage for business purposes himself, not having let it to anybody else, he had lost the protection of the Acts so far as the garage was concerned, and as he had parted with the possession of the rest of the land let to him, he was not a tenant of it or an occupier having any rights under the Acts at all. There has been a difference of opinion whether the proper order to be made in such a case was one for possession of the garage or whether there should not be an order for possession of the whole of the premises let. My view, when I decided that case, was that the judgment ought to be for possession only of the land which was being used for business premises, that is to say, the garage, but that view did not commend itself to the majority of the Court of Appeal who decided *Haskins v. Lewis* (6). I think it must now be taken that the order in *Gidden v. Mills* (5) was wrong in one respect and in one respect only, namely, that where the tenant has parted with the dwelling-house to a sub-tenant, and is himself using the rest of the premises for business purposes, judgment ought to be for the possession of the whole of the premises let and not for possession of part of the premises. That view has no bearing on the case which we have to consider now, because in the present case the tenant did retain the dwelling-house and did retain everything but the bill-posting station which was used by the bill-posting company. I see no reason to hold that there cannot be a judgment for part of the premises as to which it is proved that the exclusive right of user has been granted to a third person. In this case we are not concerned with the position of a tenant who is herself out of occupation of the dwelling-house and using part of the premises for business purposes, and it seems involved in *Gidden v. Mills* (5), apart from the question of the right order, that user of a portion of the premises exclusively reserved for business premises, may take that part (which must be a defined part) out of the Act altogether, and if it be taken out of the protection of the Act, then the land-

A lord, who has given notice to quit, and at common law* would be entitled to possession of the whole premises, can say:

“At common law I would be entitled to possession of the whole; you, the defendant have shown a right to remain in possession of a portion of the premises, but you have shown no right to remain in possession of that portion of the premises of which I seek to recover possession by this Act.”

B As I said the question is involved and is not without difficulty. I have come to the conclusion that the right order is, that the appeal should be allowed with costs, and there should be judgment for the plaintiff for possession.

SLESSER, L.J.—I agree with the views expressed by my Lords. The tests under s. 12 are inferential, but the section and the guidance given by the lapsed s. 13 of the Act of 1920 point to user as the criterion in considering whether what the tenant has done has thrown the whole or part of the house out of the protection of the Act. The difficulty which arises in cases like the present is one of fact and degree. Where the sub-tenancy is proved, it is much easier to find on the facts whether the part so demised has, or has not, been used for business purposes, but when you are dealing with user, the user, on the one hand, may be a user substantially giving occupation and dominant or paramount user to a person other than the tenant, or, on the other, the user by the person other than the tenant may be of so slight an amount as scarcely to exclude the land from the protection of the Act. Or you may get a concurrent user both by the tenant and by the grantee of the licence from the tenant. In any event I am quite clear that the learned judge here was wrong in disposing of the matter on the ground that there was a licence and not a sub-tenancy. While I think much may turn in an individual case on the nature of the user—a view which has been indicated by my Lord when he drew attention to the difference between what might properly be called an advertising station, a physical erection on a defined piece of land, and the use of a wall for the purpose of advertising—I am clear that in this case the user contemplated by the agreements was of such a kind that it did constitute with regard to a part of the house—as the land is notionally to be considered under s. 12 (2) (iii)—a user by a person other than the tenant for business purposes. In *Stening v. Abrahams* (7) FARWELL, J., says (ante p. 439) on the question whether the tenant, the grantor, had or had not parted with possession:

“The fact that the agreement is in the form of a licence is immaterial as the licence may give the licensee so exclusive a right to legal possession as to amount to a parting with possession.”

Again in *Taylor v. Overseers of Pendleton* (8), WILLS, J., said,

“The words there were more like words intended to confer a licence only than those used in the present case. I think the word ‘privilege,’ which is used in this agreement, is not inconsistent with the right to occupy. I have come to the conclusion that on the proper construction this agreement also creates a tenancy. For these reasons I am of opinion that both the hoardings are rateable.”

Here we are not concerned with rating, nor specifically with occupation, but with user. Those observations point to the fact (and I think that, if the learned judge had had them under consideration, he would not have decided the case so prematurely) that the granting of a licence is not in itself, because of the form of the licence, conclusive whether a complete right of user or even a right of occupation has or has not passed under the licence. I need not refer in detail to these agreements. They give an exclusive right of fixing advertisements upon the vacant land frontage of the licensor. The phrase “vacant frontage” seems to indicate that the tenant was not putting this land to any use, but the agreement is not very artistically drawn. We have heard some suggestion that cabbages were grown on this land; whether they were grown or whether they were derelict cabbages I know not, but looking at the fair construction of these agreements, I think it was

described as vacant land, the licensees were entitled to free and uninterrupted access to and user of the said position, and we may fairly come to the conclusion that what was intended was to grant to the licensee paramount user of this land and I think substantially an occupation, certainly an occupation of those parts which were necessary in order to erect the advertising hoarding. If that be so, you have here a part of the house, the land used and allowed to be used by the tenant for business purposes other than those of the tenant, and I agree that in those circumstances that the land, on that licence being granted, has passed outside the ambit of the Rent Restrictions Acts, and therefore, I think that this appeal should be allowed.

Appeal allowed.

Solicitors: *H. A. Phillips; Evans, Jarvis, & Sherry.*

[*Reported by R. A. YULE, Esq., Barrister-at-Law.*]

ADAMSON (INSPECTOR OF TAXES) v. UNION COLD STORAGE CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), November 23, 24, 1931]

[Reported 146 L.T. 172; 16 Tax Cas. 293]

Income Tax—Deduction in computing profits—Rent of business premises—Reduction of rent if lessee's profits insufficient to pay dividends.

A limited company was granted a lease of a large quantity of property, mostly situated outside the United Kingdom, which property it used in its business. The form of the lease was that commonly used in England, under which the lessors, as beneficial owners, demised to the company the specified property for a term of twenty-one years in consideration of a rent of £960,000 per annum which the company covenanted to pay by quarterly instalments. The lease also provided that if at the end of any financial year the company found that it had not earned sufficient profits to pay certain specified dividends and interest, then to the extent of the deficiency the rent should be abated, and any rent paid during the year in excess should be repaid. The company was assessed to income tax on its profits without any allowance for the rent paid under the lease. The commissioners took the view that the payments under the lease were not payments necessary to earn profits, but contingent payments dependent on and payable only out of profits. It was not argued that the lease was not a valid and effective document.

Held: the payments made by the company under the lease were proper deductions for the purpose of computing its profits because they were the rent of business premises and were not rendered otherwise by the fact that a rebate or reduction of the amount paid was measured by the amount of the company's profits.

Notes. Considered: *British Sugar Manufacturers, Ltd. v. Harris*, [1938] 1 All E.R. 149. Referred to: *Indian Radio and Cable Communications Co. v. Income Tax Comr., Bombay Presidency and Aden*, [1937] 3 All E.R. 709; *Vestey's Executors v. Colquhoun*, [1949] 1 All E.R. 1108.

- A** As to expenses measured by profits, see 20 HALSBURY'S LAWS (3rd Edn.) 159-161, para. 279; and for cases on the subject see 28 DIGEST 42-45, 215-226.

Cases referred to:

- (1) *Gas Lighting Improvement Co. v. I.R. Comrs.*, [1923] A.C. 723; 92 L.J.K.B. 665; 129 L.T. 481; 39 T.L.R. 504; 12 Tax Cas. 505, H.L.; Digest Supp.
- B** (2) *Pondicherry Rail Co., Ltd. v. Income Tax Comrs.* (1931), 58 L.R. Ind. App. 239; Digest Supp.
- (3) *Last v. London Assurance Corpn.* (1885), 10 App. Cas. 438; 55 L.J.Q.B. 92; 53 L.T. 634; 50 J.P. 116; 34 W.R. 233; 1 T.L.R. 617; 2 Tax Cas. 100, H.L.; 28 Digest 58, 297.

- C** **Appeal** from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.J.J.), reported 144 L.T. 140 on a Case Stated by the Commissioners for the General Purposes of the Income Tax Acts.

The Case Stated was as follows:

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the City of London, held on Feb. 18 and 19, 1929, at Gresham College, Basinghall Street, in the city of London, the Union Cold Storage Co., Ltd., an incorporated company, whose registered office is at 13-16 West Smithfield, in the city of London (hereinafter called "the appellant company") appealed against assessments to income tax for the years 1923-4 and 1924-5 under Sched. D of the Income Tax Acts in respect of the profits of the appellant company's trade as follows: 1923-4, £800,000 less £450,000 wear and tear of plant and machinery; 1924-5, £800,000 less £350,000 wear and tear of plant and machinery.

- E** 2. The main ground of the appellant company's appeal, apart from a question of depreciation, which it was agreed should stand over, was that in computing its profits for the years ended Dec. 31, 1922, and Dec. 31, 1923, respectively (two of the years of average upon which the said assessments were based) there should be included and allowed as deductions two sums of £630,000 and £960,000 paid in 1922 and 1923 respectively, in the circumstances hereinafter mentioned, under an indenture of lease dated Dec. 29, 1921, and made between Sir William Vestey (now Lord Vestey) and Sir Edmund Hoyle Vestey of the first part, the appellant company of the second part, and Messrs. Charles Auguste Kennerley Hall, James Meeres Drabble, and Kenneth Stirling, all of Paris, of the third part.

- F** 3. The appellant company was incorporated in the year 1897, and the persons concerned in the forming of it were the present Lord Vestey and Sir Edmund Hoyle Vestey. During the period between its formation and the year 1921 the company carried on a profitable business principally consisting of the maintenance and operating of cold storages in this country and elsewhere.

- G** 4. The capital of the appellant company was originally £30,000. The capital was increased from time to time, and in 1920 it was £4,780,000 made up as follows: £1,480,000 6 per cent. cumulative preference shares, £2,000,000 7 per cent. second preference shares, £1,000,000 10 per cent. A preference shares, £300,000 ordinary shares—£4,780,000. There was also outstanding at Dec. 31, 1920, 4½ per cent. first mortgage debenture stock issued by the appellant company amounting to £1,079,667.

- H** In 1923 there was a further issue of £3,300,000 first preference shares and 700,000 ordinary shares bringing the total share capital up to £8,780,000, and in 1925 there was a further issue of £3,220,000 6 per cent. preference shares bringing the total share capital up to £12,000,000.

- I** The holders of the ordinary shares have one vote for each share, and the holders of the 10 per cent. A preference shares have one vote for each share. The holders of the 6 per cent. and 7 per cent. preference shares have no voting rights unless (inter alia) the dividends are passed.

5. When Messrs. Vestey decided to form the appellant company in 1897 they approached Messrs. Sing, White & Co., stockbrokers, of Liverpool, and asked for their assistance. They desired to have an outside director on the board to look

after the interests of the outside public who hold shares or debentures issued by the company. Accordingly, Mr. James Sing, a member of the said firm, was appointed a director, and was chairman of the board from 1897 until 1913, in which year he died, and his brother, Mr. Roger Percy Sing, succeeded him, and has remained chairman of the board. Mr. R. P. Sing's main function as a director has always been and is, to represent and watch over the interests of the members of the public who have invested their money in the company, namely, the holders of preference shares and debenture stock. In 1920 and 1921 the other directors were Lord Vestey, Sir Edmund Hoyle Vestey, Mr. Horsfield, Mr. Bunday, Mr. Samuel Vestey and Mr. Percy Vestey, the two latter being managing directors.

6. Up to the year 1911 the whole of the ordinary shares (then £300,000) were held by Lord Vestey and Sir Edmund Hoyle Vestey. In 1911 these shares were converted into 10 per cent. A preference shares, and a further £300,000 ordinary shares were issued. The whole of those ordinary shares were held by Lord Vestey and Sir Edmund Hoyle Vestey, who held (in addition) a certain number of the preference shares.

In 1918 the Vestey's transferred the whole of their ordinary shares, namely, 300,000 shares of £1 each to the Western United Investment Co., Ltd. (hereinafter called "the Western Co."), which was incorporated on Aug. 26, 1918. The Western Co. holds by itself or its nominees (some of whom are employees of the appellant company) the whole of the £1,000,000 ordinary shares of the appellant company and some of the 10 per cent. A preference shares of that company.

There are four "management" shares of the Western Co. which are held respectively by Lord Vestey, his son Mr. Samuel Vestey, Sir Edmund Hoyle Vestey, and his son Mr. Ronald Vestey. The ordinary shares of the Western Co. were applied for and allotted direct to the Public Trustee, Mr. Samuel Vestey and Mr. William George Bunday, who paid cash for them, and all the shares in the Western Co. other than the four management shares hereinafter mentioned stand in the names of the Public Trustee, Mr. Samuel Vestey and Mr. Ronald Arthur Vestey, under a settlement dated July 31, 1919, whereby Lord Vestey and Sir Edmund Vestey settled the same upon trust to pay annuities to employees of the appellant company, certain relatives of the settlors, and other persons, and, subject thereto, upon trust for the descendants of the settlors.

The four Vestey's, who hold the management shares, control the Western Co. Article 5 of the articles of association of that company provides:

"The said ordinary shares shall not confer on the holders for the time being thereof the right to attend or vote either in person or by proxy at any general meeting or to have notice of such meeting or to have any voice in the management or control of the company or to appoint directors or to interfere in such management or control or to inspect the account books and documents of the company (except as by law entitled), and such holders shall be bound by the accounts from time to time furnished by the directors."

Article 6 provides:

"The said management shares shall confer on the holders for the time being thereof the right to the management of the business and the control of the company, and such holders shall alone be capable of being directors of the company. The said management shares shall not confer the right nor entitle the holders for the time being to any dividend, interest, or other payment of a like nature out of the funds, profits, or capital of the company nor the right in a winding-up of the company to any repayment of capital or other payment of a like nature in respect of such shares. The said management shares shall not entitle the holders for the time being thereof nor shall they be entitled to or be paid any remuneration or fees for their services as such directors as aforesaid or in connection with their management of the business or control of the company."

7. The head office and seat of direction of the appellant company is and always

A has been in the United Kingdom, and until the year 1915 it carried on either directly or through subsidiary companies a world-wide business. In particular, besides a very large trade in the United Kingdom, it carried on extensive trade in and with the Argentine, China, and Russia. It owned cold stores and refrigerating and other plant and machinery in Russia at Riga, Petrograd, and Moscow, and in China at Hankow, Singaree, and Shanghai, and in the year 1915 it commenced
B the erection of large works at Zarate in the Argentine. The appellant company owned the whole of the works used for the purposes of the trade wherever situate and itself carried on the trade in the United Kingdom and in Russia, but the trade at Hankow was carried on by a subsidiary company known as the International Export Co., Ltd. (hereinafter referred to as "International"), the trade at Shanghai was carried on by a subsidiary company known as the Shanghai Ice and Cold Storage
C Co., Ltd. (hereinafter referred to as "Shanghai"), and it was intended that when the works at Zarate were completed the trade there should be carried on by a third subsidiary company to be formed for that purpose under the name of the Anglo-South American Meat Co., Ltd. (hereinafter referred to as "Anglo"). The appellant company or its nominees owned all the shares in "International" and "Shanghai," and these companies were controlled in the United Kingdom and
D charged to income tax in respect of the whole of their profits under Case I of Sched. D, the greater part of those profits being paid over to the appellant company in the form of taxed dividends.

8. On Dec. 14, 1915, the appellant company entered into an agreement with the National Cold Storage Co., Inc., of New York (hereinafter referred to as "National") and Sir William Vestey and Mr. E. H. Vestey. By this agreement and a series of
E collateral agreements entered into then or subsequently between the same parties and "International," "Shanghai" and "Anglo" respectively, it was provided that the appellant company should place "National" in full undisturbed possession and control for its own individual benefit of all the business, business premises, goodwill, assets and undertaking of and controlled by the appellant company in all parts of the world outside the United Kingdom on the terms that "National," or in default
F Sir W. Vestey and Mr. E. H. Vestey, should pay annually to "International" £30,000, to "Shanghai" £3,000, to "Anglo" (as from the date when the capital of £150,000 should have been provided by the appellant company) £10,500, and to the appellant company such sums as might be required to make up the profits of the appellant company to an amount (viz., at that time £224,000) sufficient to provide for payment of the interest on its debenture stock and mortgages, the dividends on
G its 6 per cent. cumulative preference shares, the amount required to be carried to its depreciation fund, the dividends on its 10 per cent. "A" cumulative preference shares and dividends at the rate of 10 per cent. per annum on its ordinary shares. The ownership of the premises, plant, and machinery in China, Russia, and the Argentine was retained by the appellant company, and it was part of the terms of their agreement with "National" that these premises should not be demised or
H leased to "National," but that the premises, plant, and machinery should, during the continuance of the agreement, be at the sole disposal and under the sole control of "National" for the purpose of enabling "National" to carry on such of the business as "National" might think fit, "National" being bound to keep all buildings and premises in a proper state of repair, and to keep all plant and machinery in proper working order and condition, save as regards all ordinary wear and tear,
I but being under no obligation to make provision for fire insurance or to write off or provide for any depreciation in value of wasting assets, which was intended to be covered by the sum carried to the depreciation fund of the appellant company. The term of the agreement was twenty-eight years from Jan. 1, 1916, determinable by "National" on twelve months' notice at the end of seven, fourteen, or twenty-one years.

9. The provisions of the agreements referred to in the preceding paragraph were duly carried out, and from Jan. 1, 1916, until the year 1921 the businesses theretofore carried on by the appellant company or its subsidiary companies outside the

United Kingdom were carried on by "National" and were controlled abroad. The profits arising from these businesses consequently ceased to be chargeable to income tax under Case I of Sched. D, but, on the other hand, the balance of the said payments of £30,000 a year to "International" and £3,000 a year to "Shanghai" remaining after charging the administration expenses of those companies was charged to income tax and paid over to the appellant company as taxed dividends. A

10. In, and for some years prior to, the year 1921, Lord Vestey and Sir Edmund Hoyle Vestey (independently of the appellant company) were shareholders in companies which were engaged in businesses in connection with meat and other produce. The general nature of the businesses so carried on was to provide for the raising and bringing to this country the meat supplies which enabled the companies in question to compete with the Americans. Some of these companies owned ranches, cattle breeding properties and freezing works in South America, Australia, New Zealand, China, and other places. Lord Vestey and Sir Edmund H. Vestey owned personally the properties specified in the First Schedule to the said indenture of lease and through their nominees the properties specified in the Second Schedule to the said lease. Other of the companies not owning properties carried on the businesses on the leased properties and/or in connection with the distribution of the produce thereof. Lord Vestey and Sir Edmund H. Vestey beneficially owned the whole of the shares in these "holding," "operating" and "distributing" companies. B C D

11. It was stated in evidence that during the war the appellant company had to increase its cold storage accommodation very considerably, and in particular at the suggestion or with the consent of the government the appellant company built very large stores in Liverpool and in Glasgow, the government helping to finance the company, with the result that at the end of the war the cold storage accommodation throughout this country was very much in excess of requirements, and that in 1920 and 1921 it became a serious matter whether the appellant company could earn sufficient money to pay its fixed charges, including its preferential dividends. Discussions took place as to the course to be adopted by the appellant company so as to broaden the basis of its business, and the suggestion was made that the appellant company should take at a rental the properties mentioned in para. 10. Negotiations followed between the Vesteyes and Mr. R. P. Sing (as representing the outside shareholders in the appellant company), and finally an arrangement was come to as hereinafter described, the general nature of which was that the appellant company should take a lease of the ranches, freezing plants, and other immovable property mentioned in para. 10 hereof for a term of twenty-one years (determinable, however, on six months' notice as hereinafter mentioned), at a rent of £960,000 per annum (subject to abatement), that the appellant company should purchase from the Vesteyes the shares in the "operating" and "distributing" companies before mentioned for the sum of £1,226,903, subject to the condition that upon determination of the lease the appellant company should resell the shares to the Vesteyes at the same price and that the shares in the holding companies should also be acquired (without payment) by the appellant company and held by them during the period of the lease. In negotiating these arrangements Mr. Sing's desire and intention were, as he stated to us, to establish the business of the appellant company upon a broader basis so that the appellant company could and would be certain of earning the dividend on its preference capital, and the scheme evolved appeared to him one which practically ensured the company handling some quarter of a million tons of food products and getting the profits which would result from that, and which would give them a fair certainty, in ordinary times, of earning enough to pay the preference and ordinary dividends. In short, as Mr. Sing stated, he entered into the arrangement as a business proposition in order to ensure his preference shareholders' position. E F G H I

12. (a) Concurrently with the negotiation of the proposals above mentioned the appellant company decided to resume possession and control of the foreign enterprise of the appellant company which had been placed in the possession and control

A of "National" by the before-mentioned agreement of Dec. 14, 1915, other than the Russian businesses which had already been relinquished by "National." Accordingly arrangements were made with "National" for the cancellation of the said agreement of Dec. 14, 1915, as hereinafter mentioned. The properties relinquished by "National" included the said properties at Zarate (in the Argentine) and Hankow and Singargee (in China) mentioned in para. 7 above. It was B arranged that the appellant company should resume control of these properties and sell them (together with the shares in the International Export Co., Ltd.) to Lord Vestey and Sir Edmund Vestey for the sum of £1,800,000 and that the said properties should be included in the lease of properties which the appellant company was to take referred to in the preceding paragraph.

(b) It was stated to us by Mr. R. P. Sing in the course of the evidence given by C him that the business reason for selling these properties to the Vesteyes and taking a lease from them were (as regards Zarate) that it was then in contemplation that Zarate might some day be sold to another company because developments were going on by which the appellant company should in course of time have other works out there. It was all part and parcel of the appellant company's scheme of development. Also the appellant company had to find money for the shares it was D purchasing from the Vesteyes; it wanted to obtain the money without a public issue, and the Vesteyes wanted back these properties with the possibility of re-sale later on, and it was a mutually advantageous arrangement. As regards the Hankow property a further reason was that the two Chinese businesses at Harbin and Nankin, which were included in the lease, belonged to companies in which the Vesteyes held all the shares and had never been subject to the "National" agree- E ment of 1915 or the cancellation thereof of 1921. The headquarters of all the Chinese businesses were at Nankin. Hankow was to a certain extent a subsidiary, and it was thought wise that the three properties should be all in the one hand.

(c) It was also stated in evidence by Mr. Sing that at various periods and in various ways there were sales and counter-sales between various companies in which the Vesteyes were interested and the appellant company. The latter only F bought properties when the working was proved to be a success, and at sundry times and in various ways there had been sales from the appellant company to such companies as aforesaid, and then sales back from such companies to the appellant company, as suited their arrangements.

13. The foregoing arrangements were sanctioned by the directors of the appellant company at meetings held on Dec. 5 and 23, 1921.

G 14. In pursuance of the said resolutions an agreement was entered into on Dec. 23, 1921, with the National Company, whereby the agreement of 1915 was terminated and the National Company relinquished the control of the said foreign businesses other than the said Russian businesses which had already been relinquished and the control was retransferred to the appellant company. On the same day, for the purpose of giving effect to the resumption and control by the H appellant company of the said foreign enterprises three other similar agreements were entered into with the said three subsidiary companies of the appellant company, namely, "International," "Shanghai," and "Anglo," respectively.

15. (a) Sir William Vestey and Sir Edmund Hoyle Vestey decided to execute a settlement of the said rent of £960,000 in manner hereinafter appearing, and the trustees of that settlement were Messrs. Charles Auguste Hall, James Meeres I Drabble, and Kenneth Stirling, all of Paris, who were accordingly made parties to the lease which was executed pursuant to the arrangement mentioned in para. 11 hereof. The lease was dated Dec. 29, 1921, and made between Sir William Vestey and Sir Edmund Hoyle Vestey (thereinafter called "the lessors") of the first part, the appellant company (thereinafter called "the lessees") of the second part and the said Charles Auguste Kennerley Hall, James Meeres Drabble, and Kenneth Stirling of the third part, which, for the sake of convenience, is hereinafter referred to as "the lease."

(b) The properties comprised in the lease were divided into three schedules.

Those in the first schedule were properties owned by the Vesteyes in their own names. Those in the second schedule were properties to which the Vesteyes were beneficially entitled, but were in the hands of nominees. Those in the third schedule were properties held by companies which the Vesteyes controlled. For the purpose only of the claim for depreciation put forward by the appellant company and for the purpose of the hearing, it was agreed that the rent of £960,000 would be fairly apportioned between the three schedules as follows: namely, first schedule, £13,000; second schedule, £693,000; and third schedule, £254,000. The properties mentioned in these three schedules included the ranches, cattle breeding properties, freezing works, and other properties owned either by the Vesteyes or by the "holding" companies as described in para. 10 above, and also included the said properties at Zarate (in the Argentine) and Hankow and Singaree (in China) mentioned in paras. 7 and 12 above.

16. In further pursuance of the arrangements mentioned in para. 11 hereof the Vesteyes sold to the appellant company or its nominees their shares in the "operating" and "distributing" companies (other than those in the next succeeding paragraph mentioned) for the sum of £1,226,903, and the appellant company executed an undertaking dated Dec. 29, 1921, addressed to the Vesteyes, whereby in consideration of that sale the appellant company undertook, on the termination by any means of the lease, to re-sell and re-transfer or cause to be transferred to the Vesteyes in equal shares or as they might direct the said shares in the said "operating" or "distributing" companies, at the price then paid by the appellant company to the Vesteyes for the same. In the event of any of the properties upon which the business of the said companies had been carried on being withdrawn from the lease the appellant company undertook to re-sell and re-transfer as aforesaid the shares of the company which (prior to the granting of the lease) was carrying on the business at the particular property so withdrawn from the lease, at the prices then paid by the appellant company to the Vesteyes for the same.

17. For the purpose of implementing and making effective the lease so far as it included properties which were not in the legal ownership of the Vesteyes but of the "holding" companies aforesaid, the shares in these "holding" companies were transferred by the Vesteyes to the appellant company (without payment), and by a further undertaking, also dated Dec. 29, 1921, executed by the appellant company and addressed to Sir William Vestey and Sir Edmund Hoyle Vestey, the appellant company acknowledged that it held those shares for and on behalf of and as trustees for the Vesteyes in equal shares, and that it had no beneficial interest in the capital value of those shares but only in the profits earned by carrying on the business of the companies by which those shares were issued, and in respect whereof dividends might be declared and income payable on them during the currency of the lease. The same had been transferred to the appellant company to hold during the currency of the lease, not with the intention of creating any charge thereon in the appellant company's favour, but solely for the purpose of ensuring that the lease was given effect to by the respective companies. And the appellant company undertook that on the termination by any means of the lease as regards all or any of the properties in question it would re-transfer or cause to be re-transferred to the Vesteyes, or as they might direct, all the aforesaid shares or such of them as related to the properties the lease of which should have so terminated.

18. By an indenture dated Dec. 30, 1921, and made between Sir William Vestey and Sir Edmund Hoyle Vestey (thereinafter called "the settlors") of the one part and the said Charles Auguste Kennerley Hall, James Meeres Drabble, and Kenneth Stirling (thereinafter called "the trustees") of the other part, the settlors settled all rent or sums of money payable to them in accordance with the terms and during the continuance of the lease and which the trustees might receive subject to any refund or rebate they might be liable to make thereon to the appellant company upon the trusts for the benefit of the respective descendants of the settlors therein mentioned.

19. (a) It was stated by Mr. Sing in evidence that, in negotiating the lease, Lord

A Vestey first proposed a larger rent than £960,000 per annum. The figure of £960,000 was ultimately agreed upon after negotiation, but Mr. Sing stipulated that there should be an abatement clause so that, in the event of the appellant company's earnings not being sufficient to pay the rent, the rent should be pro rata abated, and an abatement clause was accordingly inserted in the lease. His sole object was to preserve the interests of the preference and other shareholders, and in particular to safeguard them against the effect of American competition, and to ensure, as far as possible, that the earning capacity of the appellant company should be sufficient to pay the preference and ordinary dividends as provided in the lease. He agreed that he could only secure the insertion of this clause if Lord Vestey and Sir Edmund Vestey and his co-directors agreed, and, further, that if Lord Vestey and Sir Edmund Vestey took a decided view one way, and he and his co-directors took a decided view the other way, the Vestey's view would ultimately prevail, in which event he should resign. In point of fact, however, he and the Vestey's have always agreed amicably.

(b) It was also stated by Mr. Sing that, in negotiating the lease, he regarded it as necessary that it should be over a fairly long period. Continuity was desirable, and it did not seem to be worth while to enter into an arrangement of this nature unless there was a fair chance of its continuing for his tenure of office as chairman of the company. The Vestey's, however, wished to be able to terminate the lease at six months' notice, and Mr. Sing agreed to the insertion of a mutual clause to this effect. Inasmuch as he had known the Vestey's for many years, and had been on the board for ten years then, he considered that it was a reasonable arrangement and relied on the Vestey's not to let the company down.

E 20. A number of retail shops have been opened by subsidiary companies in which the appellant company owns all the shares, and since 1923 it has acquired all the shares in other companies owning similar shops. The issue of the £4,000,000 additional capital in 1923 was made for the purpose of acquiring the shares in some of these companies. The total number of retail shops now owned by the various companies above mentioned is 2,600. It was stated in evidence by Mr. Sing that since the lease the business operations of the appellant company (so far as concerns the properties, &c., comprised in the lease) are as follows: It either rears on properties comprised in the lease or buys cattle out in far-distant countries and takes them into the freezing works comprised in the lease and kills them, and uses all the by-products. It has its own ships, which bring the produce from the various freezing works to London or to the Continent or to Liverpool, and there it is distributed by the appellant company, either wholesale or to the shops above mentioned, where it is sold over the counter. The business of the appellant company in respect of the profits of which it is assessed to income tax is the entirety of its business, whether arising from the properties comprised in the lease or not; and it was also stated by Mr. Sing in evidence that the ownership as lessees of the properties mentioned in the lease was an integral part of the whole business and ensured the appellant company getting at least 250,000 tons per annum; and that although without these properties the appellant company would be able to carry on business to a certain extent, it would not have the certainty that it now has.

H 21. (a) By three indentures dated respectively July 11, 1923, April 22, 1925, and Nov. 30, 1927, each made between Lord Vestey and Sir Edmund Hoyle Vestey of the first part, the appellant company of the second part, and the said C. A. Kennerley Hall, J. M. Drabble, and K. Stirling of the third part (which indentures are, for the sake of convenience, hereinafter referred to as the first, second, and third supplemental leases respectively), in pursuance of the proviso in that behalf hereinbefore referred to contained in the lease, various properties were withdrawn from the lease and other properties substituted therefor as hereinafter mentioned.

I (b) By the first supplemental lease freezing works and land used in connection therewith at Port Darwin in Australia (included in the third schedule to the lease and owned by the North Australian Meat Co., Ltd.) were withdrawn from the lease,

and freezing works and other buildings at Campana in the Argentine Republic, and known as the "Campana Works," were substituted therefor. For the purpose of a claim for depreciation made by the appellant company the Port Darwin property was valued at £916,000 and the Campana Works at £553,000. But it was stated in evidence that at the time when the substitution took place the earning capacity of the Campana Works was greater than that of Port Darwin, which was functioning to a very small extent, if at all, owing to the labour position, which made it very costly to handle cattle. At that period the Campana Works were a "live" business, whereas Port Darwin was in a poor way and, to a certain extent, lying dormant. No alteration was made in the rent payable under the lease on the occasion of the substitution. The explanation given to us as to why the rent was not increased was that Port Darwin has been a disappointment, and the Campana Works were substituted because they were considered better business which would enable the company to earn the rent. In connection with, and as part of the arrangement for the substitution of, these properties, by an agreement dated June 28, 1923, and made between the Western United Investment Co., Ltd., of the one part and the appellant company of the other part, the appellant company purchased for the sum of £4,000,000 all the shares in the North Australian Meat Company (which owned Port Darwin) and in eight retail shop-owning companies mentioned in the schedule thereto. It was thought desirable that the appellant company should own Port Darwin with a view to future possibilities.

(c) By the second supplemental lease the freezing works and lands used in connection therewith at Zarate, in the Argentine Republic (hereinbefore referred to) were withdrawn from the lease and properties in Brazil, Uruguay, China, and Poverty Bay, New Zealand, were substituted. No alteration was made in the rent payable under the lease. It was stated by Mr. Sing in evidence that one of the reasons for the withdrawal of the Zarate property was that, at the date of the second supplemental lease, negotiations were going on for the sale of this property, and it was sold to the River Plate British and Continental Meat Co., and under the terms of that sale the appellant company were to get contracts for the storage, lighterage, cartage, and sale on commission of the products of the River Plate British and Continental Meat Co. (a company in which neither the appellant company nor the Vesteyss held any interest) and therefore would earn a considerable amount on handling that business. The agreement was to last for twenty-one years with regard to storage, lighterage, and cartage, and ten years with regard to sale on commission. The arrangement made between the appellant company and the Vesteyss was that the appellant company would release the Zarate property on the terms that the contract with the River Plate Co. should be made with the appellant company, giving the appellant company the rights above mentioned, and that the Vesteyss should include in the lease the other properties above mentioned in place of Zarate.

(d) By the third supplemental lease the said Campana Works and certain other properties were withdrawn from the lease and property at Buenos Aires known as "South Dock" was substituted. No alteration was made in the rent payable under the lease. For the purpose of the said depreciation claim, South Dock was valued at £2,361,000 and was more valuable than the properties withdrawn. It was stated by Mr. Sing in evidence that South Dock was a property which the Vesteyss had just completed at that time, and was the finest and most up-to-date freezing works in the world; that it was part of the arrangement that the appellant company should purchase the Campana Works and other properties withdrawn, and the appellant company purchased them for approximately £1,900,000; that the reason why it was made a term of the arrangement that the company should purchase the withdrawn properties was that the appellant company did not wish to increase the rent payable under the lease; it wanted the benefit of the South Dock property, and it suited the appellant company to buy the withdrawn properties and continue working them on its own account. If the Vesteyss should give six months' notice to terminate the lease it might be a very useful thing for the appellant company to

A have the withdrawn properties which it was working on its own account. The same applied to the purchase by the appellant company of Port Darwin. For ordinary purposes the construction of a freezing works takes eighteen months.

22. In the years 1923 and 1924 the said rent of £960,000 per annum was paid in full, but by reason of the operation of the abatement clause, in 1922 only £630,000 was paid, and in 1925, 1926, and 1927 no rent was paid at all, because the appellant company's receipts were not sufficient. The unpaid rent is not carried forward, but simply abates.

23. For many years, including each of the years 1922 to 1927, both inclusive, mentioned in the preceding paragraph, the appellant company has invariably paid both the fixed dividends on its preference shares and also uniform dividends of 10 per cent. on its ordinary shares.

C 24. Whether any particular property is in the hands of a subsidiary company of the appellant company, or whether any particular operation is carried on by an operating company, or not, the whole business is controlled by the appellant company, and the assessments to income tax are based upon the assumption that the business, whether in the hands of the subsidiary companies or the operating companies, or the appellant company, is business taxed as carried on by the

D appellant company.

25. It was contended on behalf of the appellant company:

(a) That the said sums of £630,000 and £960,000 paid by the company under the lease were rent which the company was under a legal obligation to pay, and paid for the use and occupation of the leased properties, and were wholly paid for the purpose of enabling the company to earn its profits.

E (b) That it is an established principle of income tax law that rent payable by a trader in respect of trade premises occupied and used for the purposes of the trade is a proper and admissible deduction.

(c) That the said sums were moneys wholly and exclusively laid out and expended for the purposes of the company's trade.

F (d) That the said sums were proper deductions in computing the company's profits for assessment to income tax.

26. It was contended on behalf of the respondent:

(a) That the assessments appealed against should stand good unless the appellant company established by evidence satisfactory to the commissioners that they were excessive.

G (b) That regard must be had to the true nature and substance of the payments in respect of which deductions were claimed as appearing from the evidence before the commissioners.

H (c) That the yearly sum of £960,000 mentioned in cl. 3 of the said indenture of Dec. 29, 1921, and therein described as rent, was effectively payable by the appellant company for any year only if and so far as there remained a surplus of profit for that year after payment of (inter alia) the fixed dividends on the preference shares and a dividend of not less than 10 per cent. on the ordinary shares, and any effective payment made under that clause was a payment or application of a portion of the surplus profits of the appellant company.

(d) That the said yearly sum was not a true rent but merely a payment reserved under a contract.

I (e) That there was no necessity to pay the said yearly sum or any part thereof as a condition precedent to earning profits. On the contrary, the earning of profits was a condition precedent to the paying of that sum.

(f) That the said sums of £630,000 and £960,000 in respect of which deductions were claimed were not payments necessary for the purpose of earning profits, but were either annual payments payable out of the profits or distributions of profits.

(g) That the said sums were not proper deductions in computing the company's profits for assessment to income tax.

Having considered the evidence and the contentions of the parties, the commissioners held that the said payments of £630,000 and £960,000 were not payments

antecedent to, or necessary to, earn profits, but contingent payments dependent and payable only out of profits earned and were not allowable deductions from profits assessable to income tax. A

The Court of Appeal held, affirming the decision of ROWLATT, J., that the question was one of mixed fact and law, and therefore the decision of the commissioners could be reviewed (*Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (1)), and having regard to the document of Dec. 29, 1921, which was a genuine lease, the payments made for the premises leased were an outgoing of the business which ought to be allowed. B

The Crown appealed.

The Attorney-General (Sir William Jowitt, K.C.), The Solicitor-General (Sir Thomas Inskip, K.C.) and Reginald Hills for the appellant.

Wilfrid Greene, K.C., A. M. Bremner and J. H. Stamp for the respondent. C

LORD BUCKMASTER.—On Dec. 29, 1921, the respondents took a lease of a very large quantity of property specified in the three schedules, arranged according to the different interests in the property. Examination of the facts and circumstances connected with the granting of the lease is quite unnecessary. The lease itself, though it dealt largely with foreign rights and foreign properties, took the form of a common English lease in which the lessors, as beneficial owners, demised unto the respondent all the property that was mentioned for twenty-one years. The lease contained the common covenant for payment of rent, fixed at £960,000 a year, and provided that the lessees should pay that rent in the usual way by quarterly instalments, on the 1st of January, April, July, and October. Following that covenant there was a proviso to this effect: If at the end of each financial year ending on Dec. 31, when the accounts of the company were made up, it was found that there had not been sufficient profits earned to enable the payment of certain interests and dividends that are specified in the lease, then to the extent of the deficiency the rent should be abated, and any rent that had been paid in excess should be repaid. D E

The Inland Revenue authorities have assessed the respondent for the two years, which are now under consideration, on the basis that the respondent is not at liberty to introduce any payment of rent made under that lease as a liability in ascertaining the balance of its profit and loss, and they base their claim for this assertion, which, on the face of it, seems rather unusual, on the ground that this payment under this lease is not, in fact, a payment of rent at all, but is something in the nature of a distribution of profits which can only be made after the balance has been struck under the statute, that the landlords are really sharers in the profits of the company on a similar footing with the preference shareholders and others, and consequently this money is not deductible for the purpose of ascertaining whether profit has been earned. F G

The first thing, and, to my mind, the only thing, to be considered is this: Is this or is this not rent payable under this lease? No attack whatever has been made on the document itself. It was said that there had been an arrangement of property to try to avoid payment of income tax, of which, it may be, this document is one of the instruments; but nobody has challenged the bona fides of the document itself; nobody has said that the £960,000 is a fictitious or an artificial sum. It is admitted that this case has to be determined on the hypothesis that this is a perfectly sound business document, and it is on that ground that the payment has been attacked. When the matter is so considered, in spite of the efforts of the law officers, I find myself quite unable to understand what is the argument on which this assessment is supported. The rent is covenanted to be paid as rent. There is no provision whatever in the lease that the condition precedent to the payment of that rent is the earning of profits. It is not disputed that at any time, up to Dec. 31, action could be taken at law for payment of the quarterly sums. The only thing that is provided is that if at the end of the year, when the balance sheet is made up, certain payments cannot be made if the full rent is charged, instead of H I

A the full rent being charged a smaller sum shall be charged, and if anything has been overpaid it shall be returned. But whether the whole sum or part of it is paid, the payment is the rent of business premises and nothing but rent.

B For these reasons I am very clearly of opinion that this appeal should fail, and though I wish to make no remarks which would imply responsibility, the nature of which I cannot possibly measure or ascertain, it does appear to me, without further information, unfortunate that, when ROWLATT, J., had given judgment in the clearest terms and the Court of Appeal also to the same effect without any hesitation, the matter should have proceeded here. There is, of course, the fact that the commissioners thought otherwise, but I cannot help thinking that the commissioners may have been misled by the introduction of a large mass of irrelevant matter antecedent altogether to the date of this lease. I have only to add that the decision of the special commissioners was not a decision on a pure question of fact, but certainly involved the construction of the lease, and was in my opinion more nearly a pure question of law than a question of fact.

D LORD WARRINGTON.—I agree. Once it is admitted that the deed, the so-called lease, represents a genuine transaction, the case for the Crown appears to me to be at an end. The deed is called a lease, and, if the immovables comprised in it were situate in this country, I think it would be a lease in the technical sense, but whether or not it is right to call it a lease, having regard to the fact that the immovables are situate in foreign countries, this at any rate is clear, that the annual sum to be paid under the document is the consideration for the use and occupation by the respondent company of lands, the use and occupation of which is essential to the earning by the company of its trading profits. Now, that being so, we start with this, that the annual payment would clearly be a sum which would be properly debited against any account of profits and gains for the purpose of income tax. The deed imposed on the company an absolute obligation, by express covenant, to pay this annual sum or rent by equal quarterly payments, but, those payments having been made, it was realised—and no doubt the lessors were interested themselves in the prosperity of the company—that, in order to secure the payment of debenture interest and dividends on shares, it might be necessary to allow some abatement of the rent so paid, and accordingly it was provided that if

E “it is found that in respect of the then past financial year the result of the lessee’s operations after providing for the rent hereinbefore reserved [the total sum of £960,000] there shall be insufficient to enable the lessee to pay [the debenture interest and the dividends mentioned in the document] then the rent aforesaid for such financial year shall be abated to the extent of the deficiency so ascertained and any rent already paid”

G shall be repaid. It seems to me that the mere fact that the amount of the rebate of the rent is measured by the question whether or not the net profits are sufficient to pay such interest and dividends is a mere detail which has no effect upon the real substance of the transaction. The real substance of the transaction is that in the events specified there shall be a rebate of the rent; whatever is the rent, after the application of that rebate, is still to be paid, and it seems to me it still remains an expense necessarily incurred in earning the trading profits of the company.

H For these reasons I agree that the appeal ought to be dismissed.

I LORD ATKIN.—I agree the appeal should be dismissed. This seems to me to be a particularly clear case, and I find it unnecessary to say anything in addition to what has been already said by the noble Lords who have preceded me.

LORD TOMLIN.—I concur.

LORD MACMILLAN.—I also agree, but as reference has been made to the case of the *Pondicherry Rail. Co., Ltd. v. Income Tax Comrs.* (2), an Indian appeal before the Privy Council in which I took part, I should like to point out that the circumstances there under consideration differed entirely from those which the

House has been considering in the present appeal. We were reminded very properly by the Solicitor-General that these cases all turn on their particular circumstances, and in that case the convention under which the payments were made provided as follows: A

"The company undertakes on its part to make over to the colonial government during the whole duration of the concession one-half of the net profits which shall be arrived at" B

in a manner which is then set out in detail, provision being made for the deduction of all outgoings, such as rates and taxes, and so on. In that case, therefore, the ascertainment of profits preceded the coming into operation of the obligation to pay, and when the profits had been ascertained the obligation was to make over one-half thereof to the French Colonial Government. The obligation was conceived in language entirely different from the language which your Lordships have been considering in the present appeal, where there is a common form obligation in a lease to pay rent. When, therefore, in the passage referred to by the Attorney-General in the *Pondicherry Case* (2) I said (58 L.R. Ind. App. at p. 251) that C

"a payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits," D

I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them. Here the question is whether or not a deduction for rent has to be made in ascertaining the profits, and the question is not one of the distribution of profits at all.

I should like to add, also, that the other authorities to which the notice of the House has been directed, when their circumstances are examined, differ so entirely from the present case as to be of no assistance in its determination. To refer to one only, which the learned Solicitor-General seemed to regard as his sheet anchor, namely, *Last v. London Assurance Corp'n.* (3), that case is in an entirely different region of the law and deals with transactions of an entirely different nature. The expression "participating policies" denotes by its very terminology that they are policies which participate in profits, and when insurance companies talk of a quinquennial distribution of bonuses they plainly refer to a distribution of profits. A case dealing with such distributions appears to me to be removed, *toto cœlo*, from the type of case with which your Lordships have to deal here. I have, therefore, no difficulty in concurring in the motion that this appeal be dismissed. E F

Appeal dismissed. G

Solicitors: *Solicitor of Inland Revenue; Charles H. Wright & Tracey.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

TURK v. TURK. DUFFY v. DUFFY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), May 12, 1931]

[Reported [1931] P. 116; 100 L.J.P. 90; 145 L.T. 331; 47 T.L.R. 445;
75 Sol. Jo. 394]

B *Divorce—Maintenance of wife—Variation of order—Matters to be considered—*
Altered financial position of parties—Order “until further order”—No further
application until substantial alteration of facts—Supreme Court of Judicature
(Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190 (1), (2), s. 196.

C By an order for permanent maintenance the husband was directed “until further order” to secure an annual sum for the wife’s life and to make to her periodical payments during their joint lives. On cross-petitions for variation of the order,

D **Held:** regard must be had to all matters relevant to the exercise by the court of its discretion; one of those matters was the altered financial position of the parties; and, on the facts, there being a substantial improvement in the wife’s position, her maintenance would be limited to the sum secured to her by the settlement.

Per LORD MERRIVALE, P.: Where an order proceeds on the footing of facts judicially ascertained the term in it “until further order” does not warrant any new application while the facts are substantially unaltered.

Divorce—Maintenance of wife—Amount—Discretion of court.

E The maintenance which the Divorce Court may, in its discretion, order to be provided for the former wife after dissolution of marriage is not standardised by the law, and any practice as to the amount of permanent alimony after judicial separation, under which a wife’s income will ordinarily be made up to one-third of the joint income, does not apply to permanent maintenance.

F **Notes.** The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1) and (2), and s. 196, have been replaced by the Matrimonial Causes Act, 1950, s. 19 (2) and (3) and s. 28 (1) respectively.

Explained: *Bennett v. Bennett* (1934), 103 L.J.P. 38. Applied: *Re Harris*, [1952] 2 All E.R. 409. Referred to: *Perkins v. Perkins*, [1938] 3 All E.R. 116.

G As to orders for permanent maintenance, see 12 HALSBURY’S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 611 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY’S STATUTES (2nd Edn.) 388.

Cases referred to:

- H** (1) *Abbott v. Abbott*, [1931] P. 26; 100 L.J.P. 36; 144 L.T. 598; 47 T.L.R. 207; 75 Sol. Jo. 138; affirmed 47 T.L.R. 222, C.A.; 27 Digest (Repl.) 622, 5806.
(2) *Sharpe (otherwise Morgan) v. Sharpe*, [1909] P. 20; 78 L.J.P. 21; 99 L.T. 884; 25 T.L.R. 131; 27 Digest (Repl.) 658, 6203.
(3) *Hall v. Hall*, [1915] P. 105; 84 L.J.P. 93; 113 L.T. 58; 59 Sol. Jo. 381, C.A.; 27 Digest (Repl.) 623, 5816.
(4) *Tangye v. Tangye*, [1914] P. 201; 83 L.J.P. 164; 111 L.T. 944; 30 T.L.R. 649; 58 Sol. Jo. 723; 27 Digest (Repl.) 635, 5959.
(5) *Hanbury v. Hanbury*, [1895] A.C. 417; 72 L.T. 480; 11 R. 302, H.L.; 27 Digest (Repl.) 619, 5783.
I (6) *Fisher v. Fisher* (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 3 Jur.N.S. 103; 10 W.R. 122; 164 E.R. 1055; 27 Digest (Repl.) 613, 5740.
(7) *Dean v. Dean*, [1923] P. 172; 92 L.J.P. 109; 129 L.T. 704; 39 T.L.R. 602; 67 Sol. Jo. 704; 27 Digest (Repl.) 603, 5639.

TURK v. TURK

Motion for confirmation of a registrar’s report on petitions for decrease and increase of maintenance.

On July 30, 1926, the wife was granted a decree nisi for dissolution of her marriage, which was made absolute on Feb. 7, 1927, and the custody of the one

child of the marriage, a boy aged fourteen years. On June 30, 1927, an order for permanent maintenance was made whereby the husband was directed, until further order, to pay the wife £70 a year, less tax, during joint lives, and to secure £200 a year, less tax, for her life, on certain funds. The husband was also ordered to pay £70 a year for the maintenance and education of the child. That order was based upon the husband's income of £1,126 a year gross, of which £996 was derived from investments and £130 from 5 per cent. interest on £2,640, a bank deposit, and upon the wife's income of £160 gross a year, of which £60 was derived from a business in which she was engaged, and £100 from a voluntary allowance. On Dec. 6, 1930, the husband petitioned for a decrease of maintenance. He said that his income for the year ending April, 1930, amounted to £1,014 before deduction of tax, and that he owned and occupied a freehold house rated at £80 a year gross. He also said that the wife had considerably increased means and sources of income. In her answer, dated Jan. 15, 1931, the wife admitted that from the rents of property bequeathed to her by her father she now received £285 a year net (£555 a year gross). She denied that she had any other separate means. On Jan. 16, 1931, the wife presented a petition for increase of the maintenance payable for the child who had now been sent to a public school, the fees of which amounted to £120 a year. By his answer the husband said that the school was too expensive.

Both petitions came before the registrar in March, 1931. In his report he put the husband's gross income at £1,114 a year, and the wife's separate income at £365 a year gross. A third of the joint incomes was £493 a year gross, and, therefore, there should be payable by the husband to the wife £128 a year gross. The registrar submitted that the husband really based his petition for decrease upon the increase in the wife's means. It was doubtful if the court had power to order a decrease on that ground. Section 190 (2) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, provided for a decrease only if the "husband becomes from any cause unable to make the payments." Section 196 of the same Act provided that

"the court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters."

In *Abbott v. Abbott* (1) it was stated that s. 196 was restricted in operation to periodical payments after a decree for restitution of conjugal rights. Thus, the registrar held, the court had no power to vary an order for maintenance on the ground of an alteration in the means of the wife. As regards the wife's petition for increase of maintenance, the registrar held that the boy's education fees were reasonable. He submitted (i) that, if s. 196 was not applicable, the petition for decrease should be dismissed; (ii) if it was applicable the order for payment during joint lives should be rescinded or suspended; and (iii) the child's allowance should be increased to £150 a year. The Supreme Court of Judicature (Consolidation) Act, 1925, provides:

"Section 190. (1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed; (2) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-s. (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance

A and support as the court may think reasonable: provided that—(a) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid and subsequently revive it wholly or in part as the court thinks fit; and (b) where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order."

C "Section 196. The court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks just."

The wife moved the court to confirm submissions (i) and (iii).

D *Willis, K.C.* (with him *Victor Russell*), for the wife, referred to *Abbott v. Abbott* (1); *Sharpe (otherwise Morgan) v. Sharpe* (2); and *Hall v. Hall* (3).

Bayford, K.C. (with him *H. B. D. Grazebrook*), for the husband, referred to *Tangye v. Tangye* (4).

Cur. adv. vult.

May 12. **LORD MERRIVALE, P.**, read the following judgment.—This motion, and one of similar nature in a case of *Duffy v. Duffy*,* heard at the same sittings, arose upon petitions referred from the registry for argument in court under a direction given by reason of difficulties in point of principle which have been found to arise in the exercise of the judicial discretion directed by statute to be exercised in cases of various kinds where, upon divorce, pecuniary claims are made by the former wife upon the divorced husband with a view to secure permanent support or financial help notwithstanding that the marriage is dissolved. Such cases have, of course, a social reaction besides being of personal importance to the parties.

Any claim there is on the part of a wife after divorce to any pecuniary provision from the divorced husband is wholly dependent on statutory enactments. It has no foundation in the well-known common law principle, the basis of the old procedure of the ecclesiastical courts which requires a husband to provide maintenance for his wife according to his means. That obligation and the resultant right are enforced in this jurisdiction in cases of judicial separation on the same lines as were followed by the ecclesiastical tribunals before the Matrimonial Causes Act, 1857. What is here in question is a wholly different matter. This reminder is needed because in maintenance cases in divorce there seems to be an irresistible tendency to take into account the settled rules of long standing which control the discretion of the court granting alimony upon a decree for judicial separation. It is well to bear in mind further that the power the court has to decree a settlement out of the fortune of a divorced husband, discretionary as it is, came into being while the ancient doctrine of English law, that the husband and wife became upon marriage one person, had full legal effect. The wife's property had vested in her husband by virtue of the marriage, and in her own legal capacity she could not have separate estate. Even the ancillary power to order a divorced husband to provide monthly or weekly payments for or towards the maintenance of the divorced wife—likewise a discretionary power—came into being before any of the statutory enactments which in the past forty-five years or so have given to married women in the well-to-do classes the position of propertied independence in which in point of law they now are. A collateral fact of some importance is that since 1923 the grounds on which a wife may obtain dissolution of her marriage have been broadened by making an isolated act of adultery a ground for divorce at the wife's choice as at the husband's.

* See post p. 512.

In the present case a decree nisi of dissolution of marriage was granted to the wife in respect of the husband's adultery, and was made absolute on Feb. 22, 1927. By the decree the custody of the son, now fourteen years old, was given to the wife. In due course the wife applied for and obtained an order for permanent maintenance whereby the husband was ordered to secure to her £200 a year for the term of her life, with further orders that he should pay her in addition by monthly payments £70 a year during their joint lives until further order, and should pay at the rate of £70 a year for the maintenance of the child of the marriage. The case comes before the court now upon cross-petitions in respect of maintenance. The petition of the husband, which opened the proceedings, prays for a reduction in amount of the maintenance ordered in 1927, on the ground (a) that his income arising from stocks and shares has diminished since the date of the order, and (b) that the wife in the meantime has become entitled under the will of her late father to the rents of valuable leaseholds in London, and has other after-acquired property, and follows a profession in which she "earns her living." The wife's answer to the husband's application is that his income has not substantially decreased, that her possible income from the leaseholds in question is no more than £285 a year, that she does not earn her own living in the manner alleged or otherwise, and that her after-acquired property, the amount represented by a policy of life assurance, has been realised and invested in war savings certificates for the benefit of the child of the marriage. Pending these proceedings on the husband's application the wife filed a petition seeking an order for an increase of the amount payable by the husband in respect of the maintenance and education of the son. This application is contested by her husband. Evidence was heard in the registry, and the registrar's report on the facts, with a recommendation annexed thereto, formed the basis on which the case was argued.

The provisions of the order of 1927, and the precise nature of the statutory jurisdiction, as now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, must be kept clearly in view. The order in its material form is that:

"the [husband] do, out of his present income, and until further order of the court, pay or cause to be paid to the [wife] during their joint lives maintenance at and after the rate of £70 per year, less tax, payable monthly from date of decree absolute . . . and a further sum of £200 per year, less tax, payable likewise for her life, to be secured . . . (upon stocks enumerated), and a further sum of £70 per year for the maintenance and education of the child of the marriage, payable monthly. Liberty to apply."

It is noticeable that the several provisions of the order do not read in their proper sequence, having regard to the fact that a monthly or weekly allowance for maintenance is, under the statute, ancillary, additional, or substitutional to the order for a settlement. Stated with due regard to this consideration, what is provided is that under s. 190 (1) of the Act of 1925 the husband is ordered to secure to the wife £200 a year for her life; under s. 190 (2) he is ordered to pay in addition to this annuity £70 a year, less tax, payable monthly, until further order; and under s. 193 he is ordered to pay £70 a year, payable monthly, for or towards the maintenance and education of their son. The report shows that the order made in 1927 proceeded on the footing that the husband's income was £1,126 a year, derived from invested funds and money at interest, and the wife's £160 derived from sources no longer existing. The husband's present resources are investments producing £1,014 gross, and a freehold house worth £100 a year, together equivalent to £1,114 a year. The wife's income from ascertained assets is stated at a gross annual value of £365. The wife and her son live with her mother, and she contributes to the housekeeping £3 a week. The learned registrar estimates this contribution as equivalent to the value of the maintenance received. For the husband it was argued that this is a substantial under-valuation.

On the facts as found, the learned registrar states as his opinion that a diminution in annual income from £1,126 to £1,114 is too small to warrant a reduction of the

A order of 1927. As to the undoubted increase of the wife's means since 1927 he submits as a doubtful question whether there is jurisdiction on that ground to reduce the maintenance decreed. If there is jurisdiction under s. 196 of the Act of 1925 he recommends that the monthly payments should cease. With regard to the wife's application for increased payments on account of the son, the position is
B about £120 a year, and the registrar recommends that the father's payments should be increased from £76 to £150 a year, as prayed by the mother.

As to the law to be applied, counsel for the husband argued that on the true construction of the statute—the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2)—whenever a question is properly raised which calls for review of
C monthly or weekly sums payable to the wife after a decree of divorce, the matters must be considered which are prescribed in s. 190 (1) to govern the determination of the sum which the court may order to be secured, that is to say, the payments to be made must be

"such . . . as, having regard to her fortune, if any, to the ability of her husband, and the conduct of the parties, the court may deem to be reasonable."

D He argued, further, that to give proper effect to the two provisions in s. 190 (2) (a) and (b), whenever a question is raised under either of them the court is placed by the statute under an obligation to consider the matters on the footing of the three matters specified in s. 190 (1)—the wife's fortune, if any; the ability of the husband; and the conduct of the parties. The whole subject, he argued, must be considered *de novo*, even though the application is only made under the provisos
E by the wife. Counsel for the wife submitted that the only grounds of variation open to consideration by the court are those specified in provisos (a) and (b) to s. 190 (2). As to proviso (a), his case was that the husband has not become unable to make the prescribed payments. As to (b), no case was suggested to have arisen. Counsel submitted that s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby the court "may from time to time vary or modify any order"
F made under the provisions of this Act for "the periodical payment of money," has no application in cases of divorce, and relates only to "periodical payments" usually so called in the recognised terminology in matrimonial causes, that is, the periodical payments which are ordered to be made in suits for restitution of conjugal rights. Counsel for the husband did not challenge this contention.

G The series of legislative enactments which are embodied in the sections of the Supreme Court of Judicature (Consolidation) Act, 1925, under discussion, are the outcome of a progressive development in the jurisdiction of the court in respect of the financial relations of divorced persons. Under the Matrimonial Causes Act, 1857, s. 32, there was given power to decree against the husband a pecuniary settlement in favour of the wife, to be secured upon his real or personal possessions.
H Under the Matrimonial Causes Act, 1866, s. 1, power was given in lieu of, or in addition to, such a settlement, to order monthly or weekly payments by the husband for maintenance, subject to suspension or diminution "if the husband becomes unable to make the payments"; and under the Matrimonial Causes Act, 1907, s. 1 (2) (b), an additional power was introduced to increase the sum payable if the husband's means should increase. The difference in character of the compulsory financial settlement by a divorced husband, which was provided for by the Matrimonial Causes Act, 1857, s. 32, and the payments for or toward maintenance of the wife after divorce, which originated in the Matrimonial Causes Act, 1866, and was varied in the Matrimonial Causes Act, 1907, cannot be disregarded. The settlement under s. 32 was and is final, inexorable and unalterable, though it is made in the exercise of a wide discretion. Having regard to the terms of the Matrimonial Causes Act, 1866, it may well be that as to monthly or weekly allowances for maintenance, additional or substitutional to security, the legislature had in view the definitive matters of the provisions in s. 32 of the Act of 1857, and
I

I think it would probably have been held in respect of an order made simpliciter in the terms of the Matrimonial Causes Act, 1866, that it was a condition precedent to any application for review that since the order the husband had become "unable to make the payments."

The position now is not so plain. There are later enactments, and the language of the original Acts has received authoritative explanation. In *Hanbury v. Hanbury* (5), which arose in the House of Lords upon consideration of the Matrimonial Causes Act, 1857, s. 32, as compared with the Matrimonial Causes Act, 1866, s. 1, LORD HERSCHELL, L.C., gave a broad meaning to the words "unable to make payments." That the husband's income exceeded the sum prescribed was not taken as decisive. LORD HERSCHELL stated as his view—and, apparently, LORD WATSON, LORD MACNAGHTEN and LORD SHAND concurred in it—that under the Matrimonial Causes Act, 1866, s. 2, the order on the husband could be altered so as to meet the case of any substantial diminution of the husband's income. Again, in *Hall v. Hall* (3) the Court of Appeal had to consider the effect in the enactments now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), of the words "if the husband . . . becomes unable to make such payments." It was a case where the husband's income, though reduced, was well beyond in actual amount the monthly sum ordered to be paid. LORD COZENS-HARDY, M.R., said this:

"When an application is made for revision . . . it seems to me that the court ought to have regard to all the circumstances of the case in the same manner as if those circumstances had existed at the date of the original order."

PHILLIMORE, L.J., agreed and added something very material for consideration here:

"It is admitted that, although the order was made by consent, the court is able to vary it, seeing that it was only made 'until further order'. . . . It may be that the language of the statute is not so expressed as to enable the court to make an alteration, but the statute does not tie the hands of the court when they were free before, and this order, which is evidently in the common form, very wisely and properly allows the court to re-consider not only the position of the husband but the relative positions of the husband and wife with regard to their property; and as the Master of the Rolls has just said, it would be very proper for the registrar to consider not only the descending scale of the husband's income, but the ascending scale of the wife's, and to make an order accordingly."

The order in *Hall v. Hall* (3) was, as PHILLIMORE, L.J., pointed out, limited by the words "until further order." So is the material part of the order of 1927 which is now under consideration. A good many years have now elapsed since—probably because of the difficulties which experience showed to spring up when the full statutory authority of the court as to a wife's maintenance after divorce was exercised once and for all—orders of this class came as matter of course to be drawn with the limitative term "until further order." The words are part of the common form of order in cases of provisions for maintenance after divorce, as well as in cases of alimony after judicial separation. In the discussion of the case attention was concentrated chiefly on the language of the statutes. For practical purposes the words of the order under appeal seem to me to be not less important. An order expressed to be made "until further order" is, in truth, an order *ad interim*. Where it proceeds upon the footing of facts judicially ascertained the term "until further order" does not warrant any new application while the facts are substantially unaltered, and the court has various means of protecting suitors and safeguarding the orderly conduct of business against abuses of such a kind. Further, the words do not confer a power of variation of the order made in the first instance beyond what is included in the statutory jurisdiction which is being exercised. But where the statute warrants it, and the facts of the case require it, the reserved power which is evidenced by the limitation of this order is of very great importance. The old well-regulated practice as to alimony upon judicial separation evidences

A this; and it is additionally necessary to be kept in mind when as between parties whose marriage has been dissolved the court is called upon to exercise a discretion as to whether it will require either of them to maintain the other.

Take the various provisions in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, *seriatim*—those which apply to fixed settlements and to the provision of maintenance as between divorced persons—and they will be found to have one underlying term, the court must in every case as it arises exercise its discretion. As to settlements some elementary factors are specified—the wife's fortune, the ability of the husband—meaning in the terminology of the ecclesiastical courts his "faculties"—and the conduct of the parties, but always what is to be considered is what the court may deem to be reasonable. As to maintenance by monthly or weekly payments, the court "may," if it thinks fit, "order such monthly or weekly sum . . . as the court may think reasonable." From the time of the considered judgment in *Fisher v. Fisher* (6), in which SIR CRESSWELL CRESSWELL as judge

C ordinary expounded for the first time the meaning and effect of the Matrimonial Causes Act, 1857, s. 32, and its relation to the old law of alimony, down to this day, the considerations of policy and justice which ought to govern a compulsory apportionment of the means of the husband after divorce, at the instance of the wife, have had to be kept in view in applying that enactment and those which have supplemented it. SIR CRESSWELL CRESSWELL, when the subject was bare of authority, spoke of his task as "the arduous duty of deciding what is reasonable in the case," and examined every relevant matter. What, if anything, was reasonable as a fixed provision was then determined. So now a judge must decide what is reasonable by way of monthly or weekly payments towards maintenance, in the first instance and whenever the question is properly raised. I emphasise this once more because of the tendency which constantly shows itself to apply, in the difficult controversies which arise as to claims by wives for maintenance after divorce, the comparatively simple and practically uniform process which the ecclesiastical courts evolved for dealing with the wholly different subject of a wife's right to alimony during judicial separation. In view of the form of the order here, the question so much discussed at the hearing whether under the Judicature (Consolidation) Act, 1925, s. 196, a final order for monthly or weekly payments could be varied upon an application not grounded upon provisos (a) or (b) of s. 190 (2) is, perhaps, of no more than academic interest. My own opinion inclines to the view that it could not. For reasons which I will state in dealing with the case of *Duffy v. Duffy*,* I think counsel was right in contending that s. 196 of the Act gives no power in this behalf.

E Having regard to what I have said, how ought this order of 1927 in the present case to be dealt with under the applications of the respective parties? As to the husband's means, in 1927 his permanent resources brought him in £1,126 a year; now they represent an annual value of £1,114. Apart from variation of the wife's means an application to modify his liabilities as to maintenance in respect of the sum payable monthly which is the only part of the liability that can be modified

G would be grotesque. What, then, is the true position of the wife as to "fortune," and how does this affect the matter? She has a gross annual income of £365, apart from what the husband may provide, and lives with her mother, making a weekly contribution to her expenses. Counsel for the husband impressed upon me that the wife's household arrangements, whereby she gets board and lodging for herself and son for £3 a week, represent a greater value than the sum she pays, and suggested that in truth her mother is still helping her to the value of £100 a year.

I The registrar considered the matter and reports adversely to this contention. On the whole I think I am not called upon to give effect to it. The true effect of the report is that if there is statutory authority the registrar considers that the monthly payments should cease. His attention was directed to s. 196, but not, as it seems, to the limited nature of the order. Once the order of 1927 comes lawfully under review regard must be had to all matters relevant to the exercise of judicial discretion. In fixing the secured income and the unsecured payments in 1927 the

* See post p. 512.

fortune of the wife, as well as the ability of the husband, was a proper and apparently a prescribed factor. Prescribed or not, it enters into the discretionary judgment which is to be now arrived at. The improvement in the wife's fortune is a substantial improvement, and on the whole facts I think that until further order the husband's liability for the wife's maintenance may properly be limited to the £200 a year secured to her by the settlement. The wife's application for increased maintenance for the child of the marriage must also be considered. As to this there is no question of jurisdiction or as to the material facts. The recommendation in the registrar's report is for an increase to £150 a year. I regard it as a reasonable recommendation, and until further order the payment of the husband in this particular must be upon the footing so recommended.

[His Lordship ordered the respondent to pay the costs of the proceedings in the registry, but made no order as to costs of the hearing in court.]

Solicitors: *J. J. Edwards & Co.; Berrymans, for Brennan & Brennan, Maidstone.*

DUFFY v. DUFFY

Motion for a variation of a report made by the registrar on a petition for reduction of maintenance.

The registrar reported that in May, 1929, the wife petitioner was granted a decree nisi for the dissolution of her marriage on the ground of her husband's adultery. The suit was undefended. The decree was made absolute on Dec. 16, 1929. Alimony pendente lite had been agreed at £8 per week, a consent order having been made "without prejudice." The husband's income was then admitted at £2,300 a year. On the wife's petition for maintenance a consent order was made on Jan. 8, 1930, whereby the husband was ordered to pay her maintenance during joint lives or until further order at the rate of £8 a week, free of tax, payable weekly, with liberty to apply. On June 21, 1930, the husband filed a petition for reduction of maintenance, and said that the wife had, in May, 1930, married a retired farmer, named Townsend, who owned property worth some £20,000 and that thereby her means had increased. The husband asked that the order of Jan. 8, 1930, should be discharged or varied. On July 3, 1930, the wife, by her answer, said that her present husband was not a man of substantial means; that her financial position had not improved, and her present husband could not pay more than £4 a week for their joint support; and that she was dependent upon the maintenance of £8 a week for keeping up her station in life. On July 17, 1930, the husband filed his reply, and said that both the children of himself and the wife were married and no longer a charge upon the wife; that he had married again and had two other children to support; that the wife had the use and benefit of a leasehold house and furniture which he had bought for her, and would benefit from two insurance policies when they matured; and that she had certain house property of her own given her by her present husband. He also gave particulars of property owned, as he said, by Mr. Townsend. He further averred that his own business was declining, the half-yearly profits at June, 1930, having fallen to £355 as compared with £797 in June, 1929, and £924 in December, 1929. Apart from that he had only some very small items of income. Further affidavits were filed by both parties mutually challenging certain statements. The wife alleged that the husband still had a flourishing business as auctioneer and estate agent, and paid surtax. Discovery was ordered and viva voce evidence was heard before the registrar.

The registrar reported that at the time of the consent order for maintenance of Jan. 8, 1930, the husband's income was £1,978, including £1,721 from his business, and the wife's nil. The wife lived in a house the purchase price of which was mainly paid by the husband, and the balance by Mr. Townsend, and she had furniture bought by the husband. During 1930 the husband's business profits fell from £1,721 to £587. His average annual income for the three years 1928-30 was £1,766. The wife had no separate income, and did not derive any benefit from the property settled on her by Mr. Townsend during his life. Her sole income was the maintenance payment.

A *Birkett, K.C.* (with him *John Neal*), for the husband, referred to *Dean v. Dean* (7).

Leslie Marks for the wife.

Cur. adv. vult.

May 12. **LORD MERRIVALE, P.**, read the following judgment.—In this case the wife petitioned for dissolution of marriage and obtained a decree. There was an order by consent for alimony pendente lite at the rate of £8 a week, free of tax. A decree absolute was granted on Dec. 16, 1929, and on Jan. 8, 1930, an order by consent was made for the payment of maintenance at the same rate during joint lives of the parties or until further order. On June 21, 1930, the divorced husband filed a petition for reduction of the maintenance provided for by the order of Jan. 8, alleging as ground that the divorced wife had married a man of substantial fortune, and that her own means had increased and her financial position had improved. An answer was filed denying these assertions, asserting the new husband of the former Mrs. Dufty to be a motor mechanic not of substantial means and unable to provide more than £4 a week towards their joint housekeeping, so that she remained dependent on the payments of the former husband. In the course of the controversy, on the facts raised by the petition and answer, Mr. Dufty obtained leave to amend his petition by pleading that his means had decreased since the date of the order. He so amended it, and obtained a reduction ad interim to £6 a week, free of tax.

The report of the learned registrar disclosed some facts which are not in question. The present husband of Mr. Dufty's former wife has substantial means which are invested in an off-licence publican's business and small house property, producing an annual net income of £518. On their marriage he conveyed to his wife house property at Acocks Green, which was in need of substantial repairs, but was of such value that, after the repairs, which are said now to be about complete, the houses should yield the owner a net return of £190 a year. She also retains a house and furniture and insurance policies which she had at the time of the divorce, and of the consent order of January, 1930, to the acquisition of which Mr. Dufty had contributed. Mr. Dufty's income is derived from a business as an auctioneer and estate agent and from accumulated moneys. His profits for the three years 1928 to 1930 averaged £1,766 gross. During 1930 his business, which had brought in £1,721 in 1929, gave a profit of only £587. The learned registrar has accepted the evidence given by and on behalf of Mrs. Dufty that her present husband gives her no more than £4 a week towards her housekeeping, and that, although he has conveyed some houses to her he has done so on the condition—as they both affirm—that he shall receive the rentals for his own use during their joint lives.

On the footing of the facts admitted or found, the registrar reports that, taking the total of the three years 1928–30, the husband's average income was £1,766. He finds, further, that apart from the house and furniture and insurance policies which Mrs. Dufty had at all material times, and the new husband's contribution to the expenses of her housekeeping, her sole income is derived from Mr. Dufty's payments under the order of January, 1930. Looking at the facts so found the registrar points out that a third of the income in view as income of both parties would be roundly £588, subject to income tax, and that the consent order provides for payments at the rate of £416, free of tax. This reference to a third of the income is, apparently, a reference to the practice as to alimony after judicial separation in everyday cases, whereunder a wife's income will ordinarily be made up to one-third of the joint income, and this allusion calls for the warning observation that the maintenance which the court may, in its discretion, order to be provided after dissolution of marriage for the former wife is not standardised by the law and the rules which apply upon judicial separation. It is the monthly or weekly sum which the court, in its discretion, may think reasonable.

On behalf of the divorced husband it was contended at the hearing that at the material time his income had decreased so that within the meaning of the Supreme

Court of Judicature (Consolidation) Act, 1925, s. 190 (2), as conveyed in authorities like *Hall v. Hall* (3), he had become unable to make the payments prescribed. It was further urged that in coming to a conclusion on this question the court must exercise its discretion on like terms as in cases under s. 190 (1) with due regard to the matters prescribed there for consideration, and ought not to disregard the wife's "fortune." Further, reliance was placed for the petitioner on the terms of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 196—

"the court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes."

[His Lordship held that s. 196 only applied to periodical payments in proceedings for restitution of conjugal rights, a matter which, in view of the different terms of s. 28 of the Matrimonial Causes Act, 1950, which now deals with variation of maintenance orders, no longer calls for report, and continued:] But that in no way concludes the matter. In the present case the order of January, 1930, is expressed to have effect for the joint lives of the parties or "until further order," and application is now made for "further order." If I were satisfied that at the date of this application the means of the divorced husband had diminished so that he had a business income of less than £600 a year I should hold, under *Hall v. Hall* (3), that his continued ability to pay must now be considered. That of itself would not raise as to the former wife of Mr. Dufty the question of her "fortune" within the meaning of s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, but the facts as to her "fortune" would no doubt have some weight in relation to the exercise of the discretion under the words in s. 190 (2) (a) "as the court thinks fit." Again, if the registrar had found that at the date mentioned she possessed the resources she was asserted by the divorced husband to possess I should deem it necessary now to determine whether the order made in January, 1930, to operate until further order ought forthwith to be varied. As matters stand, I have not material before me on which I ought to set aside the conclusions of the registrar, as I am asked to do. The evidence, nevertheless, shows facts which are in course of development, so that no very great change in the situation might warrant a new order. In the circumstances I propose to allow the petition for reduction to stand over for six months, and at the end of that time either party may apply to have it disposed of, with liberty to add to the evidence as the circumstances then existing shall require.

Solicitors: *Gibson & Weldon; Jackson & Jackson.*

[Reported by WILLIAM LATEY, Esq., Barrister-at-Law.]

A

DEWAR AND ANOTHER v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Thankerton and Lord Russell), March 17, May 11, 1931]

B

[Reported [1931] A.C. 566; 100 L.J.P.C. 169; 145 L.T. 395;
47 T.L.R. 427; 16 Tax Cas. 84]

Income Tax—Trust—Gift taking effect at future date—Provision of educational endowment for infant on reaching specified age—Present income of trust fund not vested in infant.

C

The father of a young girl transferred stock to the appellants as trustees and directed them to take out an educational endowment assurance policy on the life of his infant daughter for such sum as could be insured for an annual premium of £30 to commence on her attaining the age of fifteen and to continue for four years. He further directed his trustees that after his daughter had attained the age of fifteen, the educational annuity payable under the policy should be used for her education and advancement until she attained twenty-one, and that then the capital was to be transferred to her, but should she die before that age the trustees were to re-convey and re-assign the whole trust fund to him. The appellants claimed on behalf of the infant a reduction of income tax deducted at the source from £33, the annual income of the stock, on the ground that the income of the trust fund was income of the infant, and, being her only income, was not subject to tax.

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Held (LORD RUSSELL dubitante): in view of the terms of the trust deed the infant did not have any vested interest in the income and it was impossible to say that the income was devoted to her absolute benefit; therefore, the income was not hers and the trustees' claim must fail.

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Notes. Considered: *Curtis-Wilson v. I.R. Comrs.* (1950), 66 (pt. 2) T.L.R. 269. As to the vesting of income under a trust, see 20 HALSBURY'S LAWS (3rd Edn.) 423 et seq.; and for cases see 28 DIGEST 95 et seq.

Appeal from an interlocutor of the First Division of the Court of Session (the LORD PRESIDENT, LORD SANDS, LORD BLACKBURN and LORD MORISON) as the Court of Exchequer reversing a determination of the Commissioners for the General Purposes of the Income Tax Acts for the district of Arbroath.

G

By a deed of trust Charles Bruce, of Tarriebank, Arbroath, the father of Jill Rosalind Bruce, conveyed certain funds to the appellants as trustees, and, in order to provide for the suitable education of his daughter, on her attaining the age of fifteen, he directed his trustees to take out an educational endowment assurance policy for such sum as could be insured for an annual premium of £30, the endowment to commence upon her attaining the age of fifteen and to continue for four years. He further directed his trustees, during the years from the date of his daughter's attaining the age of fifteen until she attained the age of twenty-one, to use for her education and advancement the educational annuity payable under the policy, and also any income of the trust funds that might be available. When Jill Rosalind Bruce attained majority, he directed his trustees to assign, transfer, and make over to her absolutely the capital of the trust estate, and, should she die before attaining majority, the trustees were directed to re-convey and re-assign the whole of the trust funds to himself, his heirs, or assignees. While Jill Rosalind Bruce was still under fifteen the appellants, on her behalf, lodged a claim for repayment of income tax on the ground that she had no income apart from the income of the trust which amounted to £33 per annum, and was, accordingly, well under the limit of exemption from income tax. The Commissioners, by a majority, allowed the claim. On appeal the First Division held that the income received by

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the appellants was not the income of Jill Rosalind Bruce for purposes of income tax. The trustees appealed. A

Robertson Christie, K.C., and *R. P. Morison* (both of the Scottish Bar) for the appellants.

The Attorney-General (Sir William Jowitt, K.C.), *The Lord Advocate (Craigie Aitchison, K.C.)*, *Reginald Hills* (of the English Bar) and *A. N. Skelton* (of the Scottish Bar) for the respondents. B

The House took time for consideration.

May 11. The following opinions were read.

LORD BUCKMASTER.—The question on this appeal is the right of the appellants as trustees under a deed of trust to recover on behalf of their beneficiary the return of income tax for the year 1929 deducted at the source from a sum of £33, the annual income of a sum of £600 5½ per cent. preference stock of the Scottish and Southern Counties Investment Trust, Ltd. Their claim is, of course, the claim of the beneficiary under the trust deed, and to succeed it is essential to establish the title of beneficiary to the income from which the deduction has been made. C

The trust deed is dated Oct. 17, 1927, and by it Charles Bruce, of Arbroath, "in order to provide for the suitable education of my daughter, Jill Rosalind Bruce, on her attaining the age of fifteen," transferred the £600 stock before mentioned to the appellants as trustees, directing them to take out an D

"educational endowment assurance policy . . . on the life of my said daughter for such sum as can be insured for an annual premium of £30, the endowment to commence upon her attaining fifteen, and to continue for four years." E

In the event of the income becoming insufficient to cover the premium, Charles Bruce bound himself to make good the deficiency. He further directed his trustees from the date of his daughter's attaining fifteen, until she attained twenty-one, to use for her education and advancement the educational annuity under the policy, and also any income from the trust funds that might be available. On her attaining her majority, the trustees were to make over to her the capital of the trust estate, and should she die before, the trustees were to re-convey the funds to him. F

The trustees effected a policy at the annual premium of £30, providing for a policy of £3,600 on the life of the daughter if she attained twenty-one, and, if she did not, the insurance company bound themselves to refund the premiums with the exception of the first year, with 2½ per cent. compound interest, with the option to the trustees to obtain an educational endowment policy on the daughter attaining fifteen years. One of the options so provided enabled the premiums to be discontinued after July 6, 1942, in consideration of an endowment of £612 payable in half-yearly instalments of £76 10s. for four years from July 7, 1942. A question has arisen as to whether this policy is within the terms of the trust, but this it is not necessary to decide. It depends upon whether it answered the terms of the educational endowment assurance policy mentioned in the deed on the life of the trustee's daughter and upon this evidence might be necessary as to the meaning among insurance companies of an "educational endowment assurance" policy on the life of the assured. G H

The decision, however, really turns upon the actual terms of the trust deed itself. From these it is observed that if the daughter dies before fifteen, she receives no benefit whatever, apart from the fact that during her life she has an insurance for her maintenance and education if she does attain fifteen. This does not, in my opinion, give her any present beneficial right to receive the income which must be applied for the purpose in which both she and her father have a contingent interest. She, if and when she attains fifteen; he, if she dies before. In these circumstances it is impossible to say that the income is solely devoted to her absolute benefit. Further, it will be observed that nowhere under the trust deed is there any gift I

- A** whatever to her of the income of the trust fund. If, therefore, she died with any part of the income for any time unapplied, and unless her death synchronised with the actual date of payment of the premium, this must result: her estate would have no right to the money that was unapplied, for nowhere has it been given to her. This to my mind defeats her claim to the return of tax, for that can only be made by the person entitled to the income. This is all that arises for present decision,
- B** and it is not advisable to speculate as to whether any right would arise if she attains fifteen. The judgments of the judges of the First Division fully express my opinion, and it is unnecessary further to add to the reasons they have given.

LORD DUNEDIN.—I agree.

- C LORD WARRINGTON.**—The appellants are the trustees of a deed of trust dated Oct. 17, 1927, executed by Charles Bruce for the purpose of providing for the suitable education of his daughter, Jill Rosalind Bruce, on her attaining the age of fifteen years. The fund consists of a sum of stock in a company producing an income of about £33 a year, from which income tax was deducted at the source. The infant Jill was born on July 7, 1927. The appellants, alleging that the income
- D** of the trust fund is income of the infant, and, being her only income, is not subject to tax, claimed on her behalf a return of the tax which had been deducted at the source. The claim was allowed by a majority of the General Commissioners. On the requisition of the Crown they stated a Case for the opinion of the Court of Session on the question of law whether the income received by the trustees is the income of the infant, so that they are entitled on her behalf to obtain repayment of income tax. Their Lordships of the First Division, by interlocutor, dated June 12, 1930, answered the question of law in the negative, sustained the appeal of the Crown, and reversed the determination of the Commissioners. Hence this appeal.
- E**

The real question is whether the infant has an immediately vested interest in the income so as to be entitled to insist on its application as her income for her immediate benefit or whether under the provisions of the trust deed her right to the income as such is a contingent interest only. The answer to this question depends on the true construction and effect of the trust deed and, perhaps, on the effect of the policy which it is found was effected in pursuance of the trust.

- F** The object of the trust is stated in the trust deed to be to provide for the suitable education of the infant on her attaining the age of fifteen. The trustees are directed to take out an educational endowment assurance policy on the life of the infant for such sum as can be insured for an annual premium of £30 to commence on her attaining the age of fifteen and to continue for four years. The trustees are directed during the years from her attaining fifteen until she attains twenty-one to utilise for her education and advancement the educational annuity payable under the policy, and also any income of the trust fund that may become available. The capital of the trust fund is to be transferred to her on her attaining twenty-one, but
- G** should she die before that age the trustees are to re-convey and re-assign the whole trust funds to the donor. In my opinion, under the terms of this deed, the infant has no immediately vested interest in the income as such. Admitted that she has a *jus quæsitum*, this is limited to requiring the trustees to effect the policy specified in the deed, and it is provided that the endowment secured by the policy shall not commence till she has attained fifteen. If she does so, then, and not till then, are the trustees directed to utilise the income as such for her benefit. Moreover, if she
- H** dies under twenty-one the whole trust funds are to be returned to the donor. The last direction would include any unapplied income in the hands of the trustees, and, accordingly, if, for example, she were to die shortly before a premium becomes due, the income which would otherwise go to pay that premium would pass, not as part of her estate, but to her father. The fact is that though by the payment of the premium she obtains a possible benefit, that benefit is of no present pecuniary value, but is wholly contingent on future events. On the deed itself, therefore, I
- I** come to the conclusion that the income in question is not the income of the infant.

As I understand the judgments of their Lordships of the First Division, except LORD SANDS, this opinion agrees with their view. LORD SANDS, however, prefers to rely on the terms of the policy which he assumes to be the kind of policy contemplated by the trust deed. A

The policy was one on the life of the infant, to commence at twenty-one and to continue during her life, for the sum of £3,600 at an annual premium of £30 commencing at once. If the assured should die before twenty-one the premiums (except the first) were to be returned to the trustees with compound interest. They would then revert to the donor under the deed. The trustees had several options exercisable in certain events, of which the only material one is that specified in cl. 3 of the schedule, under which they would after July 6, 1942, namely, on the infant attaining the age of fifteen, by surrendering the policy obtain the educational endowment referred to. There seems to me to be no real doubt that, as LORD SANDS says, this is such a policy as was contemplated, and, if so, it strengthens the views I have already expressed on the construction and effect of the deed itself, but I prefer to base my judgment on the deed rather than on what the trustees thought fit to do under it. In my opinion, the appeal fails and ought to be dismissed with costs. B C

LORD THANKERTON.—I agree. D

LORD RUSSELL.—I have felt considerable doubt as to the correctness of the decision which is here under appeal, the crucial question being whether the income from which the tax had been deducted was income which was held by the trustees of the deed for the sole benefit of the infant, and which, therefore, should be regarded as her income. E

In my opinion, your Lordships, in seeking the answer to this question, should only have regard to the terms of the trust deed, and should not be influenced by a consideration of the terms of the policy of assurance which the trustees in fact took out. The rights of the infant must be ascertained from the language of the trust deed and from no other document. In the trust deed, the trusts of the income of the trust fund during the minority of the infant are declared by reference to two periods. The first period ends with the infant attaining the age of fifteen years. During that time the trustees are to apply the income in payment of an annual premium of £30 for the maintenance of an educational endowment assurance policy on the infant's life, the endowment to commence when the infant attains the age of fifteen and to continue for four years. The second period covers the six years from the infant's attaining the age of fifteen years until her majority. During that time the trustees are to apply the income of the trust fund for her education and advancement. If and when the infant attains her majority the capital trust fund (and the income) will belong to her absolutely. If she dies under age they will belong to the settlor. F G

It is with the income accruing during the first period that this appeal is concerned. The difficulty which I have felt is this. While it is true to say that the application of the income during the first period will only benefit the infant contingently on her attaining the age of fifteen years, it is also true to say that, according to the wording of the deed of trust, it cannot enure for the benefit of anyone but the infant. During the second period not only is the infant the only person who can derive benefit from the application of the income, but the derivation of benefit by her is free from any element of contingency. Is the fact that, if the infant were to die under the age of fifteen she would derive no benefit from the application of the income during the first period, sufficient to prevent the income of that period from being regarded as income of the infant? Your Lordships think yes, and I am not disposed to agree. What weighs with me is the consideration that, as has been pointed out, there is no provision in the deed which, if the infant died under the age of fifteen years, would entitle her estate to claim any portion of income which had accrued at the time of her death, but which had not yet been applied in payment of the policy premium. The doubts which have disturbed me H I

A are those which assailed LORD SANDS. Unlike him, I found myself unable to escape from them by appealing to the terms of the policy; but upon consideration I find myself able for the reason indicated above to concur in the motion proposed.

Appeal dismissed.

Solicitors: *Biddle, Thorne, Welsford & Gait*, for *Mackenzie & Kermack*, W.S.,
B Edinburgh; *Solicitor for England of Board of Inland Revenue*, for *Solicitor for Scotland of Board of Inland Revenue*.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

C

Re CITY OF LONDON INSURANCE CO., LTD.

D

[CHANCERY DIVISION (Eve, J.), December 7, 14, 18, 1931]

[*Reported* [1932] 1 Ch. 226; 101 L.J.Ch. 124; 146 L.T. 296;
48 T.L.R. 169; 76 Sol. Jo. 29; [1931] B. & C.R. 129]

Company—Winding-up—Payment by contributories in excess of amount of liability—Refund of excess—Power of liquidator to enforce payment of unpaid calls to enable equal distribution of excess—Companies Act, 1929 (19 & 20 Geo. 5, c. 28), s. 157.

E

The liquidator of a company sought to retain as part of the assets available for creditors the full proceeds of two calls of 1s. and 1s. 6d., made on the B contributories, notwithstanding that they might exceed the difference between the amount of the liabilities in respect of which they were liable to contribute and the amount available to satisfy such liabilities out of the general assets other than the proceeds of these calls.

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Held: (i) the liability of the B contributories was created by s. 157 (1) of the Companies Act, 1929, and was restricted to so much left unpaid on their shares as did not exceed the balance of debts and liabilities contracted before they ceased to be members, and, therefore, the difference between the amounts mentioned should be refunded to the B contributories; (ii) the liquidator would be given power to enforce payments of unpaid calls by B contributories to enable an equal distribution of the excess proceeds of the calls to be made among all the B contributories.

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Notes. Section 157 (1) of the Companies Act, 1929, has been replaced by s. 212 (1) of the Companies Act, 1948.

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As to the liability of contributories on a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 630 et seq.; and for cases see 10 DIGEST (Repl.) 957 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Adjourned Summons whereby the liquidator asked for an order that he might be at liberty to retain as part of the assets of the company available for its creditors the full proceeds of two calls of 1s. and 1s. 6d. per share made on the B contributories, notwithstanding that such proceeds might exceed the difference between the amount of the liabilities of the company in respect of which such B contributories were liable to contribute and the amount available to satisfy such liabilities out of the general assets of the company other than the proceeds of the said two calls.

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The company was incorporated on Aug. 5, 1908, and carried on a re-insurance business, a large part of which was in respect of marine and fire insurance. Its capital was £500,000 in £1 shares, of which, at the date of the winding-up, 1,601 were fully paid and the remaining 498,399 were paid up to the extent of 6s. per

share. The winding-up commenced on Feb. 3, 1922. On July 18, 1921, the holders —2,170 in number—of 463,801 shares paid up to the extent of 6s. per share had transferred them to the City Equitable Associated, Ltd., who remained the registered holders thereof at the date of the liquidation. The City Equitable and the 2,170 former holders of the shares were settled in the list of contributories in respect thereof, the former on the A and the latter on the B list. The City Equitable was in liquidation, and insolvent, and no more than a penny in the pound could be realised by calls on it. Calls on the B contributories, referred to in the summons, were made in each case after estimates had been placed before the court of the assets and liabilities of the company, and of the probable contributions which would have to be made by the B contributories. The liquidation had reached a point whereat it was clear that the amount already collected from the B contributories would substantially exceed the difference between the aggregate liabilities in respect of which they were liable to contribute and the amount available to satisfy such liabilities out of the general assets of the company other than the proceeds of the two calls made on the B contributories, and the question was whether that excess, estimated to amount to £10,000 and upwards, should be refunded to the B contributories or be treated as part of the general assets and applied in increasing the dividend to the creditors, who, in any event, would not be paid 20s. in the pound.

Vaisey, K.C., and *Christie* for the liquidator.

Swords, K.C., and *Cecil Turner* for B contributories who had paid in full.

I. A. Reid for those who had not so paid and against whom an order had been made to pay.

P. I. Sykes for those in the like position against whom no order had been made.

Cur. adv. vult.

Dec. 18. **EVE, J.**, read a judgment in which he stated the facts and continued: I think it is clear that the moneys, subject to any deduction for costs properly chargeable to the B contributories, must be refunded to them. Their liability to contribute is created by statute, and is restricted to so much of the amount left unpaid on their shares by their associated A contributories as does not exceed the balance of the debts and liabilities of the company, contracted before they respectively ceased to be members, which remains unpaid after the assets of the company and the contributions of the A contributories have been applied *pari passu* towards the payment of all the debts of the company whenever contracted. In the present case the proceeds of the calls made on the B contributories exceed that balance, and any dealing with the excess otherwise than by returning it to the B contributories would operate to impose on them an increase of liability for which there is no statutory justification. The fact that calls have been made cannot affect the statutory liability of the B contributories. They are only the machinery by which the court collects a fund for meeting the claims of the creditors without unnecessary delay, and so long as there are assets undistributed in the liquidation it remains open to the court to correct any mistakes or injustice due to falsified estimates or other unforeseen incidents arising in a prolonged and difficult administration. Accordingly, I answer the question in the summons in the negative, and I give the liquidator liberty to enforce payment of the two calls or the unpaid balances thereof against all the B contributories therein mentioned so far (if at all) as it is necessary for the purpose of making an equal distribution of the excess proceeds of the calls made on the B contributories among all the B contributories. The costs of all parties will be taxed as between solicitor and client, and paid out of the assets.

I might add that the order, by which the call of 1s. 6d. was made, was in terms for a second and final call of 1s. 6d. That would still have left something like 11s. 6d. available for calls upon the B contributories. I do not think the order ought to have referred to the call as a final call. It remained open to the court, if necessary, to call up more, and the liquidator might have found himself in a great

A difficulty if, after the second call, he had found it necessary to call for further moneys by reason of the introduction of those words "and final." I think that it is right that he should have directions to enforce payment as asked by the second question.

Solicitors : *Paterson, Snow & Co.; Reid, Sharman & Co.*

B [Reported by A. W. CHASTER, Esq., *Barrister-at-Law.*]

C

CLARK v. CLARK

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), June 4, 1931]

[Reported 145 L.T. 487; 95 J.P. 170; 75 Sol. Jo. 616; 29 L.G.R. 559; 29 Cox, C.C. 339]

E *Justices—Husband and wife—Maintenance order—Wife not caused to live separately—Need to consider wife's conduct—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4, as amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 1 (1).*

F By the Summary Jurisdiction (Married Women) Act, 1895, s. 4, a wife could apply for a maintenance order if her husband had wilfully neglected to maintain her, "and shall by . . . such neglect have caused her to leave and live separately and apart from him." Section 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, provided that such an order could be made "notwithstanding that the neglect complained of has not caused her to leave and live separately and apart from him," and, accordingly, the words quoted from s. 4 of the Act of 1895 were repealed. By this amendment the legislature has not provided that a married woman may in any circumstances whatever be entitled to an order for maintenance. The mutual character of marital obligations is still to be taken into account, and before making an order justices must consider whether the wife has renounced any of her marital duties.

G *Divorce—Desertion—Termination—Expression of repentance by guilty party—Demand for renewal of cohabitation.*

H Where one of the spouses has brought about a breach of the matrimonial tie and is guilty of deserting the other spouse it is not a matter of course that the guilty spouse may put an end to the state of desertion by expressing repentance or demanding a renewal of cohabitation.

Notes. Referred to : *Markovitch v. Markovitch* (1934), 151 L.T. 139.

I As to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and as to the summary jurisdiction in matrimonial cases, see *ibid.* 479 et seq. For cases see 27 DIGEST (Repl.) 333 et seq., 693 et seq. For Summary Jurisdiction (Married Women) Act, 1895, and Summary Jurisdiction (Separation and Maintenance) Act, 1925, see 11 HALSBURY'S STATUTES (2nd Edn.) 849 and 864 respectively.

Cases referred to :

- (1) *Stokes v. Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 T.L.R. 553; 55 Sol. Jo. 690, D.C.; 27 Digest (Repl.) 712, 6796.
- (2) *Tyrrell v. Tyrrell* (1928), 138 L.T. 624; 92 J.P. 45; 26 L.G.R. 188; 28 Cox, C.C. 485, D.C.; 27 Digest 694, 6636.

- (3) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 40 T.L.R. 250; 68 Sol. Jo. 339; 22 L.G.R. 653, C.A.; 27 Digest (Repl.) 349, 2890. A

Appeal from an order of Maryport (Cumberland) justices dismissing a wife's summons against her husband for desertion and wilful neglect to maintain her.

On March 27, 1931, the wife took out a summons against her husband, alleging that he had "unlawfully and wilfully deserted or neglected to provide reasonable maintenance for her." At the hearing on April 2 the wife said in evidence that she was aged forty-two years and had been married twenty-two years. She and her husband had a family of children, several quite young. Her husband left her and in January, 1929, she issued a summons at Workington, which was dismissed. He gave her no support, so she took the young children to him, and had since then been working and keeping herself, until she had to give up her work owing to ill health, and get parish relief. A brother was now helping her. She visited her husband one Friday when he drew his money. He sent for the police to put her out. On her instructions her solicitors wrote to her husband on March 16, 1931, as follows: B

"Our client informs us that you left her about two years ago and that since that date you have been living apart, in spite of the fact that she has intimated to you several times that she is willing to live with you again, and to do all she can to make a fresh start, if you will do the same. She is still willing to receive you back." C

He would not have her back, and she took out the present summons. She had been charged with various offences such as being drunk and disorderly, but she did not take much drink. She had had a great deal of trouble with her husband at weekends, and had had him up for assault. Cross-examined, Mrs. Clark said that when he left her in January, 1929, he gave her £4. She was not drunk on that occasion. He blackened her eye. She cut his head. D

For the husband it was submitted that the summons in so far as desertion was concerned was *res judicata* by reason of the dismissal of the previous summons in 1929, reference being made to *Stokes v. Stokes* (1) and *Tyrrell v. Tyrrell* (2). E

The justices dealt with the case only on the basis of a claim for wilful neglect to maintain, and made no order, without giving reasons. F

The wife appealed, asking the court either to set aside the decision or to remit the summons to the justices on the ground that their order was against the weight of evidence, that there was no evidence to relieve the husband of his liability to maintain his wife, that there was ample evidence of desertion or wilful neglect, and that the justices were wrong in law. G

C. L. Beddington for the appellant.

The respondent was not represented.

LORD MERRIVALE, P.—The case illustrates the exceedingly difficult task cast on justices by the present condition of the law with regard to the relations of husband and wife, and the statutory right of wives on separation from their husbands, under certain limited conditions, to obtain orders of maintenance. The parties here had been married for twenty-two years. They were parents of a numerous family. In January, 1929, a separation took place, and the wife issued a summons under the Separation and Maintenance Acts alleging that her husband had deserted her, and claiming an order for maintenance. That summons was dismissed by the justices who heard it. It appears from the notes of the proceedings now under consideration that these people's relations were a matter of familiar knowledge to the justices, and the wife's conduct was brought to the minds of the justices by reference to matters which had been dealt with in their court. In March, 1931, the wife consulted solicitors who wrote to the husband asking him to begin anew the relationship of husband and wife. There was no reply to that letter, and the solicitors took out a summons in an ambiguous form which took care to avoid specifying where the ground of complaint was H

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A It is suggested that, as there was no evidence of adultery against the wife, the summons must be treated as the claim of a wife in a suit for restitution of conjugal rights, and that non-compliance with the claim would entitle the justices to make an order for maintenance against the husband. That is not the law. The husband's solicitor was able to steer the case so that it was treated by the justices as a claim on the ground of wilful neglect to provide reasonable maintenance. The
B justices were aware that they had dismissed the wife's summons based on the ground of desertion, and *Stokes v. Stokes* (1) was brought to their notice. That decision prevented a successful demand for the re-hearing of a charge of desertion in a case like the present. The justices treated the summons as not ambiguous but based on the ground of wilful neglect.

It is suggested that, as this woman has not been guilty of adultery, the justices
C are under an obligation to order the husband to provide maintenance for her. The argument is based on s. 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, a wife might apply for a maintenance order if her husband had wilfully neglected to maintain her, "and shall by . . . such neglect have caused her to leave and live separately and apart from him." By s. 1 (1) of the Act of 1925 such an
D order can be made "notwithstanding that the . . . neglect complained of has not caused her to leave and live separately and apart from him," and "accordingly" the words quoted above from s. 4 of the Act of 1895 are repealed. That amendment requires very careful attention by those who have to administer this very difficult branch of the law. Its true construction must be considered in the light of both the principal Act and the amending Acts, and the provision in sub-s. (4) of s. 1
E of the Act of 1925, which says:

"No order made under the principal Act shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

F Keeping definitely in mind the law of England with regard to marital relationship and the mutual character of marital duties, what the legislature has done is not to provide that a married woman who has not committed adultery may in any circumstances whatever come to the justices and claim from her husband what she considers reasonable maintenance and get an order. The law still takes account of the
G mutual character of marital obligations. I am satisfied that the justices appreciated what the substance of the case was. My inclination is to the view that the justices thought that the wife had renounced her duties. It may not be an accurate view of the facts. It may be that they will consider it necessary to hear both the parties. The summons will go back to them. They may have to consider by whose fault it was that the parties were living apart, and if so, to have regard to *Thomas v. Thomas* (3). Where one of the spouses has brought about a breach of the matrimonial tie and is guilty of deserting the other spouse, it is not a matter of course that the guilty spouse may put an end to the state of desertion by expressing repentance or demanding a renewal of cohabitation. The justices here dismissed the previous summons for desertion. When they address their minds to what caused the parties to live apart they will consider the practical effect of the amendment
H made by the Act of 1925 in respect of the wilful refusal to maintain. Although a wife at the time of the summons has not been driven to leave the husband she may nevertheless leave him afterwards and be maintained. The reference back of the matter carries no reflection at all on the intention of the justices to perform their task. This court feels the necessity of knowing precisely on what grounds the
I justices came to the conclusion that this husband ought not to be the subject of an order on the basis of wilful neglect to maintain.

BATESON, J.—I agree. It may be that the justices who saw the wife did not believe her case that her husband had wilfully neglected to maintain her. In the

previous summons they had heard an application for maintenance, and on hearing the present summons they were inclined to follow *Stokes v. Stokes* (1). It is with great reluctance that I agree to the reference back, but it would be safer for them to say what exactly they meant to decide. A

Solicitors: *Maples, Teesdale & Co.*, for *Lightfoot & Lightfoot*, Maryport.

[Reported by W. LATEY, Esq., Barrister-at-Law.] B

SPILLERS, LTD. v. CARDIFF ASSESSMENT COMMITTEE
AND PRITCHARD (CARDIFF REVENUE OFFICER) C

PIERCE (WIRRAL REVENUE OFFICER) v. WIRRAL
ASSESSMENT COMMITTEE AND SPILLERS, LTD. D

PINSENT (PLYMOUTH REVENUE OFFICER) v. PLYMOUTH
ASSESSMENT COMMITTEE AND OCTAGON
BREWERY CO., LTD. E

BLUNT (WEST DERBY REVENUE OFFICER) v. WEST DERBY
ASSESSMENT COMMITTEE AND TATE AND LYLE, LTD. E

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and MacKinnon, JJ.),
January 15, 16, 20, 22, 1931]

[Reported [1931] 2 K.B. 21; 100 L.J.K.B. 233; 144 L.T. 503;
95 J.P. 49; 47 T.L.R. 281; 75 Sol. Jo. 173; 29 L.G.R. 411;
2 B.R.A. 818] F

Rating—De-rating—Industrial hereditament—“Properties contiguous to one another”—“Contiguous”—Stable—Net annual value not exceeding 10 per cent. of part thereof attributable to industrial purposes—No right to be de-rated—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44) [as amended by the Local Government Act, 1929 (19 Geo. 5, c. 17), s. 69], s. 3 (2) (b), (3). G

The word “contiguous” means “touching” and must be given that meaning unless the context or subject-matter requires that it should be given the loose meaning of “neighbouring.” Neither the subject-matter of s. 3 (3) of the Rating and Valuation (Apportionment) Act, 1928, nor the context of the word “contiguous” in that subsection so requires, and, therefore, “contiguous” in the subsection is to be construed in the strict sense of “touching” and not as “neighbouring.” H

By s. 3 (2) of the Act a place used by the occupier for the housing or maintenance of road vehicles or as stables shall be deemed not to form part of a factory or workshop. By s. 4 (2) (a) where the part of the net annual value of a hereditament attributable to purposes other than industrial purposes does not exceed 10 per cent. of the part thereof attributable to industrial purposes, the hereditament shall be treated as if it were occupied and used wholly for industrial purposes. The provisions of s. 4 (2) (a) do not take a stable the net annual value of which does not exceed 10 per cent. of the part of the hereditament attributable to industrial purposes out of the provisions of s. 3 (2) so as to enable it to be a contiguous property within s. 3 (3). I

- A Notes.** Referred to: *New Plymouth Borough Council v. Taranaki Electric Power Board*, [1933] A.C. 680; *James A. Jobling & Co., Ltd. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 207; *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons, Ltd.*, [1956] 2 All E.R. 101.

- As to the de-rating of industrial hereditaments, see 27 HALSBURY'S LAWS (2nd Edn.) 435 et seq.; and for cases see DIGEST Supps., tit. Rates and Rating, case B No. 226a et seq. For Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 173.

Case referred to:

- (1) *Haynes v. King*, [1893] 3 Ch. 439; 63 L.J.Ch. 21; 69 L.T. 855; 42 W.R. 56; 3 R. 715; 19 Digest 132, 898.

- C Cases stated** by the recorder of Cardiff, Cheshire Quarter Sessions, the recorder of Plymouth, and the recorder of Liverpool.

SPILLERS, LTD. v. CARDIFF ASSESSMENT COMMITTEE

- The appellants, Spillers, Ltd., appealed to the recorder of Cardiff against a decision of the Cardiff Borough Assessment Committee to exclude from the special list for the rating area of the borough of Cardiff as an industrial hereditament a hereditament described as "Offices, 240-243, Bute Street." The hereditament consisted of offices and buildings in the occupation of the appellants, comprising a three-storey stone basement building, part with a flat roof and part with a slate-pitched roof, a portion of the basement and ground floor being occupied as a post office. The appellants owned and carried on a large undertaking as millers and bakers in Cardiff, and in addition to the hereditament, the subject of the appeal, they owned other premises. The appellants carried on their business upon each of the sets of premises, and the premises together formed the appellants' undertaking. The final production of the articles manufactured by them was the result of processes or treatment which had taken place in several of the premises. Except that there were mill manager's offices in other premises, the whole of the offices and staff pertaining to the appellants' whole undertaking in Cardiff were grouped together in the hereditament the subject of the appeal. The distance in an air line from the north-eastern wall of the hereditament to the west wall of the neighbouring block of premises was 47 yards, but there was no communication between the hereditament and the block in a direct line owing to the interposition of the Great Western Railway's double line. The offices in the hereditament were connected by private telephones with all the premises forming the appellants' undertaking. The whole of the business carried on by the appellants in the various buildings was recognised to be one undertaking. The recorder held that, as the offices comprised in the hereditament were a necessary adjunct to the mills, without which the mills could not be worked, the hereditament was contiguous to the mills within the meaning of the section, and allowed the appeal.

PIERCE (WIRRAL REVENUE OFFICER) v. WIRRAL ASSESSMENT COMMITTEE

- The revenue officer for the Wirral assessment area appealed to Cheshire Quarter Sessions against the decision of the Wirral Assessment Committee to include as an industrial hereditament in the special list for the rating area of Ellesmere Port and Whitby Urban District Council a hereditament occupied by Spillers, Ltd. (F. A. Frost & Sons branch), and described as "offices, North Road, Ellesmere Port." The hereditament consisted of offices situated 57 yards distant from the occupiers' factory, and was not within the curtilage of the factory. The factory had been admitted to the list as an industrial hereditament. The hereditament and the factory were in the same occupation, and were used as part of a single factory. They were separated by a line of railway belonging to the Manchester Ship Canal. Cheshire Quarter Sessions dismissed the appeal.

PINSENT (PLYMOUTH REVENUE OFFICER) v. PLYMOUTH ASSESSMENT COMMITTEE

The revenue officer for the Plymouth assessment area appealed to the recorder of Plymouth against the decision of the Plymouth Assessment Committee to include

in the special list for the rating area of the city of Plymouth as an industrial hereditament a hereditament described as "garage, cooperage stores, and yard, Sawry Street, Plymouth." The Octagon Brewery Co., Ltd., the respondents, were the owners and occupiers of a brewery occupying a site between Martin Street and Bath Lane in the city, as well as being the owners and occupiers of the hereditament in question which lay between Sawry Street and Sawry Lane, being separated from that part of Martin Street which adjoined the main brewery by the width of Martin Street and by one dwelling-house not occupied by the respondents. At the premises in question were situated the cask-washery, cooperage, and garage of the brewery, the premises being equipped with the necessary plant for washing and repairing casks. Formerly this work was done in the main brewery building, but owing to extensions of the brewery it was found necessary to obtain another site for the cask-washery and cooperage, and the Sawry Street premises were acquired for that purpose. The premises in question were registered, together with the main brewery, under the Factory and Workshop Acts, 1901-20, and they formed an indispensable part of the brewery. The recorder held that the proper meaning to be attached to the word "contiguous" in s. 3 (3) of the Rating and Valuation (Apportionment) Act, 1928, was "touching," and that the intervention of the dwelling-house prevented the hereditaments from being contiguous to one another within the meaning of the section. He, accordingly, allowed the appeal. A
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BLUNT (WEST DERBY REVENUE OFFICER) v. WEST DERBY ASSESSMENT COMMITTEE

The revenue officer for the West Derby assessment area appealed to the recorder of Liverpool against the decision of the West Derby Assessment Committee to include in the special list for the rating area of the county borough of Liverpool as an industrial hereditament a hereditament described as "stables, garage and yard, 25-35, Chisenhale Street, Liverpool." The hereditament was situated in Chisenhale Street, Liverpool, and comprised stables, garage and yard in the sole occupation of Tate and Lyle, Ltd., the respondents (the occupiers), who were sugar refiners. They occupied other hereditaments situate respectively at Love Lane, Liverpool (hereinafter referred to as their "main factory"), and at the corner of Pall Mall and Chisenhale Street. The last-mentioned hereditament and the hereditament the subject of the appeal stood on opposite sides of Chisenhale Street. The hereditament was occupied and used as (i) a large open shed fronting Chisenhale Street with open yard beyond containing three loose boxes; (ii) a two-storey stable, together with saddler's shop, harness room, stablemen's mess room, etc., on the east side of the yard; (iii) a one-storey building on the Chisenhale Street front used as a wheelwright's shop and covered cart-way (over which was a house separately occupied and assessed), and a garage for trailer vehicles; (iv) the premises were used for the garaging of the company's steam and petrol vehicles and trailers and for the re-conditioning of the same, and also as stables with a yard for the horse wagons. All the vehicles, horses and wagons occupying the premises were solely used for the purposes of the respondents' business as sugar refiners; (v) the wheelwright's and saddler's shops were used in connection with the maintenance of the vehicles and equipment. A canal and towing-path intervened between the hereditament and the occupiers' main factory. The distance between the hereditament and the main factory was about 22 yards in a direct line. The sub-soil of the canal and towing-path was vested in the canal undertaking. The hereditament was connected with the main factory only by overhead cables across the canal. The recorder held that the hereditament was used as a part of a single factory, and that the word "contiguous" had to be interpreted broadly and meant "near to or neighbouring, especially when no buildings intervene." He dismissed the appeal. E
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SAME v. SAME

The revenue officer for the West Derby assessment area appealed to the recorder of Liverpool against the decision of the West Derby Assessment Committee to include in the special list for the rating area of the county borough of Liverpool as

- A an industrial hereditament the hereditament described as "garage and works, 58, Pall Mall, Liverpool." The hereditament was situate at the corner of Pall Mall and Chisenhale Street, Liverpool, and comprised a garage and works in the sole occupation of the respondents, Tate and Lyle, Ltd. (the occupiers), who were sugar refiners. They occupied other hereditaments situate respectively at Love Lane, Liverpool (hereinafter referred to as their main factory), and at 25-35, Chisenhale Street. The last-mentioned hereditament and the hereditament the subject-matter of this appeal stood on opposite sides of Chisenhale Street. The hereditament was occupied and used as follows: (i) there was a small store for coke and fuel, together with a timekeeper's wooden office, on the Chisenhale Street side; (ii) a two-storey building at the rear of an open yard, the ground floor of the building being used entirely as a store for coke and coal for the fuelling of the occupiers' steam wagons; (iii) there was storage for 250 tons of coal; (iv) the first floor of the two-storey building which was entered from Chisenhale Street was used during the day as a repair garage for the occupiers' own road vehicles; (v) six trailers were garaged in this building at night; (vi) all the vehicles and wagons occupying the premises were solely used for the purposes of the respondents' business as sugar refiners. The hereditament was occupied and used solely for the re-conditioning and garaging of the occupiers' motor vehicles and for the storage of fuel for these vehicles. The hereditament was directly opposite to the main factory and was separated therefrom only by Chisenhale Street. The distance between the two buildings across the road was about 20 yards. The recorder, for the same reasons as in the fourth case, dismissed the appeal.

The distances between the admittedly industrial hereditaments and those sought to be included under sub-s. (3) varied from about 20 yards to about 60 yards. In the fifth case, where the properties were separated only by a public highway, the revenue officer admitted "contiguity" on the principle that the properties on opposite sides of a highway extended *ad medium filum viæ*, subject to the point about the stable.

The Rating and Valuation (Apportionment) Act, 1928, provides:

- F "Section 3 (2) (b): For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop . . . Subsection (3): Where two or more properties within the same curtilage, or contiguous to one another, are in the same occupation and, though treated as two or more hereditaments for the purposes of rating and valuation by reason of being situate in different parishes or of having been valued at different times or for any other reason, are used as parts of a single . . . factory, or workshop, then, for the purposes of determining whether the several hereditaments are industrial hereditaments they shall be treated as if they formed parts of a single hereditament comprising all such hereditaments."

The Attorney-General (Sir William Jowitt, K.C.), Wilfrid Lewis and C. H. Pearson for the Revenue Officer in each case.

- Comyns Carr, K.C., and W. C. Howe for Spillers, Ltd., Cardiff.*
Konstam, K.C., and Austin L. Jones for Spillers, Ltd., Wirral.
Joy, K.C., and Harold Murphy for the Octagon Brewery Co.
Lynskey, K.C., and F. A. Sellers for Tate and Lyle, Ltd.

Cur. adv. vult.

Jan. 22. The following judgments were read.

LORD HEWART, C.J.—These are five Special Cases, four stated by three different recorders, and one by a court of county quarter sessions. Each of the cases arises out of a claim by the owners or occupiers of an "industrial hereditament" within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment)

Act, 1928, to have another property treated as part of their main "industrial hereditament" by virtue of s. 3 (3) of that Act. The property sought to be added is not in any of the cases "within the same curtilage," and the claim is in each case that it is, within the meaning of the subsection, "contiguous to" the main hereditament. In a direct line through the air the two properties are at a distance from one another that varies in each case from about 20 yards in the fifth case to about 60 yards in the second case. In the fifth case there is nothing between the two properties except a public thoroughfare. In all the other cases there are other properties (in addition to a public road in three of them) such as a line of railway in the first and second cases, a dwelling-house of other ownership in the third, and a canal and towing-path in the fourth case. The learned recorder of Plymouth, in the third case, held that the proper meaning of "contiguous to" is "touching," and, therefore, disallowed the claim. The learned recorder of Cardiff, in the first case, has impliedly held that "contiguous to" means "neighbouring." But his decision, as recorded in the Case, is:

"I was of opinion that as the offices . . . were a necessary adjunct to the mills, without which the said mills could not be worked, the said offices were contiguous to the said mills within the meaning of s. 3 (3) of the Act."

The quarter sessions for Cheshire, in the second case, also impliedly held that "contiguous to" means "neighbouring." The learned recorder of Liverpool, in the fourth case, holds that the word "contiguous" has to be interpreted broadly, and means "near to, or neighbouring, especially when no buildings intervene"; and in the fifth case he says he was of opinion that the word "contiguous" meant "near to or neighbouring," and had to be interpreted broadly.

The fate of these appeals, therefore, depends upon the answer to the question: What is the meaning of "contiguous to" in s. 3 (3) of the Act of 1928? Does it mean, as the recorder of Plymouth held, "touching, or in contact with"? Or does it mean, as the other courts have held, "neighbouring or in proximity to"?

As to the proper meaning of the word "contiguous" there can, we think, be no doubt. Dr. Johnson, of whom it may probably be said that he employed the English language with a more anxious precision than any other man who ever lived, defines "contiguous" in his dictionary thus: "Meeting so as to touch; bordering upon each other; not separate"; and he gives no other definition. The OXFORD ENGLISH DICTIONARY gives five definitions. The first, and principal one, is: "Touching, in actual contact, next in space; meeting at a common boundary, bordering, adjoining." The second and third deal only with variants of that meaning, in the application of the word, not to space, but to time and thought. The fourth refers to a use now long obsolete. The fifth is this: "Loosely, neighbouring, situated in close proximity (though not in contact)." The truth is that the appellants in four cases (the respondents in the third) contend for the proper and exact meaning of the word. The respondents (the appellants in the third case) seek to apply the loose and inexact meaning. For the preference urged by the latter, their counsel adduced as their chief reason that the object of this Act is de-rating, and that in order to further that object and bring about as much de-rating as possible, this meaning of the word should be accepted. We cannot think that this is an adequate reason. Another argument was hinted at, though the various counsel had not the hardihood to advance it, namely, that in the use of any language by the legislature one should expect the loose and inexact rather than the correct and exact. It is true that one who spends much time in this court might be tempted in his haste to make some such assertion. But if he allowed cynicism to be tempered with sympathy for the harassed parliamentary draftsman, he would reflect that it is only in regard to phrases of doubtful import that this court is called upon to apply a toilsome scrutiny. The task is pathological and too much immersion in it may well induce oblivion of the fact that in comparison with the vast bulk of our legislation these difficult passages are rare. It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament

A correctly and exactly and not loosely and inexactly. Upon those who assert that that rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.

This, indeed, must be not merely the legal but also the literary canon of interpretation. No person of education or intelligence would understand, or suspect, B that a writer or speaker was using the word "contiguous" in its loose sense of "neighbouring" unless there was something in the context that compelled that conclusion. If a man spoke or wrote of "contiguous islands" he must necessarily mean "neighbouring," because one island must be separated by water from another. But if he spoke of "contiguous houses," it would be difficult to suppose that he meant anything but houses touching each other. The legal canon is the same. If C there is a demise of one house in a street, and a covenant by the lessor as to "contiguous" houses, and if there be evidence that at the date of the lease all the houses in the street existed as detached and separate buildings, then the word "contiguous" may be rightly construed as meaning "next adjacent" or "contiguous houses" as "houses on contiguous plots." *Haynes v. King* (1) is an example of such a case. If legal authority for so self-evident a proposition is needed, it may be observed D that NORTH, J., in that case, says that "contiguous" means "touching." And so it does, and must, unless the context, or the subject-matter, necessarily requires the improper alternative meaning.

Then is there anything in the context in this section which necessarily leads to the conclusion that "contiguous to" is used loosely and not exactly? We think certainly that there is not. The preceding words are "two or more properties E within the same curtilage." It is true that there may be two edifices in the same curtilage which may not be in contact, but equally they may be. Nor in the later words of the subsection is there anything which shows, or suggests, that the word "contiguous" cannot have been used in its true meaning and must have been used in its occasional and inexact meaning. The conclusion seems to be as follows. Counsel for the revenue officers contend for the ordinary and proper meaning of the F word. That contention must prevail against the attempt of their opponents to substitute another meaning, which by error is sometimes attached to the word, unless they can demonstrate, not merely that that other meaning is possible, or even that it is probable, but that it must be intended. We think that the utmost they have achieved is to show that it is possible, and, therefore, we think that our decision should be that "contiguous to" means "contiguous to" and does not here G mean "neighbouring." The result of this decision is that the appeal in the third case, on the Case stated by the recorder of Plymouth, is dismissed with costs, and the appeals in the first, second, and fourth cases are allowed with costs.

There remains the fifth case, about certain premises of Messrs. Tate and Lyle, at Liverpool. In this case, as we have already mentioned, the whole space intervening between the two edifices is occupied by a public thoroughfare. In view H of that fact, counsel admitted that one should be regarded as "contiguous to" the other, upon the doctrine of the extension of properties on opposite sides of a thoroughfare ad medium filum viæ, and upon what he considered to be the authority of *Haynes v. King* (1), to which we have already referred. As this admission was explicitly made it is not for us to do otherwise than to act upon it. But we must not be taken as agreeing with the proposition that *Haynes v. King* (1) lays down I that "contiguous houses" in all cases, and in general, includes houses whose curtilages are separated only by a public highway—a proposition which would appear to have the result, for example, that Buckingham Palace and St. George's Hospital are "contiguous edifices." In *Haynes v. King* (1) there was a demise of four houses on the south side of a street and a stipulation by the lessors that they should be allowed to deal as they thought fit with "any of the premises adjoining or contiguous to the hereditaments hereby demised," even if such action diminished or affected the access of light and air to the demised premises. When the lessees sought to restrain the re-building of four houses on the north side of the street,

because that re-building diminished the light and air upon the demised premises, it was held by NORTH, J., that the four houses on the north side were within the liberty reserved by the covenant to the lessors, and he put some reliance upon the doctrine *ad medium filum viæ* as justifying this loose and inexact use of the word "contiguous." In short, his decision was, we think, solely a decision upon the particular facts of that case, and cannot be regarded as authority for any general proposition of law or construction. A

But counsel for the revenue officers, having made this admission, took another point. The "property" which is sought to be added to the main hereditament by virtue of s. 3 (3) is in fact a garage or stable; it is precisely within the description of a "place" in s. 3 (2) (b). Subsection (2) (b) enacts that such a place shall "be deemed not to form part of the factory or workshop." Therefore, this place and the main hereditament cannot be "used as parts of a single factory or workshop" within s. 3 (3), inasmuch as one of the two is "to be deemed not to form part of the factory." This seems to be a formidable argument, and counsel for the rate-payers seemed to us to attempt no answer to it upon the wording of s. 3 by itself. But he relied upon s. 4 and its provision that a hereditament may include a part not used for industrial purposes, and if the net annual value of that part does not exceed 10 per cent. of the net annual value of the other part that is used for industrial purposes, then both parts shall be treated as if they were used for industrial purposes. He argued that, though under s. 3 (2) (b) a stable within the curtilage of a factory is not to be deemed to be part of the factory, yet that stable under s. 4 could be taken into account as a part of the factory not used for industrial purposes and if its net annual value did not exceed 10 per cent. of the annual value of the industrial part of the factory, then (in effect) the stable must be treated as, or deemed to be, part of the factory in direct cancellation of s. 3 (2) (b), which says that it shall not be so deemed. The final step in the argument is that, by reason of these provisions, a stable ought to be admitted as one of the two properties contemplated by s. 3 (3) and be treated as a part of a single factory so that the stable so added can be treated under s. 4 as "a hereditament occupied and used for purposes other than industrial." The combined effect, inter-relation and interaction of ss. 3 and 4 appear to us to be extraordinarily obscure. But on the whole we are of opinion that a stable which by s. 3 (2) (b) is "to be deemed not to form part of the factory" cannot be one of the "properties . . . which are used as parts of a single factory" within s. 3 (3). We have not overlooked the provision in s. 4 (2) (c), but effect can be given to that provision if a part of one, or of both, of the two properties "used as parts of a single factory" within s. 3 (3) is "used for other than industrial purposes" within s. 4 (1) and (2). B

The appeal in this fifth case, therefore, must also be allowed with costs. This conclusion makes it unnecessary to consider one other point. Section 3 (3) speaks of two or more properties treated as two or more hereditaments for the purposes of rating and valuation by reason of their being situate in different parishes or having been valued at different times or for any other reason. There is no finding in any of these cases as to the reason why the two properties were "treated as two hereditaments for the purposes of rating and valuation." It may be difficult to say if the doctrine of *eiusdem generis* applies to the words "or for any other reason." On the other hand, the special insertion of the words "by reason of" down to "any other reason" must presumably be assumed to have been made for some purpose of limitation and they can with difficulty be treated as entirely otiose. This point may need further consideration if and when it arises. C

AYORY, J.—I concur in this judgment, but with reference to the last paragraph I wish to add that I take a more definite view of the effect of the provisions in sub-s. (3) of s. 3. In my opinion, to bring a case within sub-s. (3) of s. 3 I think it must appear that the two properties have been treated as two hereditaments for the purpose of rating and valuation for some special reason, e.g., by reason of being situate in different parishes or of having been valued at different times or of having D

A been in different occupations; and there is no suggestion in any of these cases that the two properties have been so treated for any such special reason. If the words "or any other reason" were intended to cover any hereditaments which have been treated as two or more for the purpose of rating, it would have been simply expressed by the words "though rated separately."

B **MACKINNON, J.**—I agree.

Orders accordingly.

Solicitors: *Treasury Solicitor*; *William A. Crump & Son*, for *Gilbert Robertson & Co.*, Cardiff; *P. F. Walker*, for *Weightman, Pedder & Co.*, Liverpool; *Hedley Norris & Co.*, for *Albert Gard & Ruse*, Devonport; *Gregory, Rowcliffe & Co.*, for *Laces & Co.*, Liverpool.

C [Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

D

Re MILLER AND PICKERSGILL'S CONTRACT

[CHANCERY DIVISION (Clauson, J.), January 29, 1931]

E [Reported [1931] 1 Ch. 511; 100 L.J.Ch. 257; 144 L.T. 635]

Sale of Land—Sale by personal representative—Muniments of title—Statutory acknowledgment for production—Right of purchaser to include probate or letters of administration—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 36 (5).

F Where, under the Administration of Estates Act, 1925, s. 36, a purchaser of a legal estate from a personal representative is entitled to an acknowledgment for production and delivery of copies of muniments of title, he may require the vendor to include a probate or letters of administration in such statutory acknowledgment.

G **Notes.** As to the effect of the conveyance of a legal estate by a personal representative, see 16 HALSBURY'S LAWS (3rd Edn.) 342–343, para. 664; and for cases on the subject, see 40 DIGEST 301, 2593–2596. For the Administration of Estates Act, 1925, s. 36 (5), see 9 HALSBURY'S STATUTES (2nd Edn.) 740.

Case referred to:

(1) *Cooper v. Emery* (1844), 1 Ph. 388; 13 L.J.Ch. 275; 2 L.T.O.S. 437; 8 Jur. 181; 41 E.R. 679, L.C.; 40 Digest (Repl.) 327, 2689.

H **Vendor and Purchaser Summons.**

I By a contract in writing dated Oct. 20, 1930, a purchaser, Lawrence William Pickersgill, agreed to buy, and a vendor, H. C. Miller, agreed to sell, a certain dwelling-house for the sum of £120. The vendor agreed to sell the house as the personal representative of Thomas Miller, who had died intestate on June 15, 1930, and in respect of whose estate letters of administration had been granted to the vendor on Sept. 5, 1930. The vendor was willing, in accordance with the Administration of Estates Act, 1925, s. 36 (5), to have notice of the conveyance of the property to the purchaser endorsed on the letters of administration.

The purchaser claimed that he was also entitled to have inserted in the conveyance an acknowledgment by the vendor of the purchaser's right to the production of the letters of administration and delivery of copies thereof on the ground that they were part of the muniments of title, to the custody of which the vendor was entitled, the purchaser's statutory right to the production of which the vendor had acknowledged.

The vendor denied that the purchaser had any right to the production of the letters of administration, for he denied that they constituted any part of the muniments of title. A

This summons was taken out by the purchaser asking for a declaration that he was entitled to have inserted in the conveyance the acknowledgment which he claimed.

Section 36 (5) of the Administration of Estates Act, 1925, is as follows: B

"Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto." C

Eardley-Wilmot, for the applicant, referred to *Cooper v. Emery* (1); WILLIAMS ON VENDORS AND PURCHASERS, 3rd Edn., vol. 1, p. 643; DAVIDSON'S PRECEDENTS AND FORMS IN CONVEYANCING, 4th Edn., vol. 2, Part I., p. 663, note (a); KEY AND ELPHINSTONE'S PRECEDENTS, 12th Edn., vol. 1, Part I., preliminary note on p. 514; PRIDEAUX'S PRECEDENTS IN CONVEYANCING, 22nd Edn., vol. 1, p. 480, note (h), and vol. 3, addenda c. xxxi. D

R. H. Hodge for the respondent.

CLAUSON, J.—The question I have to determine is one of some interest, and, indeed, I think in practice, of some considerable importance. Before the Administration of Estates Act, 1925, there was some doubt amongst conveyancers whether, when a title taken by the purchaser on a sale contained, as one of its links, a will or letters of administration which related, as they in most cases would, to other property besides that comprised in the sale, the purchaser was or was not entitled to require the vendor to include the probate or letters of administration in such acknowledgment for production and delivery of copies of muniments as the purchaser, in the circumstances, could demand. The point can be stated thus: F
Probate and letters of administration are simply copies carried away from the Probate Registry by the executor or the administrator of something which is recorded at the Probate Registry, and the real link in the title would, accordingly, seem to be, not the probate or the letters of administration, but the will or the grant of administration appearing on record in the Probate Registry. Accordingly, it was the view of some conveyancers before the Act of 1925, that it was not necessary for the vendor to comprise in an acknowledgment the probate or letters of administration. G
Now the Administration of Estates Act, 1925, has become law, and it contains a section—s. 36—which makes a new departure in the law. It contains machinery under which, in certain circumstances, certain notices may be required to be endorsed on the probate or letters of administration, with the result that certain consequences ensue to persons who claim title through the executor of the will or the administrator, as the case may be. Curiously enough, there is no provision in the Act to provide that notices so endorsed on the probate or letters of administration should also be recorded at the Probate Registry. In case the probate or letters of administration should be lost or destroyed difficulty may arise; however, with that I am not now concerned. But it appears to me that the operation of s. 36 of the new Act has, with regard to the matter under consideration, altered the character of the probate or letters of administration. Whereas before the Act it may well be that probate or letters of administration were merely particular solemn copies of documents of record, they have now become something quite different. I
It appears to me that, by reason of the notices they are liable to have endorsed on them of matters which may form links in the title, the documents themselves are muniments of title, in the sense of being documents on which the purchaser's title may depend and not merely copies of a record on which that title may depend. Accordingly, it appears to me that, on principle, such documents must now be H

A included in the acknowledgment in cases in which the purchaser is entitled to an acknowledgment relating to the muniments of title.

For those reasons, the purchaser is, in my view, entitled to the relief he asks by the summons, namely, a declaration that he is entitled to have inserted in the conveyance to him by the respondent, the vendor of the premises comprised in the contract, an acknowledgment by the respondent of the applicant's right to

B production of the letters of administration.

Solicitors: *Maude & Tunnicliffe*, for *Simey, Iliff & Laing*, Sunderland; *Maples, Teesdale & Co.*, for *Wright, Ellis, & Martin*, Seaham Harbour.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

C

D

COOKSON v. HAREWOOD AND OTHERS

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.J.J.), October 15, 16, 19, 1931]

[Reported [1932] 2 K.B. 478, n.; 101 L.J.K.B. 394, n.;
146 L.T. 550, n.]

E

Libel—Domestic tribunal—Requirements of natural justice—Publication of decision—Sectional organ accepted by parties as means of publication.

Where a person has submitted to the jurisdiction of a controlling body a decision by a tribunal set up under the rules of that body on a complaint made against the person so submitting is final and cannot be reviewed by a court of law provided that the person affected has been given reasonable notice of the complaint and an opportunity of being heard in answer to it.

F

Rule 170 of the rules of the Pony Turf Club provided: "The stewards of the club may, in their absolute discretion, warn off any person from all courses where these rules are in force without assigning any reason for so doing." Rule 171 provided for the publication of the fact of the warning-off in the "Racing Calendar." The defendants, stewards of the club, having held an inquiry into the conduct of a certain racecourse by the plaintiff, who held, under the rules of the club, a licence to hold pony race meetings on that course, published the following notice in the "Racing Calendar": "As a result of an inquiry held by the stewards of the Pony Turf Club . . . the following person was warned off all courses under their control in accordance with r. 170: [the plaintiff's name was then given]." In an action by the plaintiff for damages for libel,

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H

Held: the statement published in the "Racing Calendar" was defamatory of the plaintiff, but the words in their ordinary and natural meaning stated truly what had in fact occurred, the plaintiff was bound by the rules under which they were published, and it was not open to him to plead by an innuendo that the words meant something other than their literal meaning, e.g., that they meant that he had been guilty of some corrupt or fraudulent practice on the turf or other gross crime.

I

Notes. Some of the observations of GREER, L.J. (infra), were criticised by ROMER, L.J., in *Chapman v. Ellesmere*, [1932] All E.R.Rep. 221 at p. 239.

Referred to: *Wells v. Myddleton* (1935), 76 Sol. Jo. 270; *Russell v. Duke of Norfolk*, [1948] 1 All E.R. 488.

As to publications by domestic tribunals, see 20 HALSBURY'S LAWS (2nd Edn.) 484. As to expulsion from clubs, see 5 HALSBURY'S LAWS (3rd Edn.) 262-265, and cases there cited.

Cases referred to :

- (1) *Weinberger v. Inglis* (No. 2), [1918] 1 Ch. 517; 87 L.J.Ch. 345; 118 L.T. 769; 34 T.L.R. 337; 62 Sol. Jo. 450, C.A.; affirmed, [1919] A.C. 606; 88 L.J.Ch. 287; 121 L.T. 65; 35 T.L.R. 399; 63 Sol. Jo. 461, H.L.; 2 Digest (Repl.) 179, 94.
- (2) *Ware and De Freville, Ltd. v. Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; sub nom. *Wake and De Freville, Ltd. v. Motor Trade Association*, 65 Sol. Jo. 239, C.A.; 32 Digest 60, 885.

Appeal by plaintiff against an order made by HORRIDGE, J., in an action tried by him with a special jury.

The plaintiff, Ernest Sawrey Cookson, claimed from the defendants, the Earl of Harewood and others, stewards of the Pony Turf Club, damages for matter which he alleged was defamatory of him which the defendants had published in the "Racing Calendar." At the trial judgment was entered for the defendants, and the plaintiff appealed.

Serjeant A. M. Sullivan, K.C., and Martin O'Connor for the plaintiff.

Geoffrey Lawrence, K.C., and Walter Frampton for the defendants, stewards of the Pony Turf Club.

E. J. C. Neep for the defendants, the Sports Printing Press.

SCRUTTON, L.J.—This case relates to certain pony races which were held at a course at West Malling. The plaintiff had applied to the stewards of the Pony Turf Club for a licence for that course. He writes four days before the race meeting took place :

"Dear Sir,—I have a proposal in reference to a pony race meeting to be held on this place. We have what I think would make an excellent course."

He speaks as "I" or "We." The Pony Turf Club is a comparatively recent institution, somewhat on the lines of the Jockey Club which deals with the racing of full-sized horses. The Pony Turf Club, under stewards of considerable turf experience and of position, attempts to do what the Jockey Club does for horse racing—to ensure that all races of ponies (horses under a certain height) should be conducted properly. When a person applies for a licence to hold a meeting, he submits himself to the rules of the Pony Turf Club. He would not be allowed to hold a race meeting unless he was ready to comply with those rules, of which he must be taken to have knowledge. The rules of the Pony Turf Club provide that for certain specified offences every person so offending shall be warned off all courses. Rule 170 provides :

"The stewards of the club may, in their absolute discretion, warn off any person from all courses where these rules are in force, without assigning any reason for so doing."

That is to say, the person applying for a licence and acting in any capacity directly or indirectly in connection with the meeting agrees to submit himself to the jurisdiction of the stewards of the Pony Turf Club.

There has been considerable obscurity as to who are the persons who run the West Malling racecourse. The plaintiff applied for the licence. He was undoubtedly the clerk of the course at all the meetings. He was an undischarged bankrupt, and his wife appeared to be the owner of the land on which the course was situate. The secretary was his daughter. His brother was to have some share in the profits. Apparently, the persons behind the race meetings at West Malling were the Cookson family. The matter was so unsatisfactorily conducted that some eighteen months after the last meeting the prizes had not been paid to the winners in a substantial number of cases, and offers were made of payment, not in cash, but in promissory notes. With regard to whether those promissory notes had been accepted, statements of the most unsatisfactory character were made by the plaintiff and other members of his family, and particularly by his brother, to the

- A stewards. When the matter was brought to their notice the stewards gave the plaintiff notice that they would hold an inquiry into the general conduct of the West Malling course, but the plaintiff did not find it convenient to attend that meeting. He treated it, apparently, as a matter of slight importance compared with his going to Portsmouth, and he sent his brother to represent him. The stewards heard what his brother had to say, some of which was quite inaccurate.
- B The stewards having heard the brother, decided to warn the plaintiff off the turf, and they published the warning in the Pony Turf Club "Racing Calendar." Rule 171 of the Pony Turf Club, which I have read, empowers the stewards, in their absolute discretion, to warn off any person from all courses where those rules were in force without assigning any reason for doing so, and the next rule expressly contemplates publication of the warning-off in the "Racing Calendar." Indeed,
- C one would expect it, because one of the consequences of warning-off is that the person who is warned off cannot train any horses. It is, therefore, obviously desirable that public notice should be given to all persons likely to read the "Racing Calendar" that they should not send any horses that they own to be trained by the plaintiff.

- Those being the facts, the plaintiff brought this action. First, he asked for a
- D declaration "that the plaintiff's name was wrongfully placed in the forfeit list and in the 'warning-off' list." As to the forfeit list, it was never placed in the forfeit list, and consequently that part of the claim goes. It is quite clear that the club cases, although I have not looked at all of them, generally proceed on the right of property—that proceedings which deprive the claimant of his property must be carried out according to the rules of natural justice, a phrase which I do not like, but which is continually used in the cases. One of the rules of natural justice is
- E that you should give the person whom you are going to affect notice of what is alleged against him and an opportunity of being heard. For that reason the learned judge, as a measure of precaution, asked the jury the first question: "Did the defendants give the plaintiff a reasonable opportunity of answering the charges on which they decided against him?" and the jury answered Yes. I am satisfied that
- F the plaintiff knew quite well that what was being complained of was the non-payment of prizes to winners for eighteen months. Provided that the matter is within the jurisdiction of the stewards, and they give the person affected reasonable notice of what he has to answer and an opportunity of being heard, the High Court is not a court of appeal from the stewards. Even if the High Court thought that the stewards came to a wrong decision, they have no jurisdiction to give any effect
- G to their view. The plaintiff undertook, not to hold meetings subject to the opinion of the High Court on racing matters, but to hold meetings subject to the jurisdiction of the stewards of the Pony Turf Club. The whole idea of the statement of claim, as regards the declarations, was, I think, founded on a complete mistake that in some way the High Court would re-hear the facts which led to the decision of the stewards and form an opinion different from the stewards and
- H give effect to it.

The first claim for a declaration, therefore, goes for the reasons which I have stated, and we are left with the action only as an action of libel. The action of libel is based upon the publication in the "Racing Calendar," and the publication in the "Racing Calendar" is this:

- I "Notice.—As a result of an inquiry held by the stewards of the Pony Turf Club, at the Registry Office, on May 4, 1929, the following person was warned off all courses under their control in accordance with r. 170: Ernest Sawrey Cookson."

That is the libel. It is perfectly obvious that that statement is quite true, every word of it. The stewards did hold an inquiry on the date mentioned, and they did, at that inquiry, come to a decision that Ernest Sawrey Cookson should be warned off all courses under their control in accordance with r. 170. I am quite aware that it is a defamatory statement to say that a man is warned off, but the statement

was true. He was warned off all courses, and if it is said that it is open to the High Court to investigate whether he was rightly warned off all courses, that is going back to the fallacy which I have explained in connection with the declaration. The High Court is not the tribunal to re-hear the decision of the stewards. The plaintiff, by applying for a licence and acting as an official of a meeting held under Pony Turf Club Rules, is bound by the rules to accept the decision of the stewards, provided, as I have said, that those proceedings are conducted in accordance with natural justice. From that point of view it has seemed to me all through this case that these questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what persons will understand it to mean. The plaintiff has submitted to the jurisdiction. The stewards have authority to publish the decision in the "Racing Calendar," and if it is defamatory it does not matter in the slightest what exact shade of meaning you are to put upon the obviously defamatory statement.

That really is the whole point which Serjeant Sullivan has been engaged in putting before us. He says, first of all: The stewards ought not to have published their decision in the "Racing Calendar." If I follow him, next he says: They ought not to have published it in the "Racing Calendar" because the warning-off is generally for some corrupt or fraudulent practice; consequently, if they publish it in the "Racing Calendar," persons will think that this warning-off is for some corrupt and fraudulent practice. That argument appears to give no effect to r. 170. The stewards are empowered to warn off and to publish without giving any reason, and, if they are empowered to publish without giving any reason, nobody has any right to assume that he has been warned off for one particular reason. The stewards have authority at their absolute discretion to warn off without giving any reason. On that ground I have been unable to take any interest, beyond listening to them and endeavouring to understand them, in Serjeant Sullivan's observations about these innuendoes.

There does not seem to me to be any reason for interfering with the verdict when what are the true matters before the court come to be considered. They are, in my opinion, that this court is not a court of appeal from the decision of the stewards on matters within their jurisdiction, and also that it is quite clear that the statement published in the "Racing Calendar" was a true statement, which must necessarily involve some defamatory meaning, but a statement which, by the action of the plaintiff, the stewards were entitled to publish in the "Racing Calendar." For these reasons, the appeal must be dismissed with costs.

GREER, L.J.—I agree for two reasons. The first of them is clearly expressed in the first few lines of the second paragraph of **HORRIDGE, J.**'s judgment, which I proceed to quote as expressing my own views in this case:

"In my view, the publication in the "Racing Calendar" was necessarily true. They had warned him off, and the publication merely said they had warned him off. I do not think it falls within that class of case, where it is said that if you repeat a rumour you cannot say it is true by proving that in fact the rumour existed; you have to prove that the subject-matter of the rumour was true. I think this is rather like the case where you speak of a man having been convicted of a certain criminal offence, in which case I think you would be justified in putting in the conviction. You would not have to re-try the man."

In my judgment, anyone who knows that a man has been convicted of larceny at a criminal trial before a court of competent jurisdiction is entitled to say, without being sued for slander or libel, that that man has, in fact, been convicted. It seems to me that also in the case where a man submits to a domestic tribunal, any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, and a boy is properly expelled by the competent authority, I think that anyone can say, without being sued for slander or libel, that

A the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit to the lawful tribunals of the country. It would, in my judgment, be an extraordinary result of the law of libel and slander that if you said that a properly constituted tribunal had found a man B guilty of some wrongful act you could be sued for libel unless you could prove that that properly constituted tribunal had rightly decided on the evidence that he was guilty.

[His Lordship reviewed the facts and continued:] In these circumstances the stewards decided, not that the plaintiff should be put on the forfeit list, but that he should be warned off all racecourses under their control. In order to make that C effective they had to give notice to every course under their control, and in order to protect those who might be sending horses to be trained by the plaintiff they had to give some kind of general notice. The notice which they gave is in these terms in the Pony Turf Club "Racing Calendar":

D "As a result of an inquiry held by the stewards of the Pony Turf Club, at the Registry Office, on May 4, 1929, the following person was warned off all courses under their control in accordance with r. 170: Ernest Sawrey Cookson."

That is the name of the plaintiff, and any reader of this "Racing Calendar" was referred, if he liked to look it up, to r. 170, where he would find that the stewards had an absolute discretion to warn off all persons from courses where these rules are in force without assigning any reason for so doing. Therefore, all that they E would be entitled to suppose that this notice meant would be that, in fact, there had been an inquiry, and that for reasons which seemed adequate to the stewards of the club, they had decided that the plaintiff should be warned off.

I am satisfied beyond peradventure, if I may use the phrase, that justice has been done by the result of this case attained at the trial, and that, so far as this appeal is based on misdirection by the learned judge I think that the case is met by F a decision under Order 39, r. 6, that no substantial wrong has arisen, and that there has been no miscarriage of justice. On that second ground also I think that this appeal should be dismissed.

G **SLESSER, L.J.**—Speaking for myself I desire to keep open the question whether there was any obligation on the Pony Turf Club, or its executive committee, to give the plaintiff, in any event, an opportunity of being heard and answering the charges. As counsel for the plaintiff has pointed out, and it is a fact, where a person having a proprietary interest is deprived of that interest as in the case of a club, or a similar society, it is his right that before he suffers his proprietary loss he shall be heard, due notice being given to him, and before the committee, or the adjudicating body can come to a decision; but I am not at all sure that this is such a case. H This gentleman was in no sense a member of the Pony Turf Club. He had applied for permission to hold races under their rules, and r. 170 gave them power, with his knowledge, to warn off any person in their absolute discretion from all courses where these rules are in force, without assigning any reason for so doing. It is not at all clear to my mind that as a general proposition he had any right to a hearing in those circumstances, because I am not at all sure that they were acting in a judicial or a quasi-judicial capacity. In *Weinberger v. Inglis* (No. 2) (1) in the I Court of Appeal, SWINFEN EADY, L.J., dealing with the case of a committee who had a right to re-elect from year to year a person to be a member of the Stock Exchange, said ([1918] 1 Ch. at p. 546), and nothing was said, I think, in the House of Lords to the contrary, that, in his opinion, it was

"an ordinary act of management and administration by a governing body of an association involving exercise of discretion, but it is not a judicial or quasi-judicial act; and as the committee acted with perfect honesty and good faith, their decision cannot be questioned."

However, it is not necessary here to consider that matter, beyond leaving the question open. A

That leaves open only the question of damages for libel. As has been pointed out by my Lords, there can be no question but that the statement that Mr. Ernest Sawrey Cookson was warned off all courses under the control of the Pony Turf Club in accordance with r. 170 is true in its natural and ordinary meaning. This matter is not entirely free from authority. In *Ware and De Freville, Ltd. v. Motor Trade Association* (2) an attempt was made in a case to say that the placing of a person on the "stop list" so that persons were not allowed to trade with him meant, and would be understood to mean, that he had been guilty of unfair dealing and dishonourable conduct in his business in the motor trade, and the words would hold him up to public odium and contempt and so on. BANKES, L.J., says ([1921] 3 K.B. at p. 54): B C

"In the absence of evidence that the words complained of would be understood in some other than their ordinary meaning, they are not, in my opinion, capable of a defamatory meaning."

SCRUTTON, L.J., delivered judgment to the same effect.

Can it be said here that in the finding of the jury on the attempt to give the words something other than their ordinary meaning there has been a miscarriage of justice? The admitted innuendoes which are suggested in the statement of claim are, as I read them, two: First, that the plaintiff had been guilty of some corrupt or fraudulent practice on the turf, and that he had been guilty of fraud, or some other gross crime. That I regard, in substance, as the severe innuendo. The second one is that the plaintiff was a man of so bad a character that he was a person who ought to be excluded from all racecourses under recognised rules. In substance both these innuendoes were put to the jury by the learned judge. In the first case the jury were asked: "Did the publication in the 'Racing Calendar' mean only that the plaintiff had been guilty of some corrupt or fraudulent practice on the turf?" The jury negatived the suggestion, and I think it is difficult to see how they could have arrived at any other conclusion, because the statement which had been made in the "Racing Calendar" did not stop, as has been, perhaps, assumed at some stages of this case, with saying that the plaintiff had been warned off, but went on in terms to say that he had been warned off in accordance with r. 170. The learned judge went on to leave the second innuendo to the jury, an innuendo which in substance had been admitted by the defendants to mean that the plaintiff was an unfit and undesirable person to associate with gentlemen on the turf. On that suggested innuendo, which was also justified, the jury answered "Yes." D E F G

Although I have listened with great attention to the long and complete argument of counsel for the plaintiff, I am unable to see that there is any ground for complaint in this matter at all. The jury have found that the words mean, not in their natural meaning, but in the innuendo which is conceded that the plaintiff was an unfit and undesirable person to associate with gentlemen of the turf, and that they mean that no more and no less. Secondly, they found, attaching that meaning, that what the defendants have said is true. Speaking for myself, I agree with what I understand to be my Lord's opinion, that, when one considers the history of this case, the jury were doing nothing very unreasonable in coming to the conclusion that the Pony Turf Club in the protection of pony racing were entitled to say that the plaintiff was an unfit and undesirable person to associate with gentlemen on the turf. However that may be, that is not a matter for us, but a matter for the jury, on which I think they were fully and properly directed. I do agree with what GREER, L.J., has said, that there did appear in the case to arise some confusion between the natural and proper meaning of the words, which are obviously, and must be, true, and the question of the innuendo that he was an unfit and undesirable person. That is miles away from suggesting that there has been any miscarriage of justice here. The only miscarriage of justice which could H I

A possibly arise would be owing to that matter which did not affect the result at all, but was perfectly clear, if a new trial were to be ordered. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: Edmund O'Connor & Co.; William Easton & Sons; T. J. Robinson & Son.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

C

Re HADDEN. PUBLIC TRUSTEE v. MORE

[CHANCERY DIVISION (Clauson, J.), October 14, 15, 20, 1931]

D [Reported [1932] 1 Ch. 133; 101 L.J.Ch. 52; 146 L.T. 190;
48 T.L.R. 9; 75 Sol. Jo. 781]

Charity—Benefit to community—Gift for provision of means of public recreation—Validity—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict., c. 42), s. 6, s. 13 (2)—Preamble to Statute 43 Eliz., c. 4.

E The provision of means for public recreation, even if it is not limited to a defined area, is a charitable object.

Notes. Considered: *Wernher's Charitable Trust (Trustees) v. I.R. Comrs.*, [1937] 2 All E.R. 488.

As to when the provision of facilities for recreation is charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 229, para. 509, text and notes (i)–(k); and for case on the subject, see 8 DIGEST (Repl.) 350, 302. For the Mortmain and Charitable Uses Act, 1888, see 2 HALSBURY'S STATUTES (2nd Edn.) 910.

F Cases referred to:

(1) *Re Drummond, Ashworth v. Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 30 T.L.R. 429; 58 Sol. Jo. 472; 8 Digest (Repl.) 320, 52.

G

(2) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, 879.

(3) *Verge v. Somerville*, [1924] A.C. 496; 93 L.J.P.C. 173; 131 L.T. 107; 40 T.L.R. 279; 68 Sol. Jo. 419; 8 Digest (Repl.) 347, 282.

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(4) *Re Melody, Brandwood v. Haden*, [1918] 1 Ch. 228; 87 L.J.Ch. 185; 118 L.T. 155; 82 J.P. 128; 62 Sol. Jo. 121; 34 T.L.R. 122; 8 Digest (Repl.) 329, 114.

(5) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, 1306.

(6) *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520; 57 L.J.Ch. 564; 58 L.T. 827; 4 T.L.R. 392; affirmed sub nom. *A.-G. v. Meyrick*, [1893] A.C. 1; 68 L.T. 174; 57 J.P. 212; 1 R. 54, H.L.; 8 Digest (Repl.) 384, 776.

I

(7) *Re Nottage, Jones v. Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, 370.

(8) *Re Mariette, Mariette v. Aldenham School Governing Body*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 31 T.L.R. 536; 59 Sol. Jo. 630; 8 Digest (Repl.) 327, 98.

(9) *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, 291.

- (10) *Shillington v. Portadown Urban Council*, [1911] 1 I.R. 247; 8 Digest (Repl.) 352, *147. A
- (11) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, 889.
- (12) *Re Clifford, Mallam v. McFie*, [1912] 1 Ch. 29; 81 L.J.Ch. 220; 106 L.T. 14; 28 T.L.R. 57; 56 Sol. Jo. 91; 8 Digest (Repl.) 356, 353.
- (13) *Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276; 98 L.J.Ch. 419; 141 L.T. 295; 45 T.L.R. 504; 8 Digest (Repl.) 359, 372. B
- (14) *Blair v. Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, 865.

Originating Summons as to the validity of certain trusts of a will.

The testator by his will made on April 30, 1929, directed his trustees to set aside a certain sum C

"to be expended in some scheme or schemes to be approved by my trustees for the benefit in the cities of Vancouver and, if in the opinion of my trustees there is some equally deserving object of the nature hereinafter indicated, of Nottingham or other places, of the working people, such as playing fields, parks, gymnasiums, or other plans which will give recreation to as many people as possible, but as regards Vancouver I would not exclude some educational purpose being considered by my trustees." D

In a former clause in his will the testator created a trust of certain other moneys as follows:

"Upon trust for any scheme to be approved by my trustees of a national character excluding hospitals and works of an educational character. Without binding my trustees I should prefer a scheme which would give open-air recreation to as large a number of people as possible." E

The testator died on Feb. 14, 1931. A summons was taken out for the determination of (inter alia) the question whether the first-mentioned trusts were valid charitable trusts or were void. F

A. H. Droop for the plaintiff, the trustee of the will.

Lionel Cohen, K.C., and *Wilfrid Hunt*, for the defendants, the son and daughter of the testator, referred to *Re Drummond* (1); *Re Macduff* (2); *Verge v. Somerville* (3); *Re Melody* (4); *Goodman v. Saltash Corpn.* (5); *Re Christchurch Inclosure Act* (6); *Re Nottage* (7); *Re Mariette* (8). G

Charles R. R. Romer (*Cleveland Stevens* with him) for the testator's widow.

Stafford Crossman, for the Attorney-General, referred to *Re Foveaux* (9); *Re Macduff* (2); *Shillington v. Portadown Urban Council* (10); *Goodman v. Saltash Corpn.* (5); *Re Christchurch Inclosure Act* (6); *Houston v. Burns* (11); *Re Nottage* (7); *Re Clifford* (12); *Re Patten* (13); *Re Drummond* (1).

CLAUSON, J.—Harvey Hadden died on Feb. 14, 1931, having by his will, dated April 30, 1929, made a disposition in cl. 13 of certain moneys in certain events in the following terms: H

"Upon trust for any scheme to be approved by my trustees of a national character, excluding hospitals and works of an educational character. Without binding my trustees I would prefer a scheme which would give open-air recreation to as large a number of people as possible." I

I have not to deal now with that provision. I refer to it merely as showing that the testator was interested in the matter of popular healthy recreation. Clause 14 of his will, which is the clause I have to construe, is as follows: [His Lordship then read that clause, and continued:] The question I have to decide is whether by this clause a valid charitable trust is created. If it is, I am asked to direct a reference to chambers to settle a scheme. If it is not, I am asked to declare that the testator died intestate as to his residue.

A The clause is very awkwardly expressed. It is suggested that on its true construction it creates a trust to apply the fund for the benefit of working people without any geographical limit and without any limit or definition as to the manner of benefiting them, the reference to "playing fields, parks, gymnasiums, or other plans which will give recreation to as many people as possible," being, so it is suggested, the mere giving of instances of authorised means of benefiting the people, without excluding the adoption of any other means which the trustees may select. It is obvious that if this be the true construction of the clause, there are grave difficulties in the way of upholding the trust as a valid trust. I need refer only to *Blair v. Duncan* (14) and *Houston v. Burns* (11).

In my judgment the construction so suggested is not the correct construction. The last two lines of the clause seem to me to indicate that the direction that as regards Vancouver the trust may be extended so as to include some educational purpose implies that, save as regards Vancouver, the trust is to be limited to the provision of benefits such as "playing fields, parks, gymnasiums, or other plans which will give recreation to as many people as possible." The expression "such as," cannot, in my judgment, be read as stating merely certain examples of the benefits which can be provided. The words seem to me, in the context, to limit the benefits to playing fields, parks, gymnasiums, and other "plans" which will give recreation to as many people as possible. The expression "plans" is a curious one, but I think that I can, with the aid of cl. 13, fairly paraphrase the class of benefits which the testator authorises by cl. 14 as being benefits which supply healthy recreation mainly or chiefly in the open air, and in particular by means of the provision of playing fields, parks, and gymnasiums.

E Finding, as I thus do, that the objects of the trust are thus expressed and defined with reasonable clarity, there is nothing in the cases to which I have already referred to prevent my holding the trust to be valid; but, as it is obvious that the trust is to be permanent, the rule against the creation of a perpetuity will prevent my holding the trust valid, unless I can hold it to be charitable in the legal sense. I have been referred to a decision of BARTON, J., in Ireland in *Shillington v.*

F *Portadown Urban Council* (10). In that case it was held that the purpose of providing the means of healthy recreation for the inhabitants of a particular town was a charitable purpose. It may be suggested, however, that the fact that in that case the charitable purpose was limited to a defined area differentiates that case from the present. There does not appear to be any other reported case which I can take as a guide on the point. Reference was, however, made to the Recreation

G Grounds Act, 1859, which is undoubtedly a legislative recognition of the desirability of providing public recreation grounds and playgrounds. It was suggested that that Act necessarily implies that such a provision would be charitable. It is not, however, necessary that I should express an opinion on the point, for the Mortmain and Charitable Uses Act, 1888, s. 6, affords me a surer and clearer guide. That section enacts that Part II of the Act, which relates to assurances to charitable

H uses, shall not apply to an assurance of a limited amount of land for purposes of a park, garden, or other land dedicated or to be dedicated to the recreation of the public. That enactment seems to me necessarily to involve that in the view of the legislature dedication of land to the recreation of the public is dedication to a charitable use; and in face of that enactment I am, I conceive, bound to hold (nor am I at all reluctant so to do) that the provision of means for public recreation is a charitable object within "the meaning, purview, and interpretation" of the preamble to the Act of 43 Eliz., c. 4: (see s. 13 (2) of the Mortmain and Charitable Uses Act, 1888). In other words, I hold that the trust declared by cl. 14 of the will before me is a valid charitable trust.

I Out of respect to the arguments of counsel, I ought to add that I am of opinion that the fact that the provision of prizes and like means for the mere encouragement of sport has been held not to be a charitable purpose (see *Re Nottage* (7)) offers no obstacle in the way of my conclusion. I see no trace in the present will of a desire to encourage mere sport; the health and welfare of the working classes

is obviously the dominant object in the testator's mind. Nor can I see that any difficulty arises from the fact that the testator contemplates that the beneficiaries should be working people, that is to say, using the term in the popular though inaccurate sense, members of a social class who are not likely to have satisfactory facilities for similar recreation within the curtilages of their own houses. It is surely far too late in the day to suggest that, in so far as it may be necessary that the element of public benefit should be inherent in the trust if it is to be held charitable, that element is not secured by the direction that working people generally are to be the beneficiaries.

For the reasons which I have endeavoured to explain, I shall declare the trust expressed in cl. 14 to be a valid charitable trust, and direct a reference to chambers to settle a scheme for the administration of the trust.

Solicitors: *Charles Russell & Co.; Radcliffes & Hood, St. Barbe Sladen & Wing; Treasury Solicitor.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

ELDRIDGE AND MORRIS v. TAYLOR AND ANOTHER

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), June 8, 1931]

[Reported [1931] 2 K.B. 416; 100 L.J.K.B. 689; 145 L.T. 499;
47 T.L.R. 516]

Moneylender—Memorandum—Delivery of copy to borrower—Borrower in arrear on original loan—Variation of agreement—Failure of moneylender to deliver to borrower copy of new memorandum.

By s. 6 (1) of the Moneylenders Act, 1927, "No contract for the repayment by a borrower of money lent to him . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract . . ."

The first defendant borrower from the plaintiffs, who were registered moneylenders, a sum of money repayable in monthly instalments. The requirements of s. 6 (1) of the Act of 1927 were complied with. This defendant being in arrears with his payments, a writ was issued against him by the plaintiffs. Negotiations took place and a variation of the agreement was made whereby the first defendant and his wife, the second defendant, gave to the plaintiffs a joint and several promissory note in respect of the balance of the debt, interest and costs. A memorandum of this agreement was signed by both defendants, but no copy of it was delivered to them by the plaintiffs within seven days as required by s. 6 (1) of the Act of 1927. The amount not having been paid on the due date, the plaintiffs issued a writ to recover the same.

Held: (i) the contract sued on, although it contained an agreement to pay interest and a certain sum for costs, in addition to the obligation to pay the amount borrowed, was a contract within the meaning of s. 6 (1) of the Act of 1927; (ii) so far as the first defendant was concerned, the agreement was unenforceable owing to the failure of the plaintiffs to send him a copy of the agreement as required by s. 6 (1) of the Act; (iii) inasmuch as the wife was

A merely surety for her husband as principal, she was discharged from liability by the discharge of the debt of the principal.

Notes. Applied: *Temperance Loan Fund v. Rose*, [1932] All E.R.Rep. 690. Referred to: *Bennett & Co., Ltd. v. Smith* (1931), 47 T.L.R. 592; *John W. Grahame (English Financiers), Ltd. v. Ingram*, [1955] 2 All E.R. 320.

B As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190-191, para. 280; and for cases on the subject, see DIGEST SUPP. For the Moneylenders Act, 1927, s. 6, see 16 HALSBURY'S STATUTES (2nd Edn.) 386.

Case referred to:

(1) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 24 T.L.R. 675; 52 Sol. Jo. 551, C.A.; 12 Digest (Repl.) 220, 1617.

C **Appeal from a decision of ROWLATT, J.**

On Feb. 27, 1930, the defendant, Lancelot Taylor, had borrowed £100 from the plaintiffs, who were registered moneylenders, at 48 per cent. interest, payable by monthly instalments of £8 6s. 8d. each, commencing on March 27, 1930. The promissory note provided that on default in payment of any instalment the whole amount remaining unpaid should become due and payable forthwith. A memorandum of that contract was signed by both defendants. Default having been made in payment of the sixth instalment, the plaintiffs issued a writ against the defendant on Nov. 20, 1930, for £71 18s. 4d. As the result of negotiations between the parties, the promissory note for £91 9s. 8d. the subject-matter of the present action, was signed by the defendant and his wife, and it was agreed that the amount due under the writ was £67 13s. principal with 48 per cent. per annum interest from Nov. 17, 1930, to Jan. 31, 1931, £78 17s. 8d., and the agreed costs £12 12s., making together the sum of £91 9s. 8d.

E The plaintiffs accordingly claimed against the defendants, as makers of the joint and promissory note, for £91 9s. 8d. dated Dec. 17, 1930, payable on Jan. 31, 1931, together with interest thereon at the rate of 48 per cent. per annum in default of payment. By their defence the defendants pleaded, inter alia, that the plaintiffs had failed to deliver or send within seven days to either of the defendants as required by s. 6 (1) of the Moneylenders Act, 1927, any copy of a note or memorandum in writing of the moneylenders' contract signed by either of the defendants, and were not entitled to recover the sum claimed from either of the defendants.

The plaintiffs appealed.

Doughty, K.C., and *R. F. Levy* for the plaintiffs.

G *Hemmerde, K.C.*, and *E. Shackleton Bailey*, for the defendants, were not called on.

H **SCRUTTON, L.J.**—This is an appeal in an action brought by a firm of moneylenders to recover money lent and interest. For reasons which appeared to it satisfactory, Parliament has put moneylenders under the strictest regulations, and it is not for us to consider whether that policy is right or not. Section 6 of the Moneylenders Act, 1927, provides that certain contracts for the repayment of money lent and certain securities for the repayment of money lent shall be invalid unless a note or memorandum of the contract is made and signed personally by the borrower, and unless a copy thereof is delivered or sent to him within seven days of the making of the contract. Parliament has apparently thought that the borrower should be protected by having in his possession an exact copy of the writing to which he had agreed.

I The facts are these: the male defendant borrowed from the plaintiffs in February, 1930, £100 payable by monthly instalments of £8 6s. 8d., commencing on March 27. Like many other borrowers, the male defendant did not comply with the contract. I have no sympathy with him, but I have to administer the Act. He was continually in arrears, with the result that on Nov. 20, 1930, a writ was issued against him for £71 18s. 4d. Thereupon negotiations took place, and, as a result, a substituted agreement or a variation of the agreement was made whereby the male

defendant agreed to pay the whole amount of the debt on Jan. 31, 1931, and the second defendant, his wife also agreed to pay the amount on the same date and at the same rate of interest, the promissory note given by them stating that "we jointly and severally promise to pay" the amount. There can be no doubt that the wife was joined as a surety for her husband, but, while the promissory note was given and while the document required by s. 6 (1) of the Act of 1927 was signed by the husband and wife, no copy thereof was sent to them by the plaintiffs, as required by the section, within seven days of the making of the agreement. The amount not having been repaid on the due date, a fresh writ was issued to recover the same, but the defendants took the point that the contract was invalid, because of the failure on the part of the plaintiffs to send them a copy of the written contract. The language of s. 6 (1) of the Act is clear, that

"no contract for the repayment by a borrower of money lent to him . . . by a moneylender . . . shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract. . . ."

The contract of Dec. 17, 1930, is a contract to repay a sum of money, the greater part of which had been lent to the husband. The case thus comes within the exact words of the section. It is quite true that there is something else in the agreement, for, in addition to the obligation to pay the money lent, there is an agreement to pay interest thereon together with certain agreed costs. But the fact that there is something in the contract besides an agreement to repay the money which had been lent does not, in my opinion, take the case out of the Act. The result is that, as far as the husband is concerned, the action must fail against him owing to the failure of the moneylenders to send him a copy of the contract.

As I have said, the contract of repayment is joint and several, and if the one party cannot be sued neither can the other, therefore the husband and wife cannot be sued. Further, the wife was merely surety for the husband, and, if the debt of the principal is gone, the surety is also discharged; consequently, the action cannot be maintained against the wife. The question then may be whether the wife is not a borrower. I am inclined to think that she comes within the word "borrower," although I do not wish to be taken as deciding this. But on the point about the wife being a surety I am quite clear. ROWLATT, J., therefore, came to a right conclusion, and the appeal must be dismissed.

GREER, L.J.—I am of the same opinion. Acts of Parliament which are intended to protect borrowers against fraudulent or harsh and unconscionable moneylending contracts sometimes result in protecting fraudulent and dishonest borrowers. But if the statute has that effect we must follow its words without regard to the consequences. This is one of those exceptional cases. There is no doubt that it is a dishonest act on the part of the two defendants to refuse to pay that which they agreed to pay. The original transaction of loan appears to have been unobjectionable. There was no answer to the first action brought, and a concession was made by the plaintiffs, who were prepared to give better terms than those to which the male defendant was entitled, provided he got the additional responsibility of the second defendant, his wife. The parties were of age, they knew exactly what they were doing, and now they take the point that, because s. 6 of the Act of 1927 has not been complied with, they are not liable. The sole question is whether that section applies. In my opinion, the words are perfectly clear. The original transaction not having been carried out by the husband, an action was brought against him, and the form of the claim makes it quite plain that the action was one by moneylenders for the balance of the principal together with interest due. In those circumstances, when the plaintiffs wanted to get judgment, the agreement which we have to consider was entered into; a joint and several promissory note was signed by the two defendants; and a memorandum of that contract was signed by them as required by the Act, both parties being aware

A that they were dealing with a contract for the repayment of money by a borrower. Apparently nothing was done with regard to disposing of the action at that time, but I assume that it was an implied term that the action should not be further pursued and should be stayed. The question for us is simply this: Is this a contract for the repayment by a borrower of money lent? The action was brought because the borrower had borrowed money and because the lenders wanted to recover the amount lent. In respect of their liability this promise was made by the defendants. It is not, as it might have been, a contract under which money has been borrowed with no contract for its repayment by the borrower. So far as the male defendant is concerned, it is quite clear that it was a contract by the borrower to repay with interest money which he had borrowed. It is quite true that there were other matters in the agreement arrived at, but that does not prevent the contract being one for the repayment of money borrowed. I was for a time a little impressed by the argument of counsel for the plaintiffs that the real transaction was not an agreement for the repayment of money lent but was an agreement entered into to purchase freedom from judgment in the first action. That is an ingenious argument, but it does not deal with the real question in this case. *Hyams v. Stuart King* (1) was cited and relied on as a parallel case, but, in my view, it does not apply, for there no money was due because the betting debt could not be enforced, and the only transaction that took place which the court was asked to enforce was a transaction in which freedom from the likelihood of action by Tattersall's was bought at a certain price. That, and that alone, was the contract entered into. Here, it is clear the contract was one for the repayment by the borrower of money lent; it was a substituted promise for repayment of the very money in respect of which the action was brought, and this action was brought to recover that money.

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With regard to the female defendant I think the plaintiffs knew perfectly well that the money had been borrowed by the husband, and that to enable them to get the money from him, they insisted on the wife being added as a surety. Inasmuch as if time had been given to the principal debtor the surety would have been released, so by omitting to give the principal debtor the proper document under s. 6 of the Act of 1927 the plaintiffs having failed against the principal debtor they fail likewise against the wife as surety. For these reasons I agree, although with some regret, that the appeal must be dismissed.

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SLESSER, L.J.—I agree. The plaintiffs' claim against the defendants is as makers of a joint and several promissory note and, alternatively, for money due under a contract in writing dated Dec. 17, 1930. To that claim the defendants pleaded that no note or memorandum in writing of the contract had been delivered or sent to them within seven days of the making of the contract, as required by s. 6 of the Act of 1927. It is not disputed that no such copy was delivered or sent to the defendants. It is said, however, on behalf of the plaintiffs that the agreement made on Dec. 17, 1930, and the promissory note of the same date were the result of the compromise of an action and that there was not a contract by the borrower for the repayment of money advanced to him, and, therefore, that the transaction was outside s. 6. In my opinion, the contract is clearly one for the repayment by the borrower of money lent to him. It states the amount, which is composed of the amount unpaid under the original promissory note, together with interest, and certain costs. So far as regards the original sum on the note and interest, that clearly was the sum which was agreed to be paid by the agreement, as it had been by the original agreement made by the male defendant. To that was added a certain sum for costs. Whatever be the consideration for the making of that contract it is none the less an agreement for the repayment of money lent to the male defendant. It was argued that the words of the section are limited to a contract made at the time of the loan, and inasmuch as in this case the loan was made some time before the contract entered into by the male and female defendants, s. 6 is said to have no application. I doubt whether the section ought to be read in that

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way. No words of limitation appear in it. When the contract is for repayment of a loan the section applies. The mere fact that a new agreement was substituted, or the old agreement was varied, does not take the case out of the section. If that be so, it concludes the case against the male defendant. As to the female defendant, I think that, to the knowledge of the plaintiffs, she was clearly added as a surety and for no other purpose. We are entitled to look at the substance of the transaction, and doing so, I think it is clear that the wife was only to be liable as a surety, and if the principal debtor is not liable the surety cannot be liable either. The husband is protected from liability owing to the omission by the plaintiffs to comply with the requirements of s. 6; so, too, the wife is protected.

Appeal dismissed.

Solicitors: *Davis & Taylor; Lloyd & Davey*, for *R. E. Fieldhouse*, Manchester.

[Reported by *EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

DAWSON LINE, LTD. v. AKTIENGESELLSCHAFT ADLER FÜR CHEMISCHE INDUSTRIE OF BERLIN

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), November 16, 17, 1931]

[Reported [1932] 1 K.B. 433; 101 L.J.K.B. 57; 146 L.T. 187;
37 Com. Cas. 28; 18 Asp.M.L.C. 273]

Shipping—Bill of lading—Bill of lading signed by master on loading as required by charterparty—Understatement of weight of cargo—Shipowners' right to full receipt.

By a charterparty, freight was to be paid on shippers' weights inserted in the bill of lading, less 2 per cent. in lieu of weighing. The master was required to sign the bill of lading as presented by the charterers. The charterers presented a bill of lading in which the weight of the cargo was subsequently found to be substantially understated.

Held: the charterers were bound to present a bill of lading which was accurate as to the weight of cargo shipped, and, if that weight was inaccurate, they must make good the loss consequent on the inaccuracy, i.e., they must pay freight on the full weight delivered.

Elder, Dempster & Co. v. Dunn & Co. (1) (1909), 101 L.T. 578, and *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.* (2), [1907] A.C. 272, followed.

Notes. As to the authority of the master of a ship to sign a bill of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 411-413, para. 581; and for cases on the subject, see 41 DIGEST 402-403, 2490-2502.

Cases referred to:

- (1) *Elder, Dempster & Co. v. Dunn & Co.* (1909), 101 L.T. 578; 11 Asp.M.L.C. 337; 15 Com. Cas. 49, H.L.; 41 Digest 432, 2713.
- (2) *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.*, [1907] A.C. 272; 76 L.J.K.B. 985; 97 L.T. 143; 23 T.L.R. 677; 10 Asp.M.L.C. 465; 13 Com. Cas. 1; 51 Sol. Jo. 623, H.L.; 41 Digest 403, 2503.
- (3) *Dillon and Algate S.S. Co., Ltd. v. Livingston, Briggs & Co. and Peninsular and Oriental Steam Navigation Co.* (1895), 11 T.L.R. 312.

- A (4) *Sheffield Corpn. v. Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Com. Cas. 287; 12 Mans. 248, H.L.; 3 Digest 276, 862.
- (5) *Birmingham and District Land Co., Ltd. v. London and North Western Rail. Co.* (1886), 34 Ch.D. 261; 56 L.J.Ch. 956; 55 L.T. 699; 35 W.R. 173, C.A.; 26 Digest 222, 1747.

B **Appeal** from a decision of ROWLATT, J., on an award stated in the form of a Special Case.

By a charterparty dated Oct. 9, 1930, the Dawson Line, Ltd. (hereinafter called "the shipowners"), chartered the steamship *Lady Brenda* to the Aktiengesellschaft Adler für Chemische Industrie of Berlin (hereinafter called "the charterers") to proceed to Berdiansk to load

C "at a usual berth or berths as customary a full and complete cargo of coal tar pitch in bulk from such suppliers as charterers may direct, . . . and being so loaded shall therewith proceed with all possible dispatch to Ghent (Belgium)."

By cl. 6 it was provided:

D "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading."

By cl. 11:

E "The bills of lading shall be in the form endorsed on the Chamber of Shipping Coasting Coal Charter, 1920, and the weights shown therein shall be the shippers' weights. Such bills of lading to be signed by the master, agent, or owner of the steamer at the offices of charterers' agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in different holds or for parcels properly separated by charterers."

By cl. 14:

F "The steamer shall deliver her cargo . . . on being paid freight at and after the rate of 12s. 6d. British sterling per ton of 20 cwt., or 1,015 cwt. on bill of lading weight less 2 per cent. in lieu of weighing, but receivers to have the option (which must be declared in writing before breaking bulk) to pay on delivered weight, in which event cargo to be weighed on board or alongside by official weighers. Consignees paying all expenses, but owner or agent having liberty to provide check clerk at steamer's expense. . . ."

G The steamship loaded a full and complete cargo of coal tar pitch at Berdiansk, the total weight of which, according to the shippers, was approximately 4,476 English tons. One bill of lading was issued for the whole cargo, and this quantity was inserted in the bill of lading. The master of the *Lady Brenda* was not satisfied that the quantity stated in the bill of lading was accurate, as, according to the draught of the steamer, he calculated that a larger quantity of cargo had been shipped. On Nov. 9, 1930, the day when the loading was completed, and the bill of lading was dated, the master addressed a letter of protest to the shippers in the following terms:

H "Referring to the bill of lading I signed to-day, I beg to call your attention to the fact that by the steamer's draught the quantity of cargo shipped must exceed the quantity stated on the bill of lading. If at the port of discharge this is found to be the case the receivers are to be held responsible for the freight on the total quantity discharged. I am reporting this matter to my owners."

I The master added at the foot of the bill of lading the words, "Weight, quality, and quantity unknown to me." Before the arrival of the *Lady Brenda* at Ghent the charterers, who were also the receivers, gave notice to the shipowners that they would pay freight on the bill of lading quantity less 2 per cent. The shipowners

were not prepared to accept freight on the quantity stated in the bill of lading in view of the information received from the master. The charterers advised the shipowners' agents that, if it should be ascertained that the quantity stated on the bill of lading was a mistake, they would pay freight on the ascertained quantity less 2 per cent. The shipowners, therefore, made arrangements to have the cargo officially weighed, and, this having been done, the outturn was 4,608 English tons—132 tons more than shown by the shippers' weight. Thereupon the charterers admitted that the bill of lading weight was inaccurate, and, without any admission of liability and without prejudice, paid to the shipowners the cost of the weighing and also freight calculated on the official outturn weight, but they deducted therefrom 2 per cent., namely, £57 12s. 6d., which was the amount in dispute between the parties. A
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The arbitrator found as a fact that the bill of lading quantity was inaccurate, and that the quantity shipped was 4,608 English tons, and not 4,476 English tons, but he awarded, subject to the opinion of the court, that the shipowners were not entitled to recover the 2 per cent. deducted—£57 12s. 6d.—so that nothing was due from the charterers to the shipowners. The question for the opinion of the court was whether, on the true construction of cl. 14 of the charterparty, the shipowners were entitled to be paid freight on the delivered weight of the cargo or on the delivered weight less 2 per cent. ROWLATT, J., upheld the award of the arbitrator. C
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The shipowners appealed.

Le Quesne, K.O., and *Carpmael* for the shipowners.

Sir Robert Aske for the charterers.

SCRUTTON, L.J.—This case has now been fully argued, and matters have been brought to the attention of the court which apparently were not before ROWLATT, J. In the circumstances, I think that he came to a wrong conclusion. E

The difficulty arose from the fact that, in respect of a cargo of coal tar pitch, a wrong weight was inserted in the bill of lading, coupled with this, that, in the charterparty, there is a clause that freight may be paid on the bill of lading weight, less 2 per cent. in lieu of weighing, with an option to the receiver to pay on delivered weight, in which case he pays the cost of weighing. The question raised is what is the position when the bill of lading states the weight, and on the cargo being weighed it is found that the bill of lading weight is substantially wrong. F

This clause about paying freight on the bill of lading weight, less 2 per cent. because the cargo is not weighed on delivery, is one that has been in existence for a long time. One of its justifications is that, if the shipowner has to weigh the cargo, he is obliged to keep the ship longer than he otherwise would, and if he is not required to weigh he allows the receiver to pay freight on the bill of lading weight, less 2 per cent., in order that he may get his ship away earlier. An instance of the operation of the practice may be found in *Dillon v. Livingston and Peninsular and Oriental Co.* (3). The Peninsular and Oriental Co. received every year in Bombay 50,000 tons of coal. It was no advantage to them to get the coal unloaded quickly, as they always had large stocks. They were quite content to pay freight on the delivered weights; but as the ship wanted to get away as soon as possible, the master asked the Bombay agents of the company to give the ship a speedy discharge by waiving their right to have the cargo weighed. A question arose whether the master had authority to make that bargain, and the evidence was that the company had always had the alternative offered them of having the cargo weighed, which would involve keeping the ship longer, or only to pay freight on the bill of lading weight less 2 per cent. The evidence about coal was that the average shortage on the outturn was 1 per cent. In this case, what the ship complains of is that it has had to weigh the cargo and has not saved time, and the receivers say that they are liable to pay freight less 2 per cent. on cargo less than that actually carried. ROWLATT, J., thought that it looked wrong that the ship should be paid freight on less than the cargo actually delivered. G
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By the charterparty, the charterers have contracted to supply a full cargo of

A coal tar pitch at Berdiansk from such suppliers as the charterers might direct. The charterers are to get the cargo from the suppliers whom they nominate. The charterers are to put the cargo on board, and the charterparty provides, by cl. 11, that

B “The bills of lading shall be in the form endorsed on the Chamber of Shipping Coasting Coal Charter, 1920, and the weights shown therein shall be the shippers’ weights.”

The shippers in this case were the agents of the charterers to supply the cargo, and by the charterparty (cl. 11) the bills of lading were to be signed

C “by the master, agent, or owner of the steamer at the offices of charterers’ agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in different holds or for parcels properly separated by charterers.”

The steamship *Lady Brenda* having loaded the cargo of coal tar pitch at Berdiansk, the master, owing to the draught of the ship, thought from the start that there was more cargo on board than that shown by the shippers’ weight. D Accordingly he put on the bill of lading: “Weight, quality, and quantity unknown to me.” He was, however, there to sign the bill of lading with the shippers’ weight stated thereon, though he suspected that it was wrong. The shipowners said that they would weigh the cargo on discharge and they did so, the quantity delivered at Ghent being found to be 4,608 tons, that is, 132 tons more than the shippers’ weight. There is no suggestion of fraud. The charterers recognised that something ought to be done, but what they did, they did without prejudice; they paid E not on the bill of lading weight, but on the delivered weight, from which, however, they claimed to make the 2 per cent. deduction, because they had not asked the ship to weigh. To that the shipowners objected.

Before ROWLATT, J., it does not appear to have been argued what was the effect of the clause in the charterparty by which the master had to sign the bills of lading F with the shippers’ weights. That question has been discussed in two cases, both in the House of Lords, which, in my view, show that the view taken by ROWLATT, J., was erroneous. In the later of the two cases (*Elder, Dempster & Co. v. Dunn & Co.* (1)) it appears that the charterer presented a bill of lading with wrong marks, in consequence of which the ship got into difficulties through not delivering the goods according to the marks. The House of Lords held that such a tender of bills G of lading by the charterer involved the obligation on the charterer to indemnify the ship against the damage that had been thereby caused. A somewhat similar point arose in *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.* (2). There, also, the master had to sign bills of lading as presented. The charterers presented a bill of lading which made the shipowners liable for negligence, by which the shipowners were exposed to liability. The shipowners claimed to be indemnified by the charterers in H respect of the injurious consequences following on the presentation of the bill of lading not in accordance with the charterparty. The House of Lords held that the charterers were liable to indemnify the shipowners. In these cases I was counsel for the successful parties, the shipowners, and I remember that considerable discussion took place as to the lines on which the claim to indemnity should be put. Some of the judges said that the charterers were liable on two grounds. The first of I these was that a right to indemnity followed from the terms of the charterparty because it required the master to sign the bills of lading in a particular form, and, consequently, that the charterers must be liable if loss followed in consequence of presenting inaccurate bills of lading. The second ground has nothing to do with the charterparty, but turns on the principle stated in *Sheffield Corpn. v. Barclay* (4) and *Birmingham and District Land Co., Ltd. v. London and North Western Rail. Co.* (5). This is that a mere request from the charterers, involving as it did the shipowners in a liability in which otherwise they would not have been involved, raised the implication of an indemnity against those consequences. Some judges

took the one view, others the other; and some judges based their decision on both views. A

In this case, it is sufficient to say that, as the master was required to sign the bills of lading as presented to him, the charterers were bound to present an accurate bill of lading as to the weight shipped. The shippers were the charterers' agents to supply the cargo and present the bill of lading; they presented an inaccurate bill of lading with consequent loss. The charterers must make good that loss consequent on the presentation by their agents of the inaccurate bill of lading. B

Counsel for the charterers pointed out that there are clauses in the Schedule to the Carriage of Goods by Sea Act, 1924, which affect the question. In my opinion, it is unnecessary to consider them, as the Act does not apply to charterparties, and the liability in this case is a liability arising from the charterparty and the provision therein that the bill of lading is to be signed by the master, as presented by the charterers' agents. The result at which we arrive, I am glad to think, fits in with the commercial aspect of the case. For the charterers to claim the deduction of 2 per cent. from the freight when the ship was not saved weighing is wrong. C

For the reasons I have given, the appeal must be allowed, and the shipowners entitled to recover the sum claimed.

GREER, L.J.—I have come to the same conclusion as my Lord, that this appeal should be allowed, but not without encountering a number of difficulties. My only reason for giving a separate judgment is that I am anxious that nothing should be said which might throw doubt on one of the fundamental principles of our law, namely, that where parties agree on a written form of words to regulate their contractual obligations, those obligations are to be found in that document, and the court will not lightly weaken its effect by reading in qualifications or implied understandings inconsistent therewith. It seems to me, especially at the present day, most important, that there should be certainty with regard to the law. If this case depended solely on the words used in the charterparty, I should have come to the conclusion that the shipowners, by the express terms of the charterparty, have agreed to accept freight measured by the bill of lading weight, and that there is nothing in the charterparty from which there can be implied an exception to that obligation. But I agree that the position may be altered by reason of some collateral contract between the parties, and I regard the decisions in *Elder, Dempster & Co. v. Dunn & Co.* (1) and *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.* (2) as meaning this and no more, that, if the charterer or some person for whom he is responsible presents a bill of lading to the master, which the latter is bound to sign as part of the terms of the contract, there may be implied from the act of presenting the bill of lading, taken together with the terms of the contract, a warranty of the correctness of the figures, description or marks stated in the bill of lading. D E F G

The only question which is not without difficulty in the case is whether, having regard to the terms of the charterparty, we are entitled or bound to treat the charterers as presenting the bill of lading for signature. At one time in the course of the argument, I was inclined to think that the charterers could not be so treated, but counsel for the shipowners has called attention to the language used in several clauses of the charterparty which has led me to the conclusion that it is right in this case to treat the suppliers when they presented the bill of lading for signature as the agents of the charterers. By cl. 1, the steamship is to H

"load at a usual berth or berths as customary a full and complete cargo . . . from such suppliers as charterers may direct." I

That means that the charterers have undertaken that they will direct other people to perform the obligation they themselves have undertaken to load the ship. That view of the contract is confirmed by cl. 6, which contains these words: "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading"—again indicating that, for the purpose of the performance of this charterparty, whoever, in fact, brings the cargo to the ship to be put on board is to do this on behalf of the charterers. Clause 11 contains a reference to the bill of

A lading being signed by the master, agent or owner of the steamer at the offices of the charterers' agents, further indicating to my mind that the charterers were the persons who, by their agents, were loading the vessel and who presented the bill of lading to the master for signature.

In these circumstances, it seems to me that this case is covered by the two decisions to which I have referred. It does not seem to me to matter whether the right view is that the freight should first be paid and thus that there should be a counter-claim for breach of contract. That would be an unbusinesslike way of dealing with the question. As I understand, the arbitrator was asked to decide the question of principle, namely, whether the loss should be borne by the one party or the other, subject to our view. Our view is that it should be borne by the charterers and not by the shipowners.

C **SLESSER, L.J.**—I agree that this appeal should be allowed. For myself, I am not conscious of any substantial variation of reasoning between my Lords in the judgment they have delivered. But if there be any question whether this decision is to depend on proceedings collateral to the charterparty, namely, the presentation of the bill of lading, or on the argument that the decisions in *Kruger & Co. v. Moel Tryvan Ship Co., Ltd.* (2) and the earlier case of *Elder, Dempster & Co. v. Dunn & Co.* (1) establish that, construing cl. 11 alone, apart from any other circumstances, the obligation in that clause that the weights shall be the shipper's weights, involves necessarily a right to indemnity from the charterer, I prefer to limit the grounds for decision in this case to those stated by GREER, L.J., and to leave open the wider question, if there be one, as to the effect of cl. 11, apart from any other circumstances.

Appeal allowed.

Solicitors: Middleton, Lewis & Clarke, for Downing & Handcock, Cardiff; W. & W. Stocken.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

RIGBY v. WAUGH'S EXECUTORS

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.JJ.), March 27, 1931]

[Reported 100 L.J.K.B. 259; 145 L.T. 137]

H *Agriculture—Agricultural holding—Notice to quit—Contract of sale of holding—Tenant informed of contemplated sale—Notice to quit acknowledged and possession promised as demanded—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 26 (1).*

I On Feb. 11, 1929, the landlords of an agricultural holding wrote to the tenant a letter in which they said: "We contemplate selling the property, and, therefore, give you notice to give up possession on" certain specified dates. The tenant replied: "I beg to acknowledge the receipt of . . . the notice to quit. We will give you possession" on the dates named.

Held: the tenant was informed by the landlords in their letter that they were contemplating a sale, and he must be taken to know the provisions of the Agricultural Holdings Act, 1923, s. 26 (1), and, therefore, when he wrote accepting the notice and stating that he would act on it, he must be taken to agree that the notice should be valid within s. 26 (1), and so the notice was good and the tenant was entitled to compensation for disturbance under s. 12 of the Act.

Notes. The Agricultural Holdings Act, 1923, was repealed by the Agricultural Holdings Act, 1948. See now s. 30 of the Act of 1948. A

As to notices to quit agricultural holdings, see 1 HALSBURY'S LAWS (3rd Edn.) 280 et seq.; and for cases see 2 DIGEST (Repl.) 8 et seq. For Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 25.

Case referred to:

(1) *Blay v. Dadswell*, [1922] 1 K.B. 632; 91 L.J.K.B. 739; 127 L.T. 6; 66 Sol. Jo. 439; 20 L.G.R. 221; 86 J.P.Jo. 65, C.A.; 2 Digest (Repl.) 14, 59. B

Appeal under s. 16 (4) of the Agricultural Holdings Act, 1923, from a decision of HIS HONOUR JUDGE MCCLEARY, sitting at the County Court at Settle, Yorkshire, on a Case Stated by an arbitrator on a question of law.

The plaintiff, George William Rigby, was a yearly tenant of a holding consisting of a farm and farmbuildings situated near Stackhouse, Settle, Yorkshire, and the defendants Andreas Clive Telford Firth Waugh and Helen Beatrice Harrison, the executors of the late Mrs. Lucy Waugh, were the landlords of the holding. On Feb. 11, 1929, the landlords wrote to the tenant the following letter: C

"As executors of the late Mrs. Lucy Waugh, we contemplate selling the property, and we, therefore, have no alternative but to give you notice to give up possession of the farm and farmbuildings situate near Stackhouse, Settle, on the 14th day of February, 1930, as to the land, and on the 12th day of May, 1930, as to the buildings, and we, accordingly, give you such notice." D

On March 1, 1929, the tenant wrote to the executors the following reply:

"I beg to acknowledge the receipt of your letter of Feb. 11 and the notice to quit. We are sorry to leave, and will give you possession of farm and buildings on Feb. 14 and May 12, 1930." E

On May 28, 1929, the landlords entered into a contract for the sale of the premises to John William Dugdale and Louie Sutton. The tenant quitted the premises on the dates mentioned in the notice to quit. He served notice of intention to claim compensation for disturbance, and particulars of the claim were delivered. The tenant incurred some loss or expense directly attributable to the quitting of the holding. The gross rent of the premises was £173. It was agreed between the parties (i) that the landlords had taken possession of the farm from the tenant, and that, if the award should be in the landlords' favour, they should not make any claim against the tenant on the ground that the tenancy was never properly terminated, and, therefore, that the tenant left the farm voluntarily; and (ii) that the landlords should not be prejudiced in the arbitration by certain negotiations that had taken place between the parties or by their having taken possession as above-mentioned, but that they should be entitled to contend in the arbitration that the tenancy was not determined by a valid notice to quit, and, therefore, that the tenant was not entitled to compensation for disturbance. F

It was contended on behalf of the tenant that he was entitled to receive from the landlords under s. 12 of the Agricultural Holdings Act, 1923, one year's rent of the holding as compensation for disturbance notwithstanding the provisions of s. 26 of the said Act, on the ground that by his letter of March 1, 1929, he agreed in writing prior to the contract of sale that the notice to quit of Feb. 11, 1929, should be valid. It was contended on behalf of the landlords that in view of the contract of sale the notice to quit was rendered null and void by s. 26 (1), and that the tenancy, not having been validly terminated by reason of such notice, the tenant was not entitled to compensation for disturbance under s. 12. The learned county court judge held that there was no evidence that the tenant agreed in writing prior to the contract for sale that the notice he had received should be valid. His letter of March 1, 1929, was merely an acceptance of the notice to quit. In order to constitute an agreement that the notice should be valid it would be necessary to show that the tenant knew that he had the right to regard the notice as null and void, and there was no evidence that the tenant had such knowledge. Indeed, it was extremely G H I

A improbable that the tenant had any knowledge of the provisions of s. 26 (1) of the Act. The learned judge held that the contention of the landlords was sound in law and that the tenant was not entitled to compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923. The tenant appealed.

W. Hanbury Aggs for the tenant.

B *H. E. Kingdon* for the landlords.

SCRUTTON, L.J.—This appeal raises a short point on the application of s. 26 of the Agricultural Holdings Act, 1923, to the particular facts of this case. Section 12 of the Act, replacing various sections in earlier Acts, gave a tenant of a holding, whose tenancy was terminated by a notice to quit given by a landlord, a right to compensation, save in the eventualities enumerated in sub-s. (1) (a) to (f). The compensation was in one respect conventional, namely, that if there was any damage it was assessed at one year's rent, which, in certain circumstances, might be increased to an amount not to exceed two years' rent. That right existing, by s. 26 (1) of the Act:

D "On the making of any contract for sale of a holding or any part of a holding held by a tenant from year to year any then current and unexpired notice to determine the tenancy of the holding given to the tenant either before or after the commencement of this Act shall, if the contract for sale is made by the person by whom the notice to quit was given, be null and void unless . . ."

E Then follows an exception which for the moment I will omit. The section refers to a valid notice to quit given by the landlord of the holding to the tenant, and to a subsequent sale by the landlord of the holding. It provides that in such a case a valid notice to quit given before the contract for sale shall be null and void.

F In *Blay v. Dadswell* (1) this court had to consider s. 26 (1), one point being whether the section applied when the landlord sold to the tenant and not to a third party. One of the rules applicable for construing the section was that the court should see what was the mischief that the legislature intended to remedy, yet I think every member of the court in that case said that he did not understand what was the mischief that it was intended to remedy, and, that being so, the court must look solely at the words of the Act and construe them according to the language used. This much is clear from the words of the section, so far as I have read them. Parliament for some reason has enacted that if a valid notice to quit such a holding is given and afterwards the landlord contracts to sell the holding, whether to a third person or to the tenant, the previous notice to quit shall be null and void, the result of which would be apparently that the tenant could stay on till he received a valid notice to quit. To continue reading the subsection, there then follows the exception:

G "unless the tenant has . . . prior to such contract of sale, by writing, agreed that such notice shall be valid."

H It may be that when Parliament inserted that exception they were considering the provisions of s. 12 of the Act, which give the tenant of such a holding a right to compensation where the tenancy of the holding is terminated by a notice to quit given by the landlord. The only question in the case now before the court is whether this tenant has before the contract of sale, by writing, agreed that such notice shall be valid.

I The landlords, before they gave the notice to quit, were expecting to sell the holding and at the proper time to give notice to terminate the tenancy. The landlords wrote this letter to the tenant:

"As executors of the late Mrs. Lucy Waugh, we contemplate selling [the property] and we, therefore, have no alternative but to give you notice to give up possession of the farm and farmbuildings situate near Stackhouse, Settle, on Feb. 14, 1930, as to the land and on May 12, 1930, as to the buildings and we, accordingly, give you such notice."

Those dates are agreed to be the proper dates for which, in Yorkshire, to give notice to terminate an annual tenancy. The notice did not continue "And I refer you to s. 26 (1) of the Agricultural Holdings Act, 1923, and I invite you to say whether you agree that this notice shall be valid." The tenant answered that notice in this way: A

"I beg to acknowledge the receipt of your letter of Feb. 11 and the notice to quit. We are sorry to leave, and will give you possession of farm and buildings on Feb. 14 and May 12, 1930." B

The only question in this case is: Was that an agreement by writing that the notice should be valid?

It does not so state in those express words, but it appears to me quite clearly to be an acceptance of the notice by the tenant as one upon which he will act, and he states that he will act upon it by giving the landlords possession of farm and buildings on Feb. 14 and May 12, 1930. That seems to me to be an agreement, in the business sense that the landlord's notice shall be valid. The tenant accepts it as a good notice; he states that he has been given the notice, and that he proposes to act upon it. The learned county court judge came to an opposite conclusion. He said C

"In order to constitute an agreement that the notice should be valid, it would be necessary to show that the tenant knew that he had the right to regard the notice as null and void. There is no evidence that the tenant had such knowledge. Indeed I should think it is extremely improbable that the tenant had any knowledge of the provisions of s. 26 (1) of the Act." D

I am sorry that I cannot agree with the learned county court judge. Everyone must be taken to know the law, every landlord and tenant, under the Agricultural Holdings Act, 1923, must be taken to know the law. Notice is given to this tenant by his landlords: "We are contemplating a sale." By the terms of s. 26 (1) of the Act of 1923, if a contract of sale is made, a notice to quit that has been given, which was quite good on the face of it, will become null and void unless the tenant agrees in writing that it shall be valid. When a tenant who is told that a sale is contemplated and is given notice to quit writes back: "I will give you possession of the farm and buildings on the named dates," it seems to me that he is agreeing that such notice shall be valid. The appeal, therefore, will be allowed with costs both here and before the learned county court judge, and the case will be remitted to the learned arbitrator to deal with the matter on the finding that the letter of the tenant is an agreement that the notice to quit given by the landlords shall be valid. E F G

GREER, L.J.—I agree. This appeal raises two questions of construction—one as to the meaning of s. 26 (1) of the Agricultural Holdings Act, 1923, and the other as to the meaning of two letters passing between landlords and a tenant farmer. On Feb. 11, 1929, notice to quit was given by the then landlords of the tenant, the executors of Mrs. Waugh, and that, if nothing more had to be considered, was a perfectly valid notice accepted as a valid notice to quit upon the dates named. At the time they gave the notice to quit the landlords contemplated selling the holding, and, as they appear to have been on good terms with their tenant, they told him so in the letter by which they gave him notice to quit. The tenant then wrote in answer his letter of March 1, 1929: H

"I beg to acknowledge the receipt of your letter of Feb. 11 and the notice to quit. We are sorry to leave, and will give you possession of farm and buildings on Feb. 14 and May 12, 1930." I

There had been no sale at the time these two letters were written, but a sale took place at a subsequent date before what would have been the dates for the expiration of the notice to quit if there had been no sale. The question we have to determine is whether, within the meaning of s. 26 (1), by his letter the tenant has, and prior to the contract of sale, by writing agreed that the notice shall be valid.

A It is remarkable that what the statute contemplates is some agreement as to the validity of a notice given before the date of the contract of sale, and, inevitably, before the tenant has any knowledge whatsoever that there is going to be a sale. The statute certainly contemplates that there may be such an agreement made between landlord and tenant at a time when neither of them are thinking of a sale at all. It does seem to me, treating the question as one, not between lawyers, but as a question as to the construction of documents which have passed between landlord and tenant, and treating this Act as dealing with the relation of landlord and tenant, that what s. 26 (1) means is this—if there is a notice to quit, and nothing more is said about it except that the tenant writes: "I have received your notice," then there would be no acceptance of the notice as a valid notice to quit, but if the tenant goes beyond that and writes: "I have received your notice to quit, and will, in accordance with that notice, give up the holding on the dates named," then that would, in my judgment, in itself be a case in which the tenant had, prior to a contract of sale, agreed that such a notice should be valid, namely, agreed that it should be binding upon him to leave, in accordance with the notice on the dates mentioned.

B This case is much stronger than that, because by the terms of the notice to quit given by the landlord, the tenant is told that a sale is very likely to take place, and, having learnt that, he writes that, though he is sorry to go, yet at the same time he will go. In my opinion, he meant by that—whether a sale takes place or does not take place, I accept this as a notice under which I have to go out on the respective dates, Feb. 14 and May 12, 1930, and, therefore, that he has done what is necessary under s. 26 (1) to prevent the notice from being an invalid notice and null and void. I cannot help thinking, though it is very difficult to know exactly what was in the mind of a legislative body, that what was intended here was that the new purchaser should not be entitled to say that the notice which had been given was a null and void notice, and deprive the tenant of his right to compensation, when the tenant had accepted the notice to quit, as a good notice, and acted upon it, and made his arrangements for some other farm, which, as a matter of fact, was what happened in this particular case. I agree that this appeal should be allowed.

SLESSER, L.J.—I agree.

Appeal allowed.

Solicitors: *Ellis & Fairbairn; Waterhouse & Co., for Charlesworth & Co., Settle.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

Re SAVILE SETTLED ESTATES. SAVILE v. SAVILE

[CHANCERY DIVISION (Maugham, J.), January 30, 1931]

[Reported [1931] 2 Ch. 210; 100 L.J.Ch. 274; 145 L.T. 17]

Settled Land—Powers of tenant for life—Variation of lease—Extension of term—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 59 (1).

A tenant for life, who had granted two mining leases, in 1924 and 1928, asked whether, under the Settled Land Act, 1925, he had power to substitute one hundred years in each term for sixty years.

Held: s. 59 (1) of the Act was not limited to cases where the variation or modification would at common law effect a surrender and re-grant; it conferred a power to execute documents in a certain form which the tenant for life could have executed in another form as a result of a surrender or re-grant; it related to the widest possible variation; and, therefore, the tenant for life had power to vary the terms.

Notes. Considered: *Re Bruce, Brudenell v. Brudenell*, post, p. 638. Considered and applied: *Re Arkwright's Settlement, Phoenix Assurance Co. v. Arkwright*, [1945] 1 All E.R. 404.

As to powers of a tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 704 et seq.; and for cases see 40 DIGEST 748 et seq. For Settled Land Act, 1925, see 28 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

- (1) *Donellan v. Read* (1832), 3 B. & Ad. 899; 1 L.J.K.B. 269; 110 E.R. 330; 31 Digest (Repl.) 238, 3724.

Summons.

In 1924 the plaintiff, in exercise of his powers as tenant for life of the settled estates, under an indenture of re-settlement, dated Jan. 30, 1884, granted a mining lease for sixty years, and in 1928 another lease for the same term to other lessees in respect of other parts of the property. This summons was issued to determine (inter alia) whether, under the Settled Land Act, 1925, he had power to vary those leases by substituting the term of one hundred years, the maximum term permitted by s. 41 of the Act, for the terms originally granted.

Topham, K.C., and *R. F. Roxburgh* for the plaintiff.

G. R. B. Whitehead for the infant son.

Droop for the trustees.

MAUGHAM, J.—It appears that the tenant for life under this settlement granted certain mining leases for the period that was then authorised by the Settled Land Act in force, namely, sixty years. Two leases in particular are mentioned in the summons, and the tenant for life is desirous now of altering those leases—to use a popular expression—by turning them into leases for terms of one hundred years each from the date when the leases took effect. The Settled Land Act, 1925, contains two sections which are material in considering whether the tenant for life has the right to do this. Section 52 (1) provides that:

“A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, or a re-grant of any land granted in fee simple, whether under this Act or not, in respect of the whole land leased or granted or any part thereof . . .”

Section 59 provides—and this section was new in the Act of 1925—that:

“A tenant for life may, at any time, by deed, either with or without consideration in money or otherwise, vary, release, waive or modify, either absolutely or otherwise, the terms of any lease whenever made of the settled land or any part thereof, or any covenants or conditions contained in any grant in

A fee simple whenever made of land with or subject to a reservation thereof of a rent which is or forms part of the settled land, and in either case in respect of the whole or any part of the land comprised in any such lease or grant, but so that every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Act if the lease had been surrendered, or the land comprised in the grant had never been so comprised, or had been re-granted."

B

It is apparent, in my opinion, that s. 59 (1) is dealing only with the form of the document which the tenant for life may enter into, because it is clear from the final words of the subsection declaring that the lease or grant shall, after variation, release, waiver or modification, be such a lease as might have been granted after a surrender, that the draftsman of the Act is considering that what he is authorising might have been done under s. 52 (1).

C

In my opinion, s. 59 (1) is not limited to cases where the variation, release, waiver or modification will at common law effect a surrender or re-grant. This section is conferring a power on the tenant for life to execute documents in a particular form which he could have executed in another form as the result of the surrender or a re-grant of the land previously dealt with. It relates to the widest possible variation, release, waiver or modification, including cases in which only part of the land comprised in the old lease or grant is the subject of those alterations.

D

Speaking generally, I think there is no doubt that the law, as stated in HALSBURY'S LAWS OF ENGLAND, 2nd Edn., vol. 20, p. 271, para. 303, is that any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy, and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder. I would add that it may result from the mere alteration in the amount of rent payable, as seems to have been held in *Donellan v. Read* (1). The section now under consideration is not concerned with that matter at all; it is only conferring on the tenant for life power to do, in a particular form, that which might have been done in another way.

E

In my opinion, therefore, Lord Savile, the plaintiff, as the tenant for life, has power, with or without consideration in money or otherwise, by deed, to vary, release, waive or modify, either absolutely or otherwise, the terms of either of the two leases mentioned in the summons, including the length of the leases there in question, provided that the leases shall, after such alteration, be leases for terms not exceeding one hundred years from the date when they respectively took effect. I do not propose in the declaration to say it is done under s. 59, but I propose to say that the tenant for life has power to execute such documents.

F

I should add that, in my opinion, an alteration of an existing lease, so that it will operate for a term extending beyond the original term, can only operate in law as a surrender of the old lease and a grant of a new one, and I am disposed to think the wiser course would be, after the declaration I have mentioned, to add this sentence:

G

"that the declaration is made without prejudice to the question whether the leases as altered will not, at common law, operate by way of surrender and re-grant."

Solicitors: *Raymond-Barker, Nix & Co.; Attree, Johnson & Ward.*

H

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

I

Re MAY. EGGAR *v.* MAY

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 16, 1931]

[Reported [1932] 1 Ch. 99; 101 L.J.Ch. 12; 146 L.T. 56;
48 T.L.R. 3; 75 Sol. Jo. 741]

Will—Condition—Legacy on condition of not being Roman Catholic—Incapacity to choose religion before age of twenty-one—"Becoming" a Roman Catholic—Continuance in Roman Catholic religion after reaching twenty-one.

By her will the testatrix gave £5,000 to trustees to invest and accumulate the invested income and to pay the income to her nephew, M., on his attaining the age of twenty-four years, "provided that he shall not be a Roman Catholic at my death, or, being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic," with a gift over if that gift failed. The testatrix died in 1915, when the nephew was eleven years old. He had been brought up and confirmed in the Roman Catholic faith, and had always remained of that faith. He attained twenty-one on June 16, 1927, and the age of twenty-four on June 16, 1930.

Held: on the true construction of the will the testatrix intended that M. should have a choice; he was not in a position legally to determine his religion until he was aged twenty-one and so was not able to make an effective choice at the date of the death of the testatrix or within twelve months thereafter; but by continuing to be a Roman Catholic after he had attained the age of twenty-one, when he could make an effective choice, he then "became a Roman Catholic" within the proviso, with the result that his life interest failed and the gift over took effect.

Notes. As to conditions in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 103 et seq. and 363 et seq.; and for cases see 44 DIGEST 434 et seq.

Cases referred to:

- (1) *Re May, Eggar v. May*, [1917] 2 Ch. 126; 86 L.J.Ch. 698; 117 L.T. 401; 33 T.L.R. 419; 61 Sol. Jo. 577; 19 Digest 529, 3907.
- (2) *Re Sandbrook, Noel v. Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 Sol. Jo. 721; 28 Digest 336, 2030.
- (3) *Patton v. Toronto General Trusts Corp.*, [1930] A.C. 629; 99 L.J.P. 213; 143 L.T. 572, P.C.; Digest Supp.

Appeal from an order of LUXMOORE, J.

By cl. 7 of her will the testatrix bequeathed £5,000 free of all duties to her trustees upon trust at their discretion to invest, and, until her nephew, the defendant, Michael May, should attain the age of twenty-four years, or the trust in his favour should become incapable of effect, to accumulate and pay the income after his attaining the age of twenty-four years to him for his life

"provided that he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic."

By cl. 8 it was provided that from and after the determination of the trust the fund was to be held in trust for the trustees of Oxford University upon the trusts therein mentioned. The question was whether the sum was now payable to such trustees. Michael May claimed the income of the legacy and accumulations as being payable to him. His adherence to the Church of Rome had never varied. At the date of the testatrix's death, which took place on July 3, 1915, Michael May was only nine years of age, and the question arose whether he could be said to be a Roman Catholic or cease to be one within twelve months of that date. The matter came

A before NEVILLE, J., in *Re May* (1), who held that the fund was not transferable at that time, and said :

"Obviously the testatrix does not intend him to enjoy it at all if he is a member of the Roman Catholic Church,"

and that question could not be decided until he had attained to years of discretion.

B He added :

"All that I decide now is that by being baptised in the Roman Catholic Church he has not forfeited his legacy."

C Michael May was now twenty-four and claimed the income as from the date on which he attained that age as payable to him, and that it would remain so payable during the residue of his life provided there was no further change in his religion, the proviso in the will on a strict construction of the gift over not having taken effect, as being against public policy, because it tended to deter Michael May's father from performing an important part of his parental duties, namely, the bringing up of the son in his own religion, and interfered with the discretion of the court on questions relating to such bringing up: *Re Sandbrook* (2), where the testatrix gave three-fourths of her residuary estate for the benefit of two grandchildren, and provided that if at any time before the date fixed for transferring the corpus to them either should live with or be or continue under the custody, guardianship, or control of their father, or be in any way directly under his control, all benefits under the legacies should thereby cease and determine, and it was held that the condition was void as against public policy and bad on the ground of uncertainty.

E LUXMOORE, J., held in the present case that nothing was given by the will until Michael May attained the age of twenty-four, but the proviso would have effect from the date of the gift. His Lordship was prepared to hold, following *Re Sandbrook* (2), that the proviso was void, and for the same reason. But that did not dispose of the matter. Michael May took nothing until he was twenty-four, and then only until he should "after my death become a Roman Catholic." His Lordship had no doubt on the true construction of the gift that the testatrix did not mean Michael May to receive any benefit if he was, in fact, a Roman Catholic at the time when it was receivable by him. The testatrix not merely made the proviso against transition to Roman Catholicism—obviously the words ordinarily meant that—but also provided against a liberty of choice. There could be no doubt that at the time when Michael May was entitled otherwise to receive this legacy he was a Roman Catholic. The words "until he shall after my death become a Roman Catholic" must, on their true construction, include his being so on attaining the age of twenty-four. It was admitted that he was then and still remained a Roman Catholic, and his Lordship, therefore, held that the legacy and accumulations were now payable to the Oxford trustees. Michael May appealed.

F H. B. Vaisey, K.C., and J. S. Franey for the appellant.

H F. D. Morton, K.C., and Montgomery White, for the respondents, were not called upon to argue.

LORD HANWORTH, M.R.—This case raises an interesting point upon the will of Miss Alice Mary May, a lady who made her will on Feb. 7, 1914. She died on July 3, 1915. She had a nephew, Michael May, who was born on June 16, 1906, so that he is now just over twenty-five years old, and with respect to him and also to another nephew, Gilbert George May, by cll. 7 and 9 of her will, she established a fund of £5,000 free of all duties, and placed those sums respectively in the hands of her trustees upon certain trusts. The trusts in the case of Gilbert were to be the same as the trusts in the case of Michael. She made a gift over, in the event of the gift to Michael not being effective, to the trustees of Oxford University upon certain terms and for certain purposes stated in the will, which I need not deal with at the present moment.

The question we have to determine, as LUXMOORE, J., has determined, is whether or not Michael May has, upon the terms of the will, a right to take the life interest

secured to him by the terms of the will in this sum of £5,000, which was handed A
to the trustees for investment and also for accumulation of income from the invest-
ments, so that the investments and the income followed the destination of the fund.
The will of the testatrix goes on in these terms, to provide for the payment of the
income of the £5,000 and the accumulations

"after the said Michael May shall have attained the age of twenty-four years B
to the said Michael May during his life provided that he shall not be a Roman
Catholic at my death or being a Roman Catholic at my death shall cease to be
a Roman Catholic before the expiration of twelve calendar months after my
death until he shall after my death become a Roman Catholic."

It appears that Michael May is not merely a Roman Catholic, but he has been a C
Roman Catholic from birth; at any rate, on Nov. 14, 1915, the rite of confirmation
was exercised upon him—a rite which is a very definite one of the Roman Catholic
Church—and he has been throughout his life a loyal and zealous member of the
Roman Catholic Church.

Before I come to construe the actual words of the will, the meaning of which we D
have to determine, I must refer to this. In 1917 there was a summons taken out
to determine whether or not the infant legatee, as he then was, had forfeited the
possibility of his enjoying this life interest by reason of the fact that he was a
Roman Catholic, and NEVILLE, J., said in his judgment ([1917] 2 Ch. at p. 130):

"The result to my mind is that during the time until he reaches the age of E
twenty-one he cannot in the sense meant in the will be said to be either a
Roman Catholic or not a Roman Catholic. In the eyes of this court he cannot
determine what his religion shall be until he has reached years of discretion."

Let us remember that those words are being spoken in June, 1917, when Michael F
May was just eleven years old and no more. NEVILLE, J., goes on:

"It is quite true that, if you asked a priest of the Roman Catholic Church, he
would unhesitatingly tell you the child was a Roman Catholic, but I do not
think the court has anything to do with that. The view of the court is not the F
view of the priest. Having come to the conclusion that the testatrix meant
that there was to be a choice on the part of the legatee, I think the legatee
must have an opportunity of exercising that choice."

Why does he say that the testatrix meant there was to be a choice on the part of G
the legatee? I think that is quite plain from the terms of the will, because the
proviso is

"provided that he shall not be a Roman Catholic at my death or being a Roman
Catholic at my death shall cease to be a Roman Catholic before the expiration
of twelve calendar months after my death,"

and, then: "until he shall after my death become a Roman Catholic."

Without dealing more closely with it, it would look as if there were three oppor- H
tunities given of testing whether he is an adherent of that church, first at the death
of the testatrix, secondly on the expiration of twelve months after the death, and
then "until he shall after my death become a Roman Catholic." Therefore, it
seems to me that NEVILLE, J., in construing this will, was right in saying that the
testatrix meant that there was to be a choice on the part of the legatee and no one I
can misunderstand that conclusion reached by the learned judge and supported in
this court. It does not mean that any doubt is thrown upon the original and con-
stant loyalty of the young man to the church throughout his life. What it does
mean is that the court, which in its jurisdiction is favourable to infants, is reluctant
to impute to the infant that what has been done for him and with his concurrence
is to deprive him of the material advantage which he can or might reap under the
will. Indeed *Patton v. Toronto General Trusts Corpn.* (3) ([1930] A.C. at p. 636)
approves of that course, because there the judgment of the court is that:

"the testator meant that the appellant was to have a real choice in the matter,

A and just as, in the eye of the court, the appellant was not in a position truly to determine what his religion was until he had attained his majority . . .”

In other words, the court will safeguard the interests of the infant until such time as he has reached an age when upon him must rest the responsibility of choice and definite adherence one way or the other. NEVILLE, J., finishes his judgment in this way:

B “All that I decide now is that by being baptised in the Roman Catholic Church he has not forfeited his legacy. The accumulations, therefore, will continue, and the question asked by the summons will be answered in the negative.”

The upshot of that decision is this. No definite conclusion whether the legacy had lapsed was come to at that time. The accumulations were to continue and an

C opportunity was to be given to the young man, at such an age as the responsibility fell upon him and not upon others, of determining whether or not his adherence was definite and sure to the Roman Catholic Church. The evidence is quite plain that Michael May would be sorry to have it put in doubt that he was a member of the Roman Catholic Church. He has now reached the age, not only of twenty-one, but of twenty-four. We now have to see, with that responsibility for his choice

D resting upon him, whether or not he has fulfilled the condition precedent laid down by the will “provided that he shall not be a Roman Catholic at my death”—under the decision of NEVILLE, J. He was not, in the legal sense, a Roman Catholic at the time of the death of the testatrix within the meaning of this will—

“or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death.”

E That clause does not come into operation, because within the meaning of the will he was not deemed to be a Roman Catholic at her death. Then it goes on: “until he shall after my death become a Roman Catholic.” After the death, what is he? After the death, and at a time when responsibility attaches to him, it is plain that he is a Roman Catholic. It is said that he did not become a Roman Catholic, but

F in accordance with the terms of the will and in accordance with the decision of NEVILLE, J., he has become a Roman Catholic, because he became that when the responsibility for his adherence to the church fell upon his shoulders and he became, in that sense, a Roman Catholic “after my death or until he shall become a Roman Catholic.” It is said that the duty fell upon the trustees of paying the income for his life and that that started at once as soon as he was twenty-four, but at the same

G time the negation of that duty also fell upon them, because within the meaning of the will he had become a Roman Catholic at a point of time which is subsequent to the death of the testatrix. Therefore, while from one point of view there is confirmation that the condition precedent, under which the life interest was to be paid, was fulfilled and the duty to pay it started equally at that same moment of time, the answer must be made that he had, after the death, become a Roman

H Catholic and that connoted the determination of the life interest.

For these reasons, giving the benefit of the decision of NEVILLE, J., to the young man, the terms of this will make it plain, by reason of these words “until he shall after my death become a Roman Catholic,” that these conditions precedent cannot be fulfilled. The result, therefore, is that the life interest to him fails and the gift over, as provided in the next clause, must take effect. The appeals must be

I dismissed.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree. As has been pointed out by the Master of the Rolls in popular language, this young man has been a Roman Catholic from the date of his birth, and yet fourteen years ago NEVILLE, J., in proceedings in which it must be taken there were the same parties as are now before us, decided, as I read his judgment ([1917] 2 Ch. 126), that for the purpose of this will the legatee must not be deemed to have been a Roman Catholic at the date of the testatrix's death.

That being so, it is impossible, it seems to me, for either of the parties before us to quarrel with that decision. There has been no appeal from it then or at any time afterwards. For myself, I refrain from expressing any opinion as to whether that decision can or cannot be supported. A

Appeal dismissed.

Solicitors: *Slaughter & May*; *Somerville, Philpot & Co.*, for *Morrell, Peel & Gamlen*, Oxford; *Thomas Eggar & Son*. B

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re VICKERY. VICKERY v. STEPHENS

[CHANCERY DIVISION (Maugham, J.), December 18, 19, 1930, January 21, 1931] D

[Reported [1931] 1 Ch. 572; 100 L.J.Ch. 138; 144 L.T. 168;
47 T.L.R. 242]

Executor—Liability—Loss through misconduct of agent employed to receive money—Need to prove “wilful default” of executor—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 23 (1). E

Where an executor employs a solicitor or other agent to receive money belonging to the estate in reliance on s. 23 (1) of the Trustee Act, 1925, he will not be liable for the loss of the money occasioned by the misconduct of the agent unless the loss happens through the “wilful default” of the executor, using those words as implying either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty. F

Notes. As to the liability of an executor in respect of his own acts, see 16 HALSBURY'S LAWS (3rd Edn.) 473 et seq.; and for cases see 24 DIGEST (Repl.) 700 et seq. For Trustee Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 50.

Cases referred to:

- (1) *Learoyd v. Whiteley* (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 36 W.R. 721; 3 T.L.R. 813, H.L.; 43 Digest 856, 3038. G
- (2) *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373; 74 L.J.P.C. 73; 92 L.T. 736; 54 W.R. 1; 21 T.L.R. 522, P.C.; 43 Trusts 994, 4630.
- (3) *Re Brier, Brier v. Evison* (1884), 26 Ch.D. 238; 51 L.T. 133; 33 W.R. 20, C.A.; 43 Digest 888, 3322.
- (4) *Re Trusts of Leeds City Brewery, Ltd., Leeds City Brewery, Ltd. v. Platts*, [1925] 1 Ch. 532, n., C.A.; 10 Digest (Repl.) 767, 4995. H
- (5) *Re City Equitable Fire Insurance Co., Ltd.*, [1925] 1 Ch. 407; 94 L.J.Ch. 445; 133 L.T. 520; 40 T.L.R. 853; [1925] B. & C.R. 109, C.A.; 9 Digest (Repl.) 489, 3217.

Action for breach of trust brought by two beneficiaries under the will of Emma Vickery, deceased, against the defendant, the sole executor, Jonah Stephens. I

By her will, dated Jan. 27, 1925, Emma Vickery appointed the defendant to be sole executor, directed payment of her debts and funeral expenses, and made certain specific bequests, but did not dispose of the residue of her estate. The testatrix died, a widow, on Dec. 27, 1926, and her will was proved by the defendant, who, in fact, was the draftsman of it. The plaintiffs were the two sons of the testatrix and were entitled in equal shares to the estate not disposed of by her will. The estate in question included a sum of £100 4½ per cent. war stock, as to which no question

A arose in the action, the sum of £214 14s. 5d. in the Post Office Savings Bank, and the sum of £62 4s. in savings certificates. The defendant had spent his life as a missionary in the city of London, and he was completely ignorant of business affairs. In the first instance he conceived that he could wind-up this simple estate without the assistance of a solicitor, but after one or two unsuccessful attempts to prepare an affidavit for Inland Revenue, he went to a solicitor named Henry H. Jennens, **B** who was carrying on business as Jennens and Jennens, at 189, Kentish Town Road, in the immediate neighbourhood of the defendant and also at three other places. The defendant had no particular reason, except that of proximity, to go to this firm, but he had seen the name for years on the door, and he thought that to go to a solicitor near by would tend to expedite the business. He had seen Mr. Jennens once before, but was not a friend of his. Mr. Jennens succeeded in obtaining a **C** grant of probate to the defendant on May 19, 1927. In the meantime he obtained from the plaintiff, Richard Vickery, the title deeds of a house which was part of the estate, the certificates for the war stock and for the savings certificates, and the Post Office Savings Bank deposit book and certain policies, and he also got from Mr. Vickery £20 on account of the estate duty and fees. According to Mr. Richard Vickery, when he was told by the defendant that he (the defendant) had spoken **D** to Jennens and proposed to employ him, he complained bitterly, said that the name of Jennens "stank" in the neighbourhood, and added that Jennens had been struck off the rolls in a probate case and on appeal had been suspended from practice for five years. Mr. Vickery stated that notwithstanding these warnings the defendant insisted on employing Jennens to obtain probate, and that he again violently protested. The defendant denied those assertions, and said that when he informed **E** Mr. Vickery that he had gone to Jennens, Mr. Vickery stated he was pleased, and that his mother had at one time proposed to get Mr. Jennens to make her will. His Lordship found as a fact that the statements of Mr. Vickery in this respect were not correct, and said that he believed those of the defendant. At the end of July or on Aug. 1, 1927, Mr. Vickery went to the defendant and asked him if he had heard anything about Jennens. On the defendant replying that he had heard nothing, **F** Mr. Vickery stated that he had been suspended for six months for assaulting a solicitor, but that the six months must be up since Jennens was practising again. The learned judge said that that was the first intimation that the defendant had that Mr. Jennens was not altogether a satisfactory person to employ as a solicitor, but it was to be noted that there was no special reason for thinking that Mr. Jennens was a dishonest man, whatever reflections might be made in relation to his temper or conduct. **G** However, not long after, Mr. Vickery, who had been making further inquiries with regard to Jennens, ascertained that Jennens on a previous occasion had been struck off the rolls by the Law Society, but that on appeal he had been suspended for five years, and he informed the defendant of this. On Aug. 8 the defendant began to press Mr. Jennens to complete the administration of the estate. On Aug. 12 the firm replied that they would do what they could to expedite a settle- **H** ment of the matter. On Aug. 22 the defendant wrote to Mr. Vickery to say that his doctor had ordered him absolute quiet and rest, and that he was going away for an indefinite period, and he adds this:

"I have written to Jennens and told him I have authorised you to act in my stead concerning the settlement of your business, therefore to communicate with you as soon as things are ready."

I His Lordship did not regard it as possible that prior to this date the defendant had been informed by Mr. Vickery of any fact leading him to suppose that, in the opinion of the latter, Mr. Jennens was unworthy of confidence. Mr. Vickery, however, ascertained by an inquiry from the authorities that a warrant valued at £62 4s. was issued in respect of the savings certificates in favour of Jennens and Jennens under a written authority of the defendant, and he wrote on Aug. 24 to the defendant in these terms:

"I have received a letter from the Post Office that you gave a written order for

the payment of the sum of £62 4s. made payable to Messrs. Jennens and Jennens, and a warrant was sent to them on Aug. 2 made payable through a bank. Have you made any more orders like this? You never told me about it after I gave you strict instructions."

His Lordship said that it would be noted that, although Mr. Vickery was objecting to such a course, he did not suggest that the matter should be taken out of the hands of Mr. Jennens, or that any immediate steps were called for. There was a conflict as to what the "strict instructions" referred to in this letter were. According to the defendant, the instructions suggested were that the sums were to be entrusted to Mr. Vickery himself. According to Mr. Vickery the phrase referred to the promise of the defendant not to do anything in relation to Jennens without consulting him. On Sept. 20, 1927, Mr. Vickery, being by this time anxious about the matter, went, accompanied by a solicitor's managing clerk, Mr. Philip Noakes, to see the defendant, and they had a long interview with him. Mr. Noakes urged the defendant to take the matter out of the hands of Jennens, gave him the name of another solicitor, and produced a form which would serve to effect a change of solicitors. The defendant was asked if he knew anything about Jennens, and the defendant admitted that Mr. Vickery had said something derogatory to him at some prior date. His Lordship said that he thought that it was then, or about that time, that the defendant was told of the charges of dishonesty which had been made in the past against Jennens, but it must be borne in mind that the defendant was being told by Jennens that there would be a settlement in a very few days. On Oct. 7 the defendant wrote to Mr. Vickery as follows:

"Dear Mr. Vickery,—Have been down twice to business. This morning at 10 a.m. to sign for assignment of your house. Settlement on Wednesday or Thursday I believe for certainty.—Yours truly, J. STEPHENS.—P.S. I will send or see you immediately it is through.—J.S."

He was repeatedly assured by Jennens that the matter would be completed at once. On Oct. 14 the defendant wrote again to Mr. Vickery:

"I am pressing for an immediate settlement and I think it is close at hand. That is, in the course of a few days. I have never had to learn patience at such a cost, such is never forgotten and for me will never come again."

On Nov. 22, 1927, the defendant wrote to Mr. Vickery as follows:

"I have signed the form and returned it with deposit book. The will is deposited at Somerset House as all wills are, but you can get a copy if you so desire. The probate is your legal document as to its provisions. I think his suggestion of sending you cheque, &c., was in consideration of my health, I don't know, as I had a bad turn last night it will be best; so I have written him accordingly."

No cheque, however, was forthcoming, and early in December the defendant put the matter in the hands of Mr. J. M. Vose, a solicitor, who took immediate steps to press Mr. Jennens for a settlement. A number of letters passed, but it proved impossible to obtain payment. The matter was reported to the Law Society. On Jan. 7, 1928, the defendant issued an originating summons for an order upon Jennens for delivery of his bill of costs and cash account and taxation. The usual order was made thereon on Feb. 6, 1928. Jennens did not comply therewith, and on May 4, 1928, an order was made on the usual motion giving leave to issue a writ of attachment against him. The writ was issued in due course, but Jennens evaded service for a time and then absconded without having paid any part of the balance in his hands, and sums of £214 14s. 5d. and £62 4s., less certain costs and some small disbursements, had been wholly lost. The plaintiffs claimed the sums in question as having been lost through the breach of trust of the defendant.

L. W. Byrne for the plaintiffs.

P. M. Walters for the defendant.

A Jan. 21. **MAUGHAM, J.**, read the following judgment.—The question that arises is whether, in the circumstances and in view of my findings as to the facts, the defendant is liable to make good these sums with interest by reason of his negligence either in employing Jennens to receive the two sums or in permitting those sums to remain in his hands in the circumstances of the case for a longer period than was necessary. In considering this question the court has to bear in **B** mind in particular two sections of the Trustee Act, 1925. Section 23 (1) is as follows :

“Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator’s or intestate’s **C** estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.”

This subsection is new, and, in my opinion, authorised the defendant in signing the authorities to Jennens and Jennens to collect the two sums in question, for I **D** do not think it can be doubted that the defendant acted in good faith in employing Jennens for the purpose. It will be observed that the subsection has no proviso or qualification to it such as we find in relation to s. 23 (3). It is hardly too much to say that it revolutionises the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real **E** necessity for the employment or not. No doubt he should use his discretion in selecting an agent and should employ him only to do acts within the scope of the usual business of the agent, but, as will be seen, a question arises whether even in these respects he is personally liable for a loss due to the employment of the agent unless he has been guilty of wilful default. Section 23 (3) is in the following terms :

“Without prejudice to such general power of appointing agents as aforesaid—
(a) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or **G** the endorsed receipt being signed, by the person entitled to give a receipt for that consideration; (b) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee; (c) A trustee may appoint a banker or solicitor to be his agent **H** to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing in this subsection shall exempt a trustee from any **I** liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee. This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act.”

This subsection is a reproduction with amendments of the Trustee Act, 1898, s. 17, which replaced the Trustee Act, 1888, s. 2. It will be observed that para. (a) of

the subsection relates to the production of a deed having endorsed thereon a receipt A
for money or other property, and that para. (c) refers to the receipt of money
payable to the trustee under a policy of insurance. In these cases, no doubt, there
is no reason why the banker or the solicitor should do anything more than receive
the money and pay the same to the trustee or as he shall direct. The proviso
must, I think, be limited to these two cases; and, of course, it is not intended to B
preclude a trustee from keeping trust funds at his bank pending investment or other
proper use of them, and it has nothing to do, in my opinion, with the case I have
to decide in which the powers given by paras. (a) and (c) were not utilised by the
defendant. There was, no doubt, a good reason for not making the proviso extend
to sub-s. (1) of s. 23, since in many cases where, for example, a banker or other
agent is employed by a trustee to receive money, the money cannot at once con- C
veniently be paid to the trustee, but has to be employed by the banker or other
agent in a number of ways.

I have now to consider s. 30 (1) of the Trustee Act, 1925, a section which replaces
s. 24 of the Trustee Act, 1893, which in its turn re-enacted LORD CRANWORTH'S Act,
s. 31. It is in the following terms:

"A trustee shall be chargeable only for money and securities received by him D
notwithstanding his signing any receipt for the sake of conformity, and shall
be answerable and accountable only for his own acts, receipts, neglects, or
defaults, and not for those of any other trustee, nor for any banker, broker, or
other person with whom any trust money or securities may be deposited, nor
for the insufficiency or deficiency of any securities, nor for any other loss,
unless the same happens through his own wilful default."

Reliance has been placed on the words concluding the subsection, "nor for any E
other loss, unless the same happens through his own wilful default." To avoid
misconception I wish to say that, having regard to the numerous decisions since
the enactment of LORD CRANWORTH'S Act in relation to the liability of trustees for
innocent breach of trust, it is impossible now to hold that the words "for any other
loss" are general, with the result that no trustee is ever liable for breach of trust F
unless the breach is occasioned by his own wilful default. In my opinion, the
words are confined to losses for which it is sought to make the trustee liable
occasioned by his signing receipts for the sake of conformity or by reason of the
wrongful acts or defaults of another trustee or of an agent with whom trust money
or securities have been deposited, or for the insufficiency or deficiency of securities G
or some other analogous loss. It may be noted that if the phrase is not so limited
it is difficult to see how there could have been any need for s. 3 of the Judicial
Trustees Act, 1896, now re-enacted as s. 61 of the Trustee Act, 1925, nor for s. 29
of that Act; nor would it be possible to explain the numerous cases before 1896
where trustees were made liable for honest mistakes, either of construction or facts:
see, for example, *Learoyd v. Whiteley* (1); *National Trustees Co. of Australasia v.*
General Finance Co. of Australasia (2), and cases there cited. On the other hand, H
since s. 30 (1) expressly refers to the defaults of bankers, brokers or other persons
with whom any trust money or securities may be deposited I am unable—dealing
here with the more limited case—to escape the conclusion that the trustee cannot
be made liable for the default of such a person unless the loss happens through the
"wilful default" of the trustee.

Before considering the meaning of the words "wilful default" in this connection I
I would observe that in *Re Brier, Brier v. Evison* (3) the Court of Appeal, consisting
of LORD SELBORNE, L.C., and COTTON and FRY, L.JJ., gave effect to LORD CRAN-
WORTH'S Act, s. 31, and held the trustees and executors not liable, inasmuch as it
had not been established that the loss occasioned by the agent's insolvency—in a
case where, as the law then required, it was shown that the employment of the
agent was a proper one—was due to the wilful default of the trustees and executors.
Now, the meaning of the phrase "wilful default" has been expounded by the Court
of Appeal in *Re Trusts of Leeds City Brewery, Ltd.* (4). It should be noted that

A in both those cases the indemnity, given to the trustees in the first case and to the directors and officers of the company in the second case, was worded in a general form, so that it could not be contended that they were liable for any matter or thing done or omitted unless it could be shown that the loss so occasioned arose from their own wilful default. This, as I have said, is not true of an ordinary executor or trustee; but the exposition of the phrase "wilful default" in such a case is not the less valuable. The Court of Appeal held, following in *Re City Equitable Fire Insurance Co., Ltd.* (5) the decision of ROMER, J., that a person is not guilty of wilful neglect or default unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not. I accept with respect what WARRINGTON, L.J., said ([1925] 1 Ch. at p. 524) that in the case of trustees there are definite and precise rules of law as to what a trustee may or may not do in the execution of his trust, and that a trustee in general is not excused in relation to a loss occasioned by a breach of trust merely because he honestly believed that he was justified in doing the act in question. But for the reasons which I have given I think that, where an executor employs a solicitor or other agent to receive money belonging to the estate, in reliance on s. 23 (1) of the Trustee Act, 1925, he will not be liable for a loss of the money occasioned by the misconduct of the agent unless the loss happens through the "wilful default" of the executor, using those words as implying, as the Court of Appeal have decided, either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty.

Returning to the facts of the present case, it should be noted that having taken the step of employing a solicitor, not merely to obtain probate and to wind-up the estate, but also to collect the war bonds, the sums in the Post Office Savings Bank, and the sums in savings certificates, the position was different from that of a trustee who has simply employed a solicitor or other agent to collect money, for the only practical way of compelling the solicitor to account in the circumstances under consideration was to require him by the usual process to deliver a bill of costs and cash account. This procedure, I may observe, is not a very effective one in the case of a fraudulent solicitor, since it lends itself in dishonest hands, as it did in the present case, to serious delay. It is essential in this case to guard oneself against judging the conduct of the defendant in the light of subsequent events. To have employed a new solicitor as soon as the defendant became aware that H. H. Jennens was a person with a tarnished reputation for honesty, would certainly have meant further costs. It might have proved quite unnecessary, even on the supposition that Jennens was a rogue. Even a man of the world might have thought that the sum involved—the sum of £300 or thereabouts—was far too small to make it probable that the solicitor would be likely—unless, indeed, in the case of stern necessity—for such a sum to expose himself to the orders of the court and to the action of the Law Society. Nor must it be forgotten that upon the facts as I find them it was not till the month of September, 1927, that the defendant had any real reason for suspecting that Jennens was unworthy of confidence, and it seems that after that date he kept on pressing for an immediate settlement and kept on being assured that a settlement would immediately take place. On the whole, I have come to the conclusion that the defendant was, in any view of the facts, liable only in respect of an error of judgment, and this in the case of a loss occasioned by the defalcations of a solicitor does not amount to wilful default on the part of the executor. The action accordingly, in my judgment, fails and must be dismissed.

Judgment for defendant.

Solicitors: Sandford & Co.; C. O. Humphreys & Son.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re BRELSFORD

[CHANCERY DIVISION (Clauson, J.), July 27, 1931]

[Reported [1932] 1 Ch. 24; [1931] B. & C.R. 21; 100 L.J.Ch. 365;
146 L.T. 160]

Bankruptcy—Execution—Benefit of execution—Withdrawal of sheriff on agreement to pay instalments—Execution not completed by date of receiving order—Right to retain benefit of execution—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40 (1).

On Sept. 17, 1928, the respondents recovered judgment for £215 and costs against a debtor. The following day the sheriff levied execution against the goods of the debtor under a writ of fi. fa. On Sept. 24, 1928, it was agreed between the respondents and the debtor that, in consideration of the respondents withdrawing execution, the debtor would pay £15 of the debt and the remainder by monthly instalments of £10, the respondents being empowered, in the event of failure by the debtor to pay any particular instalment, to authorise the sheriff to re-take possession. The debtor thereupon paid £15 and the sheriff withdrew. Subsequently the debtor paid to the respondents £63 in respect of the instalments. On Jan. 10, 1930, default having been made in the payment of the instalments, the sheriff entered for the second time into possession of the debtor's goods. On Jan. 13, 1930, a receiving order was made against the debtor and he was adjudicated bankrupt. On Jan. 16, 1930, the Official Receiver, as the trustee in bankruptcy, claimed from the respondents the two sums of £15 and £63 on the ground that they formed part of the bankrupt's estate available for payment to his creditors. On April 20, 1930, on a motion by the Official Receiver to enforce his claim, a Special Case was stated by the county court judge for the opinion of the High Court under the Bankruptcy Act, 1914, s. 100 (3), whether the respondents were entitled to retain or were bound to account for and pay to the trustee in bankruptcy the two sums received by them or either of them. By s. 40 (1) of the Act of 1914 an execution creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition or of the commission of any available act of bankruptcy by the debtor.

Held: both the sums received by the respondents came within the meaning of s. 40 (1) of the Act of 1914, and, were, therefore, benefits of the execution for which they were liable to account to the trustee in bankruptcy.

Re Ford (1), [1900] 1 Q.B. 264, applied.

Notes. Followed: *Re Kern*, [1932] All E.R.Rep. 848. Considered: *Re Andrew, Official Receiver v. Standard Range and Foundry Co., Ltd.*, [1936] 3 All E.R. 450.

As to completion of execution, see 2 HALSBURY'S LAWS (3rd Edn.) 542–543, para. 1076; and for cases on the subject, see 5 DIGEST 809–814, 6903–6928. For the Bankruptcy Act, 1914, s. 40, see 2 HALSBURY'S STATUTES (2nd Edn.) 376.

Cases referred to:

- (1) *Re Ford, Ex parte Official Receiver*, [1900] 1 Q.B. 264; 69 L.J.Q.B. 74; 81 L.T. 648; 48 W.R. 173; 44 Sol. Jo. 75; 7 Mans. 14, D.C.; 5 Digest 812, 6918.
- (2) *Figg v. Moore Bros.*, [1894] 2 Q.B. 690; 63 L.J.Q.B. 709; 71 L.T. 232; 10 T.L.R. 490; 1 Mans. 404; 10 R. 549; 5 Digest 812, 6915.
- (3) *Re Pollock and Pendle, Ex parte Wilson and Mathieson, Ltd.* (1902), 87 L.T. 238; 18 T.L.R. 794; 46 Sol. Jo. 701, D.C.; 5 Digest 812, 6919.

- A** (4) *Re Jenkins, Ex parte Trustee* (1904), 90 L.T. 65; 20 T.L.R. 187, D.C.; 5 Digest 818, 6955.
- (5) *Re Godding, Ex parte Trustee*, [1914] 2 K.B. 70; 110 L.T. 207; 58 Sol. Jo. 221; sub nom. *Re Godding, Ex parte Partridge*, 83 L.J.K.B. 1222; 21 Mans. 137; 5 Digest 812, 6920.
- B** (6) *Re Fairley*, [1922] 2 Ch. 791; sub nom. *Re Fairley, Ex parte Official Receiver*, 92 L.J.Ch. 140; [1922] B. & C.R. 127; sub nom. *Re Fairley, Ex parte Low and Bonar, Ltd.*, 38 T.L.R. 893, D.C.; Digest Supp.
- (7) *Re Evans, Ex parte Salaman*, [1916] H.B.R. 111; 5 Digest 812, 6921.
- (8) *Bower v. Hett*, [1895] 2 Q.B. 337; 64 L.J.Q.B. 772; 73 L.T. 176; 44 W.R. 4; 11 T.L.R. 540; 39 Sol. Jo. 669; 14 R. 710, C.A.; 5 Digest 816, 6937.
- C** (9) *Crowder v. Lang* (1828), 8 B. & C. 598; 3 Man. & Ry. K.B. 17; 7 L.J.O.S.K.B. 86; 108 E.R. 1164; 21 Digest 509, 850.

Special Case stated by the Nottingham county court judge under the Bankruptcy Act, 1914, s. 100 (3).

The facts appear in the headnote.

Section 40 (1) of the Bankruptcy Act, 1914, is as follows:

- D** "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any
- E** available act of bankruptcy by the debtor."

Roland Burrows for the Official Receiver, the trustee in bankruptcy, referred to *Re Ford* (1); *Figg v. Moore Bros.* (2); *Re Pollock and Pendle* (3); *Re Jenkins* (4); *Re Godding* (5); *Re Fairley* (6); and *Re Evans* (7).

- F** *Frank Gahan* for the respondents, *Shell Mex Ltd.*, referred to *Re Ford* (1); *Bower v. Hett* (8); *Crowder v. Lang* (9); Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict., c. 106), s. 133; Bankruptcy Act, 1869 (32 & 33 Vict., c. 71); Bankruptcy Act, 1914, ss. 30 (3), 38, 40, 41, 44 (1).

CLAUSON, J.—This is a Special Case stated by the county court judge of Nottingham on a question of law. The question is put in these terms:

- G** "The question for the opinion of the court is, whether, having regard to the provisions of the Bankruptcy Act, 1914, a judgment creditor, who has caused an execution to be levied on the goods and chattels of a judgment debtor and has afterwards caused such execution to be withdrawn on terms that the judgment debt shall be paid by instalments with power, on a failure to pay such instalments, for the sheriff to re-enter and seize the judgment debtor's goods and chattels, is entitled, in the event of the judgment debtor being
- H** adjudicated bankrupt before the instalments have been fully paid, to retain or is bound to account and pay to the trustee in bankruptcy of such debtor: (a) the sums paid to him by the judgment debtor after the first levying of execution and while the sheriff was still in possession; (b) the sums paid to him by the judgment debtor after the first levying of execution, but while the sheriff was out of possession."

- I** The judgment creditors put in the sheriff on a writ of fi. fa. on Sept. 18, 1928. Negotiations then took place between the judgment debtor and the judgment creditors with a view to arranging terms of payment of the debt by instalments, the result of which was that the judgment creditors authorised the sheriff's officer to withdraw from possession on the following conditions being fully complied with, namely, that:

"(a) the bankrupt should pay the costs of the sheriff in connection with the execution; (b) the bankrupt should pay forthwith the sum of £15 on account of

the judgment debt; (c) the bankrupt should undertake to pay the balance of the judgment debt by instalments of £10 a month on the 21st day of each month; (d) the bankrupt should give an authority to the sheriff to re-enter into possession in the event of his failure to pay the instalments as they became due."

The bankrupt there mentioned is the judgment debtor.

That arrangement having been made, the judgment debtor forthwith paid the costs of the execution and remitted to the judgment creditors the sum of £15; and the sheriff then withdrew from possession. At a time subsequent to such withdrawal, the judgment debtor paid to the judgment creditors some further sums, amounting together to £63. Those sums and the £15 previously paid, totalling £78, were paid before the date at which the bankruptcy is to be deemed to have commenced.

The matter is governed by s. 40 of the Bankruptcy Act, 1914, which is in these terms:

"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition . . . or of the commission of any available act of bankruptcy by the debtor. . . ."

In the circumstances which I have stated it is plain—indeed, I do not think anybody disputes it—that the execution was not completed before the date of the receiving order, because, as between the various parties, there was a right in the judgment creditors to go in again and take further steps under the execution. The question I have to determine is whether, if the judgment creditors retain the £15 and the £63, they will, or will not, be retaining the benefit of the execution against the trustee in bankruptcy of the debtor.

A number of very difficult questions have arisen from time to time under this section, and a number of decisions have been given, as to which I am entitled to say—and I am only repeating the language used by HORRIDGE, J., in *Re Godding* (5)—it is not always easy effectively and completely to reconcile them. I have heard a most interesting argument by counsel for the official receiver, the trustee in bankruptcy, and counsel for the respondents, and I have looked at many authorities. It is not necessary for me to express, and I must not be taken, in any remarks I have made during the argument, to have expressed, any view on the many difficult points which emerge on studying those cases.

I propose to decide this case simply on the words of the section in the light thrown on them by one case which is binding on me, that is *Re Ford* (1). I need not travel through that case, but, having regard to the decision of the two learned judges, WRIGHT and CHANNELL, JJ., sitting as a Divisional Court, it would, to my mind, be impossible for me, being bound by that decision, to hold otherwise than that, if the judgment creditors retained the £15 in the present case, they would be retaining some part at least of the benefit of the execution, because they obtained that £15 only as the price of their allowing the sheriff to go out of possession. Therefore, it seems to me, having regard to that case, I am bound to hold that the judgment creditors are not entitled to retain the £15.

As regards the £63, it may be said the point is not precisely covered by authority, but I can only say that I should be whittling away the principle of the decision in *Re Ford* (1) if I did not hold with regard to that sum also that, as it was obtained as the price of permitting the sheriff not to re-seize the goods, the judgment creditors would, if they retained it, be retaining part of the benefit of the execution.

On these grounds, I hold that the judgment creditors are not entitled to retain either of the sums of £15 and £63. Accordingly, I will answer the question put to

A me by declaring that the judgment creditors are bound to account to the trustee in bankruptcy for the £15 and also for the £63.

By arrangement, the costs of both parties were ordered to be paid out of the estate.

Solicitors: *Solicitor for the Board of Trade; Waltons & Co.*

B [Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

C

Re COLETTA

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.), November 30, 1931]

D

[Reported [1932] 1 K.B. 501; 101 L.J.K.B. 208; 146 L.T. 180; 48 T.L.R. 113; 30 L.G.R. 109; 96 J.P. 16]

Licensing—Permitted hours—Extension—Intoxicating liquor ancillary to refreshment—Certificate of justices—Withdrawal—Right of appeal to quarter sessions—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 29—Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 3.

E

On Sept. 28, 1921, the licensee of a hotel was granted by justices, under s. 3 (1) of the Licensing Act, 1921, and the Licensing Rules, 1921, r. 3, a certificate entitling him to an extension of the permitted hours at the hotel by adding one hour at the end of the permitted hours in the evening. At the licensing sessions in 1931 the justices renewed the licensee's justices' licence, but withdrew the certificate.

F

Held: the certificate, when granted, did not become part of the justices' licence so as to entitle the licensee to appeal to quarter sessions, under s. 29 (1) of the Licensing (Consolidation) Act, 1910, against the withdrawal as being a refusal to renew the licence; there was no appeal against the withdrawal given by any other enactment; and, therefore, quarter sessions had no jurisdiction to entertain an appeal.

G

Notes. Section 29 (1) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 35 (1) of the Licensing Act, 1953, and s. 3 of the Licensing Act, 1921, by s. 104 of the Act of 1953.

As to permitted hours and extensions, see 22 HALSBURY'S LAWS (3rd Edn.) 653 et seq.; and as to appeals, see *ibid.* 606 et seq. For cases see 30 DIGEST (Repl.) 64 et seq. and 76 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

H

Case referred to:

(1) *A.-G. v. Sillem* (1864), 10 H.L.Cas. 704; 10 Jur.N.S. 446; 33 L.J.(Ex.)N.S. 209; 4 New. Rep. 29; 10 L.T.W.S. 434; 12 W.R. 641, H.L.; 15 Digest (Repl.) 876, 8442.

I

Appeal from an order of the Divisional Court quashing a decision of the County of London Quarter Sessions on appeal from the St. James's (Piccadilly) licensing justices.

The facts are set out in the judgment of the Master of the Rolls.

Sir Leslie Scott, K.C., Sir Patrick Hastings, K.C., and Walter Frampton for the appellant.

Roland Oliver, K.C., and G. D. Roberts for the Commissioner of Police.

LORD HANWORTH, M.R.—This appeal fails. It raises an interesting point in respect to matters dealt with by the Licensing Act, 1921. A

The licence in question, which is held by the appellant, Pasquali Coletta, the licensee, is an old licence in the sense that it is one which has been granted for many years to hotel premises in Leicester Square. As I gather, the licence was in existence before the present appellant became the transferred holder of it. It is a licence, therefore, which must be renewed unless the licensing justices, when it comes up at the licensing sessions in March for renewal, decide to refuse to renew it on the limited grounds which are permitted by the statute. The Act of 1921 gave a further right or liberty under s. 3, whereby special provision was made as to the extension of permitted hours in the evening in certain premises. In order to take advantage of that section, it was necessary for the holder of the licence to get a certificate from the licensing justices that the premises conformed to the terms of s. 3 (2) of the Act of 1921. The certificate was granted on Sept. 28, 1921. The statute received the Royal Assent on Aug. 17, 1921, and it was provided, by what may be called a temporary provision, for this certificate to be considered and dealt with at the transfer sessions as apart from the general annual licensing meeting of justices. Those transfer sessions were held on Sept. 28, 1921, for the division of St. James in the county of London. On that date the licensing justices for that division certified that B

“they are satisfied that the licensed premises, the Queen’s Hotel, are structurally adapted and bona fide used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment to which the sale and supply of intoxicating liquor is ancillary.” C

That certificate having been granted, it became open to the holder of the licence to elect in accordance with s. 3 (1) which provides that there could be, if he so elected, an hour added on to the end of the permitted hours during which the sale of intoxicants could be permitted in the evening. That certificate continued, and the licence was renewed year by year. But, on Jan. 22, 1931, the sub-divisional inspector gave notice to the holder of the licence, Mr. Pasquali Coletta, that he intended to D

“object to your continuing to hold the certificate under s. 3 of the Licensing Act, 1921, and to ask that the same be withdrawn.” E

That notice was given in pursuance of the terms of the section and the regulations made thereunder. When the licensing sessions were held on March 4, that objection was taken, with the result that, while the justices renewed the licence to sell intoxicating liquor, they withdrew the certificate. Upon that decision an appeal was taken by the licensee to quarter sessions, and quarter sessions, on April 24, restored the certificate and allowed the appeal. Upon that, application was made to the King’s Bench Division of the High Court of Justice for a certiorari in order to bring up that order of quarter sessions to be quashed on the ground that quarter sessions had no jurisdiction to hear the appeal. A rule nisi was obtained, and cause was shown on July 28, when the rule for a certiorari was made absolute, and it was ordered by the King’s Bench Division that a writ should issue to remove into the court that order of the court of quarter sessions of April 24, and it was further ordered that such order after return should be quashed. From that decision of the King’s Bench Division this appeal is now taken to this court. F

The question we have to decide, therefore, is whether or not there is an appeal on this matter of the certificate from the licensing justices to quarter sessions. It is conceded on all hands that an appeal is the creature of statute. It is pointed out that provision is made for appeal in certain cases. The licensing law is contained in the Licensing (Consolidation) Act, 1910. To that must be added the Licensing Act, 1921. By s. 22 of the 1921 Act it is provided that that Act is to be construed as one with the Act of 1910, and the two Acts are to be read together. Hence on what may be called general matters, such as the question of appeal, one has to turn G

A back to the Act of 1910. By s. 29 it is said that the powers of appeal are given, which will cover the point raised in the present appeal. Section 29 says this:

"Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal transfer or special removal of a justices' licence . . . may appeal against the refusal to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated."

B I think it is right to point out that, just as an appeal is a creature of statute, so the statutes are careful in certain cases to provide appeals in such cases. For illustration, s. 72 deals with the powers of justices to require structural alterations in licensed premises, and it provides that there shall be an appeal in such a case.

C It is quite true that that is, so to speak, a side issue to the grant of the licence, but it shows that the legislature has been careful in particular cases (whether on the main point of the grant of the licence or on subsidiary points) to deal specifically with cases where an appeal is to be given. Similarly, one may turn to s. 99, where there is an appeal in respect of decisions concerning offences not under the Licensing Acts:

D "If any person feels aggrieved by an order or conviction made by a court of summary jurisdiction under this Act, he may appeal therefrom to quarter sessions."

I call attention to those sections, because it is sometimes suggested, when one turns to an Act of Parliament, that it seems so unlikely that the legislature should have overlooked a particular procedure or failed to give a certain right, that an effort ought to be made to strain the words of the Act of Parliament as they stand, so as to embrace what the court may think would have been useful had it been incorporated. But, inasmuch as we have ss. 22, 72, and 99, I think the court has to be content that the legislature intended to grant an appeal in certain cases, but only in those cases which are covered by particular sections. The only section which it is said will cover this case, is s. 29, and the way in which it is said to cover this case is that this licensee feels himself aggrieved by the refusal of the licensing justices to grant a renewal of a justices' licence. I have pointed out that they did not purport so to do. They granted a renewal of a licence that had been renewed time and again. What they did was to withdraw the certificate given under s. 3 (2) of the Act of 1921.

E It is said that the certificate added a good deal to the value of the justices' licence. It enlarged the length of time during which there could be a sale of intoxicants. It enabled a whole hour to be added to what are the permitted hours. Hence this certificate ought to be treated as an integral part of the justices' licence. After considering very carefully that argument we are unable to take that view. It must be remembered that, under the system which now prevails, the position is, under the Act of 1921, that there are certain permitted hours. There were certain alterations in the commencement and termination of those permitted hours, and it is possible, having regard to those permitted hours, that adjustments may be made suitable for the particular districts in which the question arises. Broadly speaking, certain permitted hours are allowed under s. 1, the exact incidence of those hours to the clock being capable of adjustment and alteration. Section 3 of the Act of 1921 added something more:

F "The provisions of this Act as to permitted hours on weekdays shall as respects licensed premises or clubs to which this section applies, have effect, if the holder of the licence or the committee of the club so elects, as though one hour were added to the end of the permitted hours in the evening."

G I think that the permitted hours there referred to must mean the permitted hours that are referred to in s. 1 of the same Act, and not the permitted hours as interpreted by s. 20, where the permitted hours are simply the hours during which liquor may be sold or supplied. I think s. 3 (1) must be intended to refer to the

eight hours which are the permitted hours in that section, otherwise, as I have pointed out, there could be no restriction if that interpretation of s. 20 was applied in sub-s. (1) of s. 3. A

That election by the licensee is not to be operative until the licensee has a trading certificate under sub-s. (2). Subsection (2) reads as follows:

"This section applies to any licensed premises or clubs for and so long as the licensing justices are satisfied that they are structurally adapted and bona fide used or intended to be used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary." B

Let me pause upon those words. That is a certificate which has to be granted so long as the licensing justices are satisfied. There are no words which incorporate that certificate or that satisfaction so as to bring it under the ordinary justices' licence. It is merely a preliminary which cannot necessarily involve the licensee in any duty. But once he is armed with that certificate he can elect to keep open as though one hour were added at the end of the permitted hours in the evening. I think under sub-s. 3 that election would hold good during the current licence of the year, but it still remains a privilege given to him upon his election, not granted to him as a part of the licence, not something in respect of which he has rights similar to his right to renewal of the licence at the hands of licensing justices, but a liberty which he can elect to exercise so long as he can show that the justices are satisfied with the structure of the premises and the bona fide user and intention to use those premises for the provision of substantial refreshment. I find it difficult to see in that section the incorporating of a right vested in the licensee under his justices' licence or to see that the limitation of the right of justices in failing to renew a licence are to apply to a certificate and the liberties which may be exercised by the licensee after his election upon it. In my view, this special provision as to the extension of the permitted hours lies outside all the matter of the renewal of the licence. It is ancillary to the licence. It is something which the licensee may exercise, but is not bound to continue to exercise. C D E

On these grounds it appears to me that it is quite impossible to hold that the section which grants an appeal in respect of a refusal to renew a justices' licence embraces a case which deals only with this subsequent and ancillary right of the holder of that licence upon his election to do something which he can do for an extra hour so long as, and only so long as, the justices are satisfied under sub-s. (2). It appears to me that there is no appeal granted in such a case to a licensee, and, therefore, the order of the Divisional Court was right, and must be affirmed, with costs. F G

LAWRENCE, L.J.—I agree. Section 3 of the Act of 1921 confers certain privileges on the holder of a justices' licence, if that holder complies with certain conditions under sub-s. (2) of the Act, by which the justices are to be satisfied that the premises are structurally and otherwise adapted as mentioned in that section. The rules lay down that the satisfaction of the justices is to be evidenced by a certificate, and the point made by the appellant in this case is that that certificate, when granted, forms part of the justices' licence. In my judgment, that contention is not well founded. It is admitted that on the application, in the first instance, for a certificate under sub-s. (2), there would be no appeal from the refusal to grant such a certificate. But it is said that, when once the certificate has been granted, there is a vested right in having it renewed, and as the certificate is part of the justices' licence, the refusal to grant a certificate amounts to a refusal to grant a renewal of the justices' licence. It seems to me that that argument is fallacious. The justices' licence is a condition precedent to the granting of the privileges under s. 3, unless and until the holder of such a justices' licence cannot avail himself of the privileges granted to him under s. 3, showing, to my mind, that the privileges under s. 3 do not in any sense form an integral part of the licence itself. I put this to counsel during the argument. Supposing a renewal of the licence were dealt H I

A with by the justices at their annual meeting first, and granted, and then the matter of the satisfaction of the justices under sub-s. (2) of s. 3 were considered by them, and they were not satisfied, could the licensee by any possibility say that the justices had refused to renew the licence? In my judgment, he could not. I think it would be altogether misconstruing s. 29 of the Act of 1910 to read into it that a refusal to grant a certificate under s. 3 of the 1921 Act amounted to a refusal to grant a renewal of the justices' licence. Under s. 16 the renewal of a justices' licence means the granting of a justices' licence

"at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application."

C In the present case, such a licence has in fact been granted. For these reasons, in addition to those mentioned by my Lord, and by the learned judges in the court below, I agree that this appeal fails.

D **SLESSER, L.J.**—I agree that this appeal fails. The licensing justices refused to certify under sub-s. (3) of s. 2 of the Licensing Act, 1921, that the premises in question were so structurally adapted and bona fide used as to entitle the licensee to the benefits of an extension of the permitted hours given by s. 3 of that Act. An appeal was made from the refusal of the licensing justices to allow that certificate to the court of quarter sessions, who entertained the appeal. It was then said, on application for a certiorari to the King's Bench Division, that the court of quarter sessions had no jurisdiction to hear the appeal. It is clear, as LORD WESTBURY said in *A.-G. v. Sillem* (1), that the creation of a right of appeal is an act which requires distinct legislative authority. Counsel for the licensee says that the legislative authority in the present case is to be found in s. 29 of the Licensing (Consolidation) Act, 1910, which provides that any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal of a justices' licence may appeal to quarter sessions. Therefore, it becomes necessary, in order to support the right of appeal, to say that what was here done by the licensing justices was the refusal of a renewal of a justices' licence.

F By s. 1 of the Licensing (Consolidation) Act, 1910, it is provided that:

"An excise licence under which intoxicating liquor may be sold by retail shall not be granted except to a person who holds a justices' licence granted in accordance with this Act."

G There are many other sections in the Act dealing with the conditions under which justices' licenses may be granted, and the effect of their being granted. Up to the time of the passing of the Act of 1921, the problem which we have here to consider could hardly have arisen, because by s. 16 of the Act of 1910 it is stated:

"The renewal of a justices' licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence."

H Leaving aside for the moment the Act of 1921, it is clear, to my mind, that there was on the last application to the justices a licence granted similar to that which the appellant here had enjoyed in the past, so that so far from the justices refusing the renewal of a licence, they in fact granted the renewal of a licence. But it is said that under the Act of 1921 a different position had arisen. It is quite true under s. 3 (2) of that Act the justices had given a certificate that the premises were structurally adapted and bona fide used or intended to be used for the purpose of habitually providing refreshment, and so on, and that they now refused to continue it. It is said that the grant of the certificate was something, as I understand it, inherent in the licence, and that any future licence which had not attached to it that beneficial certificate was a licence the renewal of which has been refused.

I On that I would observe this. Subsection (2) of s. 3 does not in itself confer any specific right to sell liquor for specified hours at all. All it does is this. The whole of s. 3 only applies to licensed premises or clubs which satisfy the conditions of sub-s. (2). The effect of granting the certificate or the satisfaction of the justices

—it matters not which—under sub-s. (2) is to bring the licensed premises—not the licensee, but the licensed premises—or clubs within the ambit of the section, and thereby confer upon the holder of the licence the right, if he elects, or the committee of the club, as the case may be, if they elect, to keep the premises open for an hour as if an hour were added at the end of the permitted hours in the evening. In my view, that permission, which is dependent upon the matter coming within the section, is something quite other than the licence itself. Although the Acts of 1921 and 1910 are to be read as one, the Act of 1910 is concerned with the granting of justices' licences, and the Act of 1921 is primarily concerned with the limitation of hours, which is a different subject-matter, and the permitted hours are varied and increased if the person can bring himself within s. 3. That is not to say that the certificate is a part of the licence, nor is the refusal to grant a certificate under sub-s. (2) such an act as would justify one in holding that there had been a refusal of a similar licence within the section of the earlier Act, which gives the right of appeal.

There is one other matter which leads me to think that this appeal ought not to be allowed. In the latter part of sub-s. (3) of s. 3 it is contemplated that the permission which is given in the first subsection to keep the premises or clubs open for an hour longer than the permitted hours, may be brought to an end by the holder of the licence or the secretary of the club giving not less than fourteen days' notice in writing

“before the expiration of any licensing year to the superintendent of the police [not to the licensing justices] that he intends to cease to avail himself of the provisions of this section, in which case the said provisions shall cease to apply at the end of that year.”

So that if it be true that the permission to keep open the extra hour is part of the licence, it would appear that it may be deleted from the licence not by application to the justices, but by an executive act of the police. That strengthens the view that this is ancillary and additional to the licence—merely giving extra powers to remain open. If that be so, I think that the section which gives the right of appeal is not appropriate to affect the subject-matter of this appeal. As counsel for the Commissioner of Police has pointed out, there are many matters in which the licensing justices may act on which there is no right of appeal. This, I think, is one of them, and for want of there being any power to bring this appeal, I think the quarter sessions acted without jurisdiction, and that the Divisional Court were right in holding that the rule should be made absolute.

Appeal dismissed.

Solicitors : *Finnis, Downey, Linnell & Chessher; Wontner & Sons.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

A

LOUIS DREYFUS & CO., LTD. v. TEMPUS SHIPPING CO., LTD.

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), April 30, May 1, 4, June 26, 1931]

B

[Reported [1931] A.C. 726; 100 L.J.K.B. 673; 145 L.T. 490;
47 T.L.R. 542; 75 Sol. Jo. 554; 36 Com. Cas. 318;
18 Asp.M.L.C. 243]

Shipping—General average—Defence to claim—Need to prove actionable wrong by shipowner—Unseaworthy condition of ship—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), s. 502.

C

By s. 502 of the Merchant Shipping Act, 1894: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

D

The steamship *C.* was chartered to load a cargo of grain in the River Plate and carry it to certain British or continental ports as ordered. The charterparty was in the Chamber of Shipping River Plate Charterparty, 1914 (Homeward), form, cl. 29 providing as follows: "the steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . fire, from any cause or wheresoever occurring . . . or any latent defect in hull machinery or appurtenances . . . even when occasioned by neglect default or error of judgment of . . . the servants of the shipowners (not resulting however in any case from want of due diligence by the owners of the steamer . . .)" Having loaded, the ship started for her destination. It was then found that some of the bunker coal had caught fire and the ship was compelled to put into Montevideo as a port of refuge to have her fire extinguished. Part of the cargo was damaged and part was lost, and part of refuge expenditure was incurred. † The shipowners sued the cargo-owners for contribution to general average expenditure, to which the cargo-owners pleaded that, as the expenditure was occasioned by the fault of the shipowners in sending an unseaworthy ship to sea, they were not entitled to contribution. ¶ It was common ground that the expenditure was of the class which gave rise to a claim for general average contribution, and it was found that, while the fire was due to the unseaworthiness of the ship, the loss occurred without the "actual fault or privity" of the shipowners. The cargo-owners counter-claimed the value of the maize.

E

F

G

Held: (i) the shipowners were not deprived of the protection afforded by s. 502 by reason of the fact that the fire was due to the unseaworthy condition of the ship.

H

Ingram and Royle, Ltd. v. Services Maritimes du Tréport, Ltd. (1), [1914] 1 K.B. 541, applied. *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co., Ltd.* (2), [1912] 1 K.B. 229, distinguished.

(ii) in the absence of proof of an actionable wrong on their part, the shipowners, in view of the provisions of s. 502, were entitled to recover from the cargo-owners the contribution claimed.

I

Schloss v. Heriot (3) (1863), 14 C.B.N.S. 59, and *Strang, Steel & Co. v. A. Scott & Co.* (4) (1889), 14 App. Cas. 201, applied.

Notes. Referred to: *Hain Steamship Co. v. Tate and Lyle, Ltd.*, [1936] 2 All E.R. 597.

As to provisions relieving a shipowner, see 30 HALSBURY'S LAWS (2nd Edn.) 315 et seq.; and as to general average, see *ibid.* 592 et seq. For cases see 41 DIGEST 407 et seq.; 592 et seq. For Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

- (1) *Ingram and Royle, Ltd. v. Services Maritimes du Tréport, Ltd.*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, 2609. A
- (2) *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co., Ltd.*, [1912] 1 K.B. 229; 81 L.J.K.B. 129; 105 L.T. 810; 28 T.L.R. 85; 12 Asp.M.L.C. 82; 17 Com. Cas. 6, C.A.; on appeal, [1913] A.C. 52, H.L.; 41 Digest 418, 2613. B
- (3) *Schloss v. Heriot* (1863), 14 C.B.N.S. 59; 2 New Rep. 33; 32 L.J.C.P. 211; 8 L.T. 246; 10 Jur.N.S. 76; 11 W.R. 596; 1 Mar.L.C. 335; 143 E.R. 366; 41 Digest 604, 4313.
- (4) *Strang, Steel & Co. v. A. Scott & Co.* (1889), 14 App. Cas. 601; 5 T.L.R. 705; 6 Asp.M.L.C. 419; sub nom. *Steel & Co. v. A. Scott & Co.*, 59 L.J.P.C. 1; 61 L.T. 597; 38 W.R. 452, P.C.; 41 Digest 592, 4165. C
- (5) *The Carron Park* (1890), 15 P.D. 203; 59 L.J.P. 74; 63 L.T. 356; 39 W.R. 191; 6 T.L.R. 474; 6 Asp.M.L.C. 543; 41 Digest 426, 2680.
- (6) *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London*, [1900] 2 Q.B. 540; 69 L.J.Q.B. 860; 83 L.T. 321; 16 T.L.R. 515; 9 Asp.M.L.C. 122; 5 Com. Cas. 346, C.A.; 41 Digest 404, 2508. D
- (7) *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, 2693.
- (8) *Greenshields, Cowie & Co. v. Stephens & Sons*, [1908] A.C. 431; 77 L.J.K.B. 985; 99 L.T. 597; 24 T.L.R. 880; 52 Sol. Jo. 727; 11 Asp.M.L.C. 167; 14 Com. Cas. 41, H.L.; 41 Digest 597, 4225. E
- (9) *Prehn v. Bailey, The Ettrick* (1881), 6 P.D. 127; 45 L.T. 399; 4 Asp.M.L.C. 465, C.A.; 41 Digest 601, 4280.
- (10) *Schmidt v. Royal Mail Steamship Co.* (1876), 45 L.J.Q.B. 646; 4 Asp.M.L.C. 217, n.; 41 Digest 597, 4221.
- (11) *Crooks v. Allan* (1879), 5 Q.B.D. 38; 49 L.J.Q.B. 201; 41 L.T. 800; 28 W.R. 304; 4 Asp.M.L.C. 216; 41 Digest 602, 4294. F
- (12) *Burton & Co. v. English & Co.* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 41 Digest 596, 4218.
- (13) *The Irrawaddy* (1887), 171 U.S.Rep. 187; cited in [1901] P. at p. 294.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.J.J.).

The facts, which are sufficiently summarised in the headnote, appear fully from their Lordships' judgments. G

The Court of Appeal held (SCRUTTON, L.J. dissenting) that having regard to *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co., Ltd.* (2) it must be assumed that damage by fire caused by unseaworthiness was within the protection of s. 502 of the Merchant Shipping Act, 1894, if the shipowners established that such unseaworthiness was without their fault or privity, and there was nothing in the facts of this case which deprived the shipowners of the right to contribution claimed in the action. It was not suggested that the section relieved the shipowners from their liability to contribute, but only that it put them in such a position that they could not be deprived of their right to a contribution from the cargo-owners on the ground that the expenses were incurred merely on their own behalf and not on behalf of the cargo-owners. Nor was it contended that the shipowners were freed from making their own contributions to the general average, but only that there was nothing in the facts that deprived them of the right to say that as between them and the cargo-owners the cargo-owners must contribute to the general average expenditure which was incurred on behalf of all the interests concerned. Held also by the court, as regards the counter-claim for the loss of the cargo, that the shipowners were protected by the exceptions in the charterparty of "fire" and "latent defects in appurtenances," H I

A and that as the damage by fire had occurred without their actual fault or privity they were protected by s. 502 from liability. The cargo-owners appealed.

Sir Thomas Inskip, K.C., Sir Robert Aske and F. Martin Vaughan for the appellants.

W. N. Raeburn, K.C., and R. I. Simey for the respondents.

B The House took time for consideration.

June 26. The following opinions were read.

LORD DUNEDIN.—The respondents are the owners of the steamship *Campus*, and the appellants are the owners of a cargo of maize and grain shipped on board the *Campus* on a return voyage from the River Plate to the United Kingdom.

C Shortly after starting on the homeward voyage fire broke out in the ship's bunkers, which heated and destroyed a part of the maize and threatened to spread and destroy more cargo and endanger the ship. The captain accordingly put into the port of Montevideo, threw part of the maize overboard, and put more of it into lighters, some of which, from its condition, had to be destroyed. In doing this, general average expenses were incurred.

D The present action was raised at the instance of the ship against the cargo-owners for a contribution to the general expenses so incurred. The cargo-owners denied liability, and counter-claimed for the value of the maize destroyed. This they did upon the ground that the fire was due to bad bunker coal, or, in other words, the unseaworthiness of the ship. The case was heard before WRIGHT, J., who held that the ship was unseaworthy. He held that the claim by the ship for general
E average contribution was not good, and that the counter-claim for damage to the cargo failed on account of the provisions of s. 502 of the Merchant Shipping Act, 1894. That section, so far as the material part is concerned, is as follows:

“The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (i) Where any goods,
F merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . .”

WRIGHT, J., held that the loss happened without the actual fault or privity of the owners and that the destroyed maize was lost by reason of fire on the ship. An appeal being taken to the Court of Appeal, that court unanimously upheld

G WRIGHT, J.'s judgment as to the counter-claim, but differed as to the claim for general average. SCRUTTON, L.J., agreed with WRIGHT, J., but GREER and SLESSER, L.JJ., held that the claim for general average succeeded. Appeal is now being taken to this House by the cargo-owners.

There are thus two questions distinct in themselves, and it is expedient to consider them separately. First, as to the claim of the cargo-owners for the
H destruction by fire, the fire being caused by a condition of things which amounted to unseaworthiness. Now, as to authoritative decision on this point, so far as the courts below were concerned, there can be no doubt. (Where there was an exception in the bill of lading of fire on board, it had been held that that did not protect the ship when the fire was due to unseaworthiness.) But whether the statutory
I exception against fire was elided by proving that the fire was due to unseaworthiness came up for decision in *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co., Ltd.* (2), where BRAY, J., held that it was not, and his judgment was affirmed unanimously by the Court of Appeal in *Ingram and Royle, Ltd. v. Services Maritimes du Tréport, Ltd.* (1). These cases, though binding on the Court of Appeal, are not binding on your Lordships, and if you thought that they clearly were wrong it would be your duty to hold that they were wrongly decided. These cases were not only the unanimous decision of learned judges; however, they have ruled the conduct of shipping for seventeen years, and it would obviously be against your Lordships' custom to disturb such a practice

unless, as I say, you thought they were clearly wrong. I cannot say any such thing. As far as my own opinion is concerned, I think they were rightly decided. No doubt the point was very arguable. The arguments pro and con are most clearly and candidly put by KENNEDY, L.J., in the *Virginia Case* (2). But what turned the scale was that, to come to the result opposite to that of the decision would be, as VAUGHAN WILLIAMS, L.J., put it ([1912] 1 K.B. at p. 238): "to change the words of the section from 'a British sea-going ship' into 'a British sea-going seaworthy ship.'" The judges in the *Virginia Case* (2), while thus pronouncing on the interpretation of s. 502, held that in that case s. 502 was impliedly excluded by the terms of the bill of lading, and the appellant has put forward the same argument in this case. The same argument was urged in *Ingram and Royle, Ltd. v. Services Maritimes du Tréport, Ltd.* (1), but was unsuccessful, it being pointed out that the reason of the exclusion in the *Virginia Case* (2) was based on the fact, not that the bill of lading mentioned fire as one of the exceptions, but that it went on in the concluding part to deal exhaustively with the question of seaworthiness, while in *Ingram and Royle's Case* (1) there was no such concluding part. The same answer must be made in this case. In other words, the bill of lading equiparates with the bill of lading in *Ingram and Royle's Case* (1) and not with the bill of lading in the *Virginia Case* (2). I am, therefore, for these reasons, of opinion that the decision of the courts below on the first point, that is to say, the counter-claim for damage to the maize, was right.

The second question, whether the ship could demand a general average contribution in the circumstances of the case, is not dealt with by direct authority. But there is a body of decided authority on several propositions, and the question is how that general authority is to be applied to this case. That the expenditure here was of the class which gives rise to a claim for general average contribution is not denied. It was incurred in order to save the ship and cargo from the further peril by fire. "But then," say the appellants to the respondents, "the fire was caused by unseaworthiness due to your fault, and therefore, on the authority of *Schloss v. Heriot* (3), an authority upheld by *Strang, Steel & Co. v. A. Scott & Co.* (4), you cannot recover because it was your own fault which necessitated the average expenditure." To which the respondents retort: "It was settled by *The Carron Park* (5) and again by *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) that where there was an exception in the bill of lading against fault as causing fire the rule has no application, and the statutory exception against fire in s. 502 must have the same effect." These counter-propositions, so far as based on the cases quoted, are all correct, so that the crucial question is whether the statutory exception of liability introduced by s. 502 has the same effect as had the exception in the bill of lading in *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). It is also possible to contend, and the appellants' counsel did so contend, that the two cases of *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6), which are not binding on your Lordships, though they were on the courts below, were wrongly decided.

It is, I think, best first to consider the ground on which the answer to a demand for contribution is made when the circumstances which give rise to the necessity for general average expenditure are due to the fault of the person claiming the contribution. The most authoritative statement is to be found in the opinion of LORD WATSON in *Strang, Steel & Co. v. A. Scott & Co.* (4). In that case, that which caused the necessity of sacrificing something for the general safety of all was negligent navigation by the master. The loss incurred was by the jettison of cargo. The litigation arose in a somewhat peculiar way. The ship having arrived, the agents for the ship gave notice to all the consignees of cargo that they would not be allowed to remove their goods unless they made a deposit of 5 per cent. on the value "against probable average claims." In order to get their goods, certain consignees paid the deposit under protest and then raised action to get back the money so paid. They also said they had made a sufficient tender, but that aspect

A of the case may be disregarded. In their pleadings the plaintiffs added a plea that they were not liable to contribute to general average on account of the ship or cargo (i.e., sacrificed cargo) because the jettison was rendered necessary by the negligence of the master. The recorder at Rangoon, before whom the case was defended, gave effect to this plea and ordered the return of the money. This could only be right if in the circumstances there could not arise any general average claim. LORD WATSON, in delivering judgment, which reversed the decision of the recorder, said (14 App. Cas. at p. 605):

C "In the course of the argument upon this appeal, three separate points were raised and fully discussed: The appellants argued (i) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the shipmaster's fault; (ii) that in respect the bills of lading for the cargo of the *Abington* specially excepted 'any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship,' the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master,"

D and then the question of tender, which may be disregarded. LORD WATSON then went on to discuss the origin of the doctrine of general average based on the Rhodian law, and his opinion may be summed up in the words of the headnote (14 App. Cas. 601):

E "The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are: (i) Each owner of jettisoned goods becomes the creditor of ship and cargo saved. (ii) He has a direct claim against each of the owners of ship and cargo for a pro rata contribution towards his indemnity, which he can recover (a) by direct action; (b) by enforcing through the shipmaster, who is his agent for that purpose, a lien on each parcel of goods sold to answer its proportionate liability."

F Then LORD WATSON went on to discuss the exceptions to the law of general contribution, and he expressed himself thus (14 App. Cas. at p. 608):

G "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save."

H After approving of *Schloss v. Heriot* (3), he sums up thus (14 App. Cas. at p. 609):

"The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers."

I It will be observed that contention (ii), as above, was exactly the contention in *The Carron Park Case* (5). That contention (ii) LORD WATSON refused to decide because it was not proved that the bills of lading did all contain the exception, but I think it is clear that he inserted the rider:

"unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them,"

because he foresaw that the same case as subsequently arose in *The Carron Park* (5) might emerge. He refused, as I have already said, to decide it, but he pointedly said that the case would be open when the question of the average adjustment came to the front.

That brings me to the case of *The Carron Park* (5) itself, as approved of in *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). I should say that I think that LORD WATSON's opinion in *Strang, Steel & Co. v. A. Scott & Co.* (4) gives one an indication that he would have approved of the judgment in *The Carron Park* (5), and that for two reasons. In the first place, he was examining the whole law, and if he had thought that the second point was irrelevant as stated, I think he would have said so, instead of saying that he would not decide because he was not sure of the facts. In the second place, in his general discussion he had clearly put the exception as being based on the tortious act of the shipowner and his agent, the captain, and it was that conception of tortious act which postulates an actionable wrong that was the prevailing argument in *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). And here, again, we are faced with the question of interfering with judgments which have held the field for a long time, and on which shipping practice has been based, for *The Carron Park* (5) was decided in 1890 and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) in 1900, and now we are in 1931. I am, therefore, of opinion that it would be wrong for your Lordships to hold that *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) were wrongly decided.

Now arises the last and most difficult question. *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) were both cases where the cause of the danger which led to the position of general average was the negligence of the captain. Though unseaworthiness was pleaded in *The Carron Park* (5), the President found against that plea and put the negligence as a negligence during the voyage. *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) was a case of collision by negligence, and there is no doubt that, had the trouble arisen from unseaworthiness, the decisions would have been, apart from a possible argument on the statute of 1894, the other way, for a mere exception against fault in the bill of lading does not cover unseaworthiness—*Steel v. State Line Steamship Co.* (7).

Does, then, s. 502, decided as it has been to include unseaworthiness, bring about a position the same as that of *The Carron Park* (5)? This is what has caused the difference of judicial opinion in the courts below, and I do not hesitate to say that the first inclination of my mind was to agree with SCRUTTON, L.J., and WRIGHT, J., but in the end I have come to the opposite conclusion. The argument for their opinion is, I will not say based on, but greatly fortified by, the dictum of LORD HALSBURY in *Greenshields, Cowie & Co. v. Stephens & Sons* (8) where, dealing with this very section, he said ([1908] A.C. at p. 436): "The statute is not dealing with average at all." Moreover, at first sight, it is startling that a section which was framed as one to limit liability, i.e., so to speak, is of a negative complexion, may be used to give a right which does not otherwise exist, i.e., so to speak, is of a positive complexion. The argument which prevailed in the end with me was this: the answer to the exception of the right to claim general average which was held good in *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6), which I have already held were rightly decided, turned entirely on the question of whether the shipowner, as in a question with the shipper, had committed an actionable wrong. Now, s. 502 says that, if fire is the cause of the trouble, there is no actionable wrong committed by the shipowner however much he may have caused the fire; and by decision (which here, again, I have already approved) this is explained to embrace fire when caused by unseaworthiness. Therefore in this case there is no actionable wrong in what the shipowner did, and consequently the answer to the exception is not a good one, just as was found in *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). Put in other words, the argument may read thus: "The effect of s. 502 is to incorporate that section in every bill of lading," or, if it is better expressed, "to impose an added contract besides that expressed in the bill of lading." Once so incorporated or added, there is obviously

A no actual wrong committed by the owner of the ship, and the principle of *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6) applies. I ought, perhaps, to add that as the expression in s. 502 is "shall not make good any loss," the appellants argued that there was still an actionable wrong, and that all the statute did was to say you shall not pay for it. I think that argument is the argument of a drowning man. An actionable wrong

B for which you can recover nothing is a contradiction in terms.

As to the dictum of LORD HALSBURY. It was a case where coal caught fire by spontaneous combustion, and it was argued that the owner of the rest of the coal which had not been damaged by water poured on it could not claim a general average contribution because the whole trouble had come from what was termed the inherent vice of the coal. But LORD HALSBURY disposed of that by pointing

C out that "inherent vice" was really a faulty expression. Had the fire been traced to an actual fault on the part of the owner of the coal it would have been otherwise, on the principle of *Schloss v. Heriot* (3), but there was no fault on the part of the owner of the coal. He knew nothing wrong about it, and the shipowner approved without demur, to the shipping of that particular coal. Then an additional argument upon s. 502 was brought in. It was said that, as s. 502 says the shipowner

D is not to be liable to pay for any loss by fire, he cannot be called on to contribute to general average for the benefit of the coal-owner, to which the obvious answer was that a general average contribution does not rest on any idea of loss on the part of the person called to make it, or, in other words, a section which absolves you from loss does not absolve you from something which is not loss at all, and LORD HALSBURY added the observation in question. It was quite true, as he said,

E that the section was not dealing with general average, but none the less the result of the section may have an effect on general average. I, therefore, think that the argument I have set forth is not displaced by LORD HALSBURY's remark. I move that the appeal be dismissed with costs.

LORD WARRINGTON.—The respondents in the present appeal are the owners of the steamship *Campus* and were plaintiffs in the action in which the appeal

F arises. The appellants are the owners of cargo shipped on the *Campus* and were defendants in the action. The claim of the respondents was for a contribution to certain expenses, now admitted to be general average expenses, to which the appellants, as cargo-owners, would *prima facie* be bound to contribute. They defended the action on the ground that the emergency giving rise to the expenditure

G was caused by the unseaworthiness of the ship and the shipowners were, therefore, in default, and, under the well-established principles of the law of general average, were debarred from claiming contribution from the owners of the cargo. These principles are stated in the judgment of the Judicial Committee prepared by LORD WATSON in *Strang, Steel & Co. v. A. Scott & Co.* (4) (14 App. Cas. at p. 607), and as so stated are not in dispute. To this defence it was replied by the respondents

H that under the provisions of s. 502 of the Merchant Shipping Act, 1894, they were under no liability to the appellants for loss or damage to their goods, and were, therefore, not in default, in spite of the fact that they had committed a breach of the contract of carriage in respect of the unseaworthiness of the ship. The question, therefore, in the action is whether the reply of the respondents is well founded. It was rejected by WRIGHT, J., who dismissed the action. In the Court of Appeal it was accepted by the majority, GREER and SLESSER, L.JJ.; SCRUTTON, L.J.,

I dissenting.

The material facts on this point are no longer in dispute, and I will only summarise the result. The trouble was fire on board arising from the character and condition of the coal carried in the bunkers, and the damage to cargo was occasioned by the near proximity of one of the holds, in which maize was stored, to a bunker, the coal in which took fire, and the insufficient protection of the hold against fire in the bunker. These circumstances were found by WRIGHT, J., to constitute unseaworthiness causing the loss of and damage to cargo, and this finding is accepted. The material part of s. 502 is as follows:

"The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

In the present case the loss of or damage to the appellants' cargo happened by reason of fire on board the ship, and without any actual fault or privity on the part of the respondents, the shipowners. The shipowners were, therefore, completely freed from any liability to make good such loss or damage. It is not alleged that the breach of the ordinary implied warranty of seaworthiness gave rise to any other pecuniary claim.

The first question to be decided is what, in the circumstances, is the true effect of the contract of carriage in the present case. In my opinion, inasmuch as there, is nothing in the contract expressed in the bill of lading by reference to the charter-party to exclude the operation of s. 502, the provisions of that section become an addition to the terms expressed in such contract. I am further of opinion, on the authority of *Ingram and Royle, Ltd. v. Services Maritimes du Tréport, Ltd.* (1), that the terms of the section are operative, notwithstanding that the cause of the trouble was the unseaworthiness of the ship. It follows that in the present case no part of the loss of or damage to the cargo can be recovered from the shipowners, but the whole of it falls upon the cargo-owners themselves. On the other hand, of course, any damage to the ship falls to be borne by the shipowner.

The next question is: How does the contract between the shipowner and the cargo-owner affect the right of the former to contribution by the latter to general average expenses? I agree with GREER, L.J., that the right to contribution arises whenever the expenditure is incurred or the sacrifice made in the interest of both the parties and not of one of them alone. In the present case, inasmuch as the whole of the loss of or damage to the cargo falls on the cargo-owner, the expenditure in question is incurred in the interest of both parties, and a due proportion thereof in the shape of contribution in general average would be recoverable by the shipowner. If the immunity of the shipowner were derived simply from a bill of lading absolving him from liability in the event which happened the case would be completely covered by *The Carron Park* (5) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). Can it make any difference that the immunity is found in the added term supplied by s. 502? I can see no logical reason for so holding. The statutory provision is as much part of the contract as if the parties had written it out in the bill of lading itself. In my judgment, therefore, the decisions in the two cases above mentioned are applicable to the present case. I agree that they were rightly decided, but even if I were doubtful on this point I should not, for reasons expressed in the opinion of my noble and learned friend LORD DUNEDIN, which I have had the advantage of reading, have been prepared now to overrule them. I am of opinion, therefore, that the order of the Court of Appeal, reversing the judgment of WRIGHT, J., in the original action, should be affirmed. As to the counter-claim, I agree that the order appealed from should be affirmed.

It remains only to say a few words about the dictum of LORD HALSBURY in *Greenshields, Cowie & Co. v. Stephens & Sons* (8) ([1908] A.C. at p. 436), that s. 502 "is not dealing with questions of general average." On the facts of that case the provision of s. 502 was really irrelevant to the claim of the cargo-owner to contribution by the ship, and the statement of LORD HALSBURY was a dictum only. But though, in a sense, it is true that the section is not dealing with general average, yet when, as in the present case, its provisions become an added term of the contract of carriage, and the rights and liabilities of the several parties to contribution in general average depend, as they do, upon the terms of the contract, the provisions of the section of necessity affect those rights and liabilities. On the whole I agree that the appeal should be dismissed with costs.

A I have been asked to say that my noble and learned friend **LORD MACMILLAN** concurs in the judgments that have been delivered.

LORD ATKIN.—The question in the present case arises on the claim of the respondents, the owners of the steamship *Campus*, against the appellants, the owners of a grain cargo shipped on board the *Campus*, for contribution in respect of a general average expenditure occasioned to avert a loss caused by fire on board.

B The appellants reply that the fire was caused by the respondents' fault in that it was due to unseaworthiness of the ship. The respondents rejoin that the appellants cannot rely on any such fault by reason of the provisions of s. 502 of the Merchant Shipping Act, 1894. This raises an interesting issue in the law of general average, at one time the subject of controversy, but, as I venture to suggest to your Lordships, now settled by authority of the Court of Appeal and accepted by the shipping world for about a generation. It will only be necessary to deal shortly with the facts, as many of the issues that arose in the course of the proceedings have disappeared in the progress of the case to this House.

C The ship proceeded from Cardiff with a cargo of coal and sufficient bunkers to take her outwards to the Argentine and part of the way home. On her way out she was chartered by an Argentine company on the terms of the Centrocon charter-party to load a cargo of grain at Argentine ports and proceed to a continental or United Kingdom port. The exception clause of the charter provides:

D "The steamer shall not be liable for loss or damage occasioned by . . . fire from any cause or wheresoever occurring . . . even when occasioned by the negligence, default or error of judgment of the master, mariners or other servants of the shipowners or persons for whom they may be responsible."

E The charter also provides: "Average if any payable according to York-Antwerp Rules, 1924." The ship duly loaded a cargo of maize under bills of lading of which the appellants are the holders, which merely incorporate the terms of the charter as to exceptions and expressly repeat the terms adopting the York-Antwerp Rules, 1924. Having received a full cargo she started on her homeward voyage, but before

F she left the River Plate fire broke out in the bunkers and reached part of the cargo. The ship in consequence put in to Montevideo, discharged part of the damaged cargo, and incurred expenditure which, it is common ground, was general average expenditure. The question in dispute is whether the ship can recover a contribution for it from the cargo. It has been found that the fire was due to unseaworthiness without the fault or privity of the owners. The ship, therefore,

G cannot rely on the exceptions which are not so drawn as to include unseaworthiness. In these circumstances the cargo-owners apparently thought themselves in a position to counter-claim for damage to their cargo caused by fire, including the general average contribution, if any, to which they were liable. This claim was defeated by the provisions of s. 502 of the Merchant Shipping Act. It was contended by the cargo-owners that the protection given by the section was not

H extended to cases of fire occurring in an unseaworthy ship. I am satisfied that this contention fails. It has been decided to the contrary in the Court of Appeal; I see no reason why a condition so important, and, if included, so easily expressed, should be read into a clause which was obviously intended to give relief against possibly overwhelming claims to shipowners who were themselves not in actual fault.

I The case, therefore, before us has been confined to the shipowners' claim for contribution. The answer of the cargo-owner is based on the finding that the fire was due to unseaworthiness. The shipowner, says the cargo-owner, cannot claim contribution where the peril threatening the whole adventure is due to his fault. The reply of the shipowner is that such a defence can only be made where the alleged fault is an actionable wrong, and that it has been held that where the contract of carriage relieves the shipowner from responsibility for what otherwise would be an actionable wrong the rule no longer applies, and that in the present case the statute has the same effect as an express exception relieving the shipowner

from liability for unseaworthiness causing fire. The cargo-owner in this House has made a double rejoinder. In the first place, he attacks the decisions which allow the shipowner in general average to rely upon contractual exceptions to relieve himself of the consequences of fault; in the second place, he says that, assuming such decisions to stand, the statutory provisions have not the same effect and cannot be used as having any influence at all on any question of general average. A

It is now well established in our municipal law that a shipowner cannot claim a contribution for a general average sacrifice or expenditure where the peril that occasioned the sacrifice or expenditure was due to the fault of himself or his servants. But this proposition is of little practical value until a correct connotation is given to the word "fault." B The first appearance of the doctrine in a reported case so far as I am aware is to be found in *Schloss v. Heriot* (3). That was an action by a shipowner against cargo-owner for contribution in respect of a general average loss. C The defendant for a fourth plea averred that the ship was unseaworthy at the commencement of the voyage, and that the average loss "was caused and occasioned and arose and happened from and in consequence of such unseaworthiness." The case was decided on demurrer, counsel for the defendant arguing that the plea was good inasmuch as it showed that the loss was occasioned by the actionable negligence and misconduct of the plaintiff himself. D ERLE, C.J., in giving judgment, said (14 C.B.N.S. at p. 641):

"The fourth plea, I think, is a good one. It shows that the plaintiff was himself the cause of the loss—that his actionable negligence and misconduct produced the very damage for which he seeks to recover contribution from the defendants. Further, I am of opinion that, if necessary, the plea is sustainable on the ground that the defendants would be entitled in a cross-action to recover back the whole sum claimed by the plaintiff in this action." E

WILLES, J., and KEATING, J., concurred. It is plain that the decision in that case proceeded on the footing that the fault relied on was actionable: the first head of the judgment is that the plaintiff himself caused the loss by his actionable negligence and misconduct; the second head is circuity of action which necessarily involved actionable fault. F

In *Prehn v. Bailey, The Ettrick* (9), the owner of a ship which had been sunk by a collision for which the ship was to blame had raised the ship, and having limited his liability in accordance with the statute claimed a contribution from the cargo-owner for either salvage or general average. The Court of Appeal refused contribution, BRETT, L.J., saying if the general average contribution arose by reason of a default of this he cannot claim anything. G COTTON, L.J., said that it would be against equity to say that a person who himself has done the wrongful act which caused the expenditure shall claim from anyone else. I think it plain that BRETT, L.J., in speaking of "default," and COTTON, L.J., in speaking of "wrongful act," had in mind the class of act which was the subject of their discussion, namely, an actionable wrong, in that case negligence causing collision. Similarly in *Strang, Steel & Co. v. A. Scott & Co.* (4) (14 App. Cas. at p. 608), LORD WATSON, in stating the principle that where a person has by his own fault occasioned the peril it would be unjust to permit him to recover from the cargo-owners, proceeds to say that in any question with them he is a "wrongdoer" and must seek to mitigate the consequences of his "wrongful act." H He then refers to the property imperilled "by his own tortious act" and cites *Schloss v. Heriot* (3) as the leading English authority. I The English law on this matter is to be found in these authorities; and I can find no trace of any principle other than that the fault which deprives the claimant of his right to contribution must be fault which is an actionable fault against the person from whom contribution is claimed. A statutory limitation of liability of course does not defeat the principle: it leaves the fault actionable, as was decided in *The Ettrick* (9). I myself find it difficult to conceive of a fault in this relation which, though not actionable, is yet in some manner so blameworthy as to deprive the party of his right to contribution. It is further to be noted that

- A the principle does not prevent an act which otherwise complies with the conditions from being a general average act. For such a purpose one does not look at the cause of the peril, but the quality of the acts done to avert it. In other words, a cargo-owner who has suffered a general average sacrifice may claim contribution from his fellow cargo-owners though the peril be incurred by the negligence of the ship. If any authority be required for this it is to be found in *Strang, Steel & Co. v. A. Scott & Co.* (4). The question, therefore, always is one of the immediate relations between the claimant for contribution and the contributory interests.

- I have dwelt upon the necessity for the fault to be actionable to illustrate the cases relied on by the shipowner which seem to me to decide that, where the act causing the peril is by convention of the parties not actionable, the claimant who has committed the act is not precluded from obtaining contribution. The first of these is *The Carron Park* (5), decided by SIR JAMES HANNEN in 1890. There a cargo of sugar was loaded on the defendant's ship on the terms of a charterparty which contained an exception clause,

"neglect or default whatsoever of the pilot master crew or other servants of the shipowner always excepted."

- D The cargo was damaged by water through a valve being negligently left open by one of the engineers of the vessel. The action was for damage to cargo; the shipowner pleaded the exception and counter-claimed for a general average contribution. The President gave effect to the exception on the claim, and held the shipowner entitled to contribution in general average. He says (15 P.D. at p. 207):

- E "The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it."

After citing from LORD WATSON in *Strang, Steel & Co. v. A. Scott & Co.* (4), he proceeds:

- F "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract—that the shipowner shall not be responsible for the negligence of his servants in the events which have happened."

- This decision, which was criticised at the time by a writer of great authority on such matters, the late JUDGE CARVER, in his work, *CARRIAGE OF GOODS BY SEA*, 4th Edn., s. 373 (b), was affirmed and followed by the Court of Appeal in *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). In that case the shipowners had chartered the *Port Victor* to the defendants by a charterparty which contained an exception clause,

"negligence of the master . . . or other servants of the shipowner or charterers always mutually excepted."

- H The captain was to be at liberty to sign bills of lading at any rate of freight the charterers might choose without prejudice to the stipulations of the charterparty, and the charterers agreed to indemnify the owners from any consequence that might arise from the captain signing bills of lading. During the currency of the charter the captain by the charterers' instructions signed bills of lading for cargo without a negligence clause. The ship collided with another ship through the negligence of the captain. The ship in consequence incurred certain general average expenditure. The shipowners sued the charterers for an indemnity, alleging that by reason of the absence of the negligence clause they had lost their right to a contribution against the bill of lading holders. The defence, argued by Carver, K.C., and Scrutton, was that if the bills of lading had contained a negligence clause still the shipowner would not have been entitled to contribution, and that the decision in *The Carron Park* (5) was wrong. The court by a majority, A. L. SMITH, L.J., and ROMER, L.J.; VAUGHAN WILLIAMS, L.J., dissenting, gave judgment for the shipowner and affirmed *The Carron Park* (5). A. L. SMITH, L.J., a judge of large experience in these matters, said ([1900] 2 Q.B. at p. 546):

"To create the shipowner a wrongdoer as regards the cargo-owner there must be the breach of some duty, and, if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo-owner for the master to be guilty of that which the cargo-owner and shipowner have agreed shall be no breach of duty at all."

ROMER, L.J., expressed the same reasoning, pointing out that with the negligence clause at the moment of the sacrifice shipowner and cargo-owner between themselves stood on a footing of equality.

Since that date the decision has stood undisturbed by any authority. It has been followed in Scotland. Countless contracts of carriage by sea must have been made on the footing that it was correct, and general average claims adjusted accordingly. Even if one were to assume that, had the case at the time come on appeal for decision before your Lordships, the balance of argument would have been on the side of the cargo-owners, I apprehend that at the present date your Lordships would have felt the greatest difficulty in overruling a decision not unreasonable in itself upon which so many people have acted and regulated their mutual obligations in an important branch of commerce. It is noteworthy that the statutory exceptions in the Carriage of Goods by Sea Act, 1924, must have been agreed to on the footing that the law was as laid down in these cases. I should, therefore, myself have been content to accept the decision on this ground alone. But I think the reasoning correct. If by convention between the parties the so-called fault is an act which is not actionable, as between them the foundation for the doctrine invoked disappears. It is no longer a wrong of the shipowner which has caused the peril: it is no longer inequitable for him to enforce a contribution. Counsel for the cargo-owner fell back upon another argument. Assume, they said, that the ship recovers if the exception is so drawn as expressly to displace the duty, as by saying negligence excepted, yet if the exception does not expressly displace the duty but merely says that the ship is not responsible for the consequences of the negligence then the original principle survives. My Lords, this seems to me much too narrow a view to find a place in the construction of a commercial contract. The object of the exception is to protect the person committing the act in question from liability for any consequences of it; and this is effectively secured whether it is said that there shall be no duty to avoid doing the act, or no obligation to pay any compensation if it is done. Both forms of words, according to English law, prevent any liability from arising either in contract or tort.

I think that up to this point there has been no difference of opinion in the courts below. I see no disposition on the part of WRIGHT, J., or SCRUTTON, L.J., to question the correctness of the decisions in *The Carron Park* (5) and in *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (6). The only difference has been upon the effect of s. 502. As a matter of principle I am unable to see any distinction in this context between a contractual exception and a statutory exception. If the words of the statute had been written into the charterparty there could be no doubt that the right to contribution would not be defeated, always assuming that *The Carron Park* (5) was, as I have held, rightly decided. That the act or omission is made by statute not actionable, rather than by agreement, can hardly be a circumstance affecting the ultimate liability. By the most effective method it is prescribed that in cases falling within the statute there is no actionable fault. If so, the right to contribution is not destroyed. With unfeigned respect to the two very learned judges who took a different view, whose opinions on such a matter are of the greatest weight, they have, I think, imputed to a sentence of LORD HALSBURY in *Greenshields, Cowie & Co. v. Stephens & Sons* (8), more than it was intended to convey. In that case fire having broken out in a cargo of coal the whole cargo was damaged by water in the course of saving both ship and cargo.

- A** The cargo-owners claimed against the ship contribution in general average. The ship set up the provisions of s. 502. This House, affirming CHANNELL, J., and the Court of Appeal, held that the section afforded no answer. It applied to a liability sought to be imposed upon a shipowner for damage to goods by fire where otherwise he would be liable on his contract of carriage or by reason of his custody of the goods. LORD HALSBURY said: "The statute is not dealing with average at all."
- B** This statement seems in its context to be reasonably plain. Similarly, if the shipowner had sought to protect himself from a contribution by relying on a bill of lading exception it would rightly be said the bill of lading is not dealing with average at all. For, I think, there can be no doubt that the bill of lading exceptions operate to relieve the shipowner from the consequences of non-delivery of goods or delivery of damaged goods in breach of duty arising from his having agreed or assumed to carry them: *Schmidt v. Royal Mail Steamship Co.* (10); *Crooks v. Allan* (11); and *Burton & Co. v. English & Co.* (12). Indeed, if it were otherwise, the exception of "perils of the sea," alone, the oldest of exceptions, would have made the cargo-owners' right of contribution against the ship of little practical value. The statute then is not dealing with average, but it is dealing with actionable fault, and as the suggested defence to the claim for contribution is actionable fault of the claimant the statute defeats such a defence. I have not thought it necessary to deal with the decision of the Supreme Court of the United States in *The Irrawaddy* (13) because, as pointed out by GREER, L.J., in the Court of Appeal, that case was decided on distinctions then existing between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention. In my opinion the view of the majority of the Court of Appeal in this case ought to prevail, and this appeal should be dismissed with costs.
- E**

LORD THANKERTON.—I have had the opportunity of reading and considering the opinion of my noble friend, **LORD DUNEDIN**, and I entirely concur in it.

Appeal dismissed.

- Solicitors: *Ince, Roscoe, Wilson & Glover; Botterell & Roche, for Vaughan & Roche, Cardiff.*
- F**

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

FISHER v. LONDON, MIDLAND AND SCOTTISH RAIL. CO.

[House of Lords (Lord Dunedin, Lord Tomlin and Lord Thankerton), November 28, December 1, 2, 1930, February 13, 1931]

[Reported [1931] A.C. 351; 100 L.J.P.C. 98; 144 L.T. 730;
47 T.L.R. 266; 75 Sol. Jo. 155; 24 B.W.C.C. 1]

B

Workmen's Compensation—"Arising out of employment"—"In course of employment"—*Separate questions*—*Burden of proof*—"Unexplained accident"—*Circumstantial evidence*—*Workmen's Compensation Act, 1925* (15 & 16 Geo. 5, c. 84), s. 1 (1).

On claims for compensation under the Workmen's Compensation Acts the questions of what is "arising out of the employment" and what is "in the course of the employment" are two separate questions and must both, as well as the fact that there was an accident, be made good by the applicant. A man may be in the course of his employment though he is not at the moment actually working. The proof incumbent on an applicant can be furnished by circumstantial evidence just as well as by direct testimony.

C

Where the evidence establishes that in the course of his employment a workman was properly in a place to which some risk particular thereto attached and an accident occurred capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk and to hold that the accident arose out of the employment, but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment. Proof of violence from outside or suicide excludes accident.

D

E

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

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Applied: *Geary v. Mathew Brown & Co.* (1931), 24 B.W.C.C. 210; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L.T. 124. Explained: *Rosen v. Owners of S.S. Quercus*, [1933] A.C. 494. Applied: *McLarty v. Prince Line, Ltd.* (1933), 26 B.W.C.C. 134. Considered: *Todd v. MacCullum* (1933), 25 B.W.C.C. Supp. 155. Referred to: *Hutchings v. Devon County Council* (1931), 24 B.W.C.C. 320; *Evans v. Raglan Collieries, Ltd.* (1933), 26 B.W.C.C. 609; *Towriss v. Marshall, Knott and Barker, Ltd.* (1938), 31 B.W.C.C. 78; *Alexander v. J. Dickinson & Sons, Ltd.*, [1939] 3 All E.R. 204.

G

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq.; and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202; and for National Insurance (Industrial Injuries) Act, 1946, see *ibid.* 797.

H

Cases referred to:

- (1) *Mackinnon v. Miller*, 1909 S.C. 373; 46 S.L.R. 299; 1 S.L.T. 65; 2 B.W.C.C. 64; 34 Digest 332, b.
- (2) *Marshall v. Owners of the Wild Rose*, [1910] A.C. 486; 79 L.J.K.B. 912; 103 L.T. 114; 26 T.L.R. 608; 54 Sol. Jo. 678; 3 B.W.C.C. 514; 11 Asp.M.L.C. 409, H.L.; 34 Digest 2697.
- (3) *Bender v. Owners of S.S. Zent*, [1909] 2 K.B. 41; 78 L.J.K.B. 533; 100 L.T. 639; 2 B.W.C.C. 22, C.A.; 34 Digest 328, 2676.
- (4) *Wakelin v. London and South-Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233; 31 Sol. Jo. 119, H.L.; 36 Digest (Repl.) 130, 667.

I

- A** (5) *Thom (or Simpson) v. Sinclair*, [1917] A.C. 127; 86 L.J.P.C. 102; 116 L.T. 609; 33 T.L.R. 247; 61 Sol. Jo. 350; 10 B.W.C.C. 220, H.L.; 34 Digest 320, 2619.
- (6) *Rice v. Owners of Ship Swansea Vale* (1910), 102 L.T. 270; 3 B.W.C.C. 152, C.A.; affirmed sub nom. *Owners of Ship Swansea Vale v. Rice*, [1912] A.C. 238; 81 L.J.K.B. 672; 104 L.T. 658; 27 T.L.R. 440; 55 Sol. Jo. 497; 4 B.W.C.C. 298; 12 Asp.M.L.C. 47, H.L.; 34 Digest 329, 2680.
- B** (7) *Kerr (or Lendrum) v. Ayr Steam Shipping Co., Ltd.*, 1913 S.C. 331; reversed, [1915] A.C. 217; 84 L.J.P.C. 1; 111 L.T. 875; 30 T.L.R. 664; 58 Sol. Jo. 737; 7 B.W.C.C. 801; 1914 S.C. 91; 1914 2 S.L.T. 137; 51 S.L.R. 733, H.L.; 34 Digest 333, 2706.
- C** (8) *Moore v. Manchester Liners, Ltd.*, [1910] A.C. 498; 79 L.J.K.B. 1175; 103 L.T. 226; 26 T.L.R. 618; 54 Sol. Jo. 703; 3 B.W.C.C. 527, H.L.; 34 Digest 309, 2547.
- (9) *Kitchenham v. Owners of S.S. Johannesburg*, [1911] A.C. 417; 80 L.J.K.B. 1102; 105 L.T. 118; 27 T.L.R. 504; 55 Sol. Jo. 599; 4 B.W.C.C. 311, H.L.; 34 Digest 309, 2548.
- D** (10) *Charles R. Davidson & Co. v. McRobb (or Officer)*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 34 T.L.R. 213; 62 Sol. Jo. 347; 10 B.W.C.C. 673; 1918 S.C. 66; 55 S.L.R. 185; 1918 1 S.L.T. 87; 34 Digest 276, 2339.
- (11) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 83 L.J.P.C. 220; 111 L.T. 305; 30 T.L.R. 452; 58 Sol. Jo. 493; 7 B.W.C.C. 274, H.L.; 34 Digest 270, 2300.
- E** (12) *Pomfret v. Lancashire and Yorkshire Rail. Co.*, [1903] 2 K.B. 718; 72 L.J.K.B. 729; 89 L.J. 176; 52 W.R. 66; 19 T.L.R. 649; 47 Sol. Jo. 469; 5 B.W.C.C. 22, C.A.; 34 Digest 331, 2692.
- (13) *M'Neice v. Singer Sewing Machine Co., Ltd.*, 1911 S.C. 12; 48 S.L.R. 15; 1910 2 S.L.T. 210; 4 B.W.C.C. 351; 34 Digest 321, m.
- (14) *Dennis v. A. J. White & Co.*, [1917] A.C. 479; 86 L.J.K.B. 1074; 116 L.T. 774; 33 T.L.R. 434; 61 Sol. Jo. 558; 10 B.W.C.C. 280, H.L.; 34 Digest 321, 2627.
- F** (15) *Craske v. Wigan*, [1909] 2 K.B. 635; 78 L.J.K.B. 994; 101 L.T. 6; 25 T.L.R. 632; 53 Sol. Jo. 560; 2 B.W.C.C. 35, C.A.; 34 Digest 316, 2597.
- (16) *A. G. Moore & Co. v. Barkey*, [1923] A.C. 790; 93 L.J.P.C. 63; sub nom. *Barkey v. Moore & Co.*, 130 L.T. 45; 16 B.W.C.C. 176, H.L.; 34 Digest 324, 2651.
- G** (17) *Millar v. Refuge Assurance Co., Ltd.*, 1912 S.C. 37; 49 S.L.R. 67; 1911 2 S.L.T. 361; 34 Digest 319, r.
- (18) *Astley v. R. Evans & Co., Ltd.*, [1911] 1 K.B. 1036; 80 L.J.K.B. 731; 104 L.T. 373; 4 B.W.C.C. 209, C.A.; affirmed sub nom. *Evans & Co., Ltd. v. Astley*, [1911] A.C. 674; 105 L.T. 385; 27 T.L.R. 557; 4 B.W.C.C. 319; 80 L.J.K.B. 1177, H.L.; 34 Digest 324, 2649.
- H** (19) *Owners of S.S. Serbino v. Proctor*, [1916] 1 A.C. 464; 85 L.J.K.B. 599; 114 L.T. 431; 32 T.L.R. 280; 60 Sol. Jo. 272; 9 B.W.C.C. 182, H.L.; 34 Digest 329, 2681.
- (20) *Grant v. Glasgow and South Western Rail. Co.*, 1908 S.C. 187; 45 S.L.R. 128; 15 S.L.T. 585; 1 B.W.C.C. 17; 34 Digest 343, 2770 ii.
- I** (21) *O'Brien v. Star Line, Ltd.*, 1908 S.C. 1258; 45 S.L.R. 935; 15 S.L.T. 88; 1 B.W.C.C. 177; 34 Digest 336, o.
- (22) *Lynch v. Crown Steamship Co., Ltd.* (1916), 9 B.W.C.C. 652; 1916 S.C. 695; 1916 1 S.L.T. 370; 53 S.L.R. 575; 34 Digest 328, 2676 i.
- (23) *McDonald v. Owners of S.S. Banana*, [1908] 2 K.B. 926; 78 L.J.K.B. 26; 99 L.T. 671; 24 T.L.R. 887; 52 Sol. Jo. 741; 1 B.W.C.C. 185, C.A.; 34 Digest 335, 2721.

Appeal against the interlocutor of the First Division of the Court of Session (the

Lord President, LORD SANDS, LORD BLACKBURN and LORD MORRISON) on appeal by way of a Stated Case reversing a determination of the sheriff-substitute of Renfrew and Bute. A

The Case stated by the sheriff-substitute was as follows :

This was an arbitration under the Workmen's Compensation Act, 1925, in which I found the following facts admitted or proved: (i) That for some years prior to Sept. 17, 1928, the deceased, Joseph Simpson, was a railway guard in the employment of the [respondents]. (ii) That on the said date he lost his life by falling in Bishopton Tunnel from one of the [respondents'] trains. (iii) That the [appellant] and her pupil children named in the petition are dependants of the deceased in the sense of the Workmen's Compensation Act, 1925. (iv) That in the event of the [appellant] establishing her claim she, as an individual and as tutrix and administratrix in law of her said children, is entitled to the sum of £600. (v) That on the last-mentioned date, about 8 a.m., the deceased signed on at the [respondents'] control office at Polmadie for the duties of the day. (vi) That he was then instructed to travel without further duties from Central Station, Glasgow, by the 9.3 a.m. train to Gourrock and there to take charge of a train from Gourrock to Glasgow. (vii) That deceased, accordingly, joined the said 9.3 a.m. train at Central Station and proceeded to travel in a third-class compartment towards Gourrock. (viii) That so far as appears no one accompanied him or saw him in the said compartment, and no one but he travelled in the said compartment between Glasgow and Gourrock. (ix) That he had with him a guard's equipment in a bag identified as his by a number stamped thereon, certain provision for refreshment, a cigarette case, a matchbox, and a newspaper. (x) That on the arrival of the said train at Gourrock an unoccupied compartment was found containing the said articles. (xi) That the said articles were laid out as if the deceased had been arranging them on the seat facing forward toward the left side, except the newspaper which was on the opposite seat. (xii) That when the said compartment was found unoccupied as aforesaid, on the right side thereof which was next to the Gourrock platform the window was found completely shut and the door open, but that it is common ground that it was probably opened at Gourrock. (xiii) That on the left side of the compartment, which was the working side between Glasgow and Gourrock, the door was found properly shut but the window open. (xiv) That the hinge of the said door was towards the forward end of the train. (xv) That the said door was secured by a lock having a double catch and so contrived that while the door is open or on the first or safety catch the outer handle is necessarily at an angle almost vertical, but that when the door is completely shut the lock is released by a stud pressing on the jamb of the door and turns so that the door is completely secured and the outside handle is horizontal. (xvi) That there was no inside handle for opening the said door. (xvii) That the said door and its lock were in complete order and repair, and that there were no marks on the door to suggest that it had come into contact with any obstacle. (xviii) That the said door was 2 ft. in breadth and when fully open extended from the side of the carriage $24\frac{1}{2}$ in., and that between the west end of the tunnel and the place where the deceased was found as after mentioned there were several places where, when fully open, the door would have come into contact with the side of the tunnel. (xix) That at and about the place where the deceased was found as after mentioned the carriage had a clearance inside the tunnel of about 2 ft. 9 in. (xx) That so far as appears all the doors of the train were properly shut on leaving Bishopton, which is the station immediately before the said tunnel, and on arrival at Langbank, which is the station immediately after the said tunnel. (xxi) That the open part of the window when fully opened extends to 2 ft. $\frac{1}{2}$ in. in length by 1 ft. 7 in. in breadth, and that the height from the floor to the bottom of the open part of the window when fully opened is 3 ft. (xxii) That the deceased was 5 ft. $6\frac{1}{2}$ in. in height without his boots. (xxiii) That during its passage through the said tunnel the compartment was lit by electricity. (xxiv) That the deceased was found on the said date about noon lying upon the ground in the said tunnel at a point 120 yds. from the west end of the west portion of the tunnel close to the left side B
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- A** thereof in the direction in which the said train was proceeding. (xxv) That he was then unconscious and died without regaining consciousness. (xxvi) That the only observable wound on the body was a lacerated wound two or three inches long at the left side of the back of the neck just at the base of the skull. (xxvii) That on a projecting piece of stone on the side of the tunnel about 6 ft. above the place where the deceased was found lying, there was observed a small tuft resembling
- B** the deceased's hair, but this matter was not investigated. (xxviii) That the cause of death was certified as fracture of the skull and shock, but there was no post-mortem examination. (xxix) That no facts were proved showing or tending to show that the deceased was a victim of violence, or that he committed suicide. (xxx) That when at the said control office he had arranged with the person in charge for re-arrangement of his work to enable him on the evening of the Friday following to
- C** accompany his wife on an excursion of pleasure. (xxxi) That when the deceased was found as aforesaid he was properly dressed, and in particular his trousers were properly buttoned. (xxxii) That no further facts or circumstances were proved showing or tending to show that the fastenings of the door were insecure or were interfered with by the deceased, or that the deceased opened or attempted to open, or shut or attempted to shut, the door, or leaned out of the carriage, or in any way
- D** failed to behave as a railway passenger ought, or that the door opened accidentally. (xxxiii) That he was a steady man of cheerful disposition, with no domestic or financial worries. (xxxiv) That it is possible to fall from the window of a train by pure accident. (xxxv) That it is not known what the deceased was doing at the time of, and immediately prior to, the accident. (xxxvi) That so far as appears the deceased was immediately prior to his death proceeding in course of his employment, and that the manner in which he was killed was consistent with his continuing in that employment. (xxxvii) That he met his death by falling accidentally through the window of the compartment in which he was travelling as aforesaid. On these facts I formed the opinion that the accident arose out of and in the course of the deceased's employment, and that the [appellant] as an individual and as tutrix and administratrix in law of her pupil children was entitled to compensation
- F** under the Workmen's Compensation Act, 1925, in respect of the death of the said Joseph Simpson. I, accordingly, awarded to her as an individual and as tutrix and administratrix in law aforesaid the sum of £600 in name of compensation, with expenses. The question of law for the opinion of the court is: On the facts stated was I entitled to find that the deceased Joseph Simpson met his death by accident arising out of his employment with the [respondents]?
- G** The First Division answered the question of law in the negative. The widow appealed.

A. P. Duffes, K.C. (of the Scottish and also of the English Bar), *G. R. Thomson* (of the Scottish Bar) and *A. Aiken Watson* (of the English Bar) for the appellant.

Douglas Jamieson, K.C., J. L. Clyde (both of the Scottish Bar) and *F. Bertram Reece* (of the English Bar) for the respondents.

The House took time for consideration.

Feb. 13. The following opinions were read.

LORD DUNEDIN.—This is a case arising under the Workmen's Compensation Acts. The sheriff-substitute, as arbitrator, stated a Special Case to the First Division of the Court of Session. The sheriff set forth the Case in a series of thirty-seven findings. I do not think it is necessary to recite them in full, because the facts set forth in most of them can be put, for the purposes of your Lordships' judgment, much more briefly in a narrative form.

Joseph Simpson was a railway guard in the employment of the respondents. He was instructed to travel from the Central Station, Glasgow, by the 9.3 a.m. train to Gourrock on Sept. 17, 1928, in order to take charge of a train from Gourrock to Glasgow. He got into a third-class compartment in that train, and no one else

was in the compartment. The train stopped at Bishopton and Langbank and proceeded on to Gourrock. On arrival at Gourrock he was missing, but various articles belonging to him were found on the seat of the compartment. Between Bishopton and Langbank there is a tunnel. At about noon his body was found lying in the tunnel at the left side of the direction of the train. He was unconscious when found, and he died without regaining consciousness. The cause of death was a lacerated wound on the base of the skull such as would have been caused by a fall from the train, it being found that the skull was fractured. The compartment in which he was, had, at Gourrock, on its left side the door shut but the window open, and the hinge of the door was towards the direction in which the train was travelling. So far, a summary. I now give the particular findings at the end. [His Lordship read findings No. (xxix) to No. (xxxvii); said that on those facts the sheriff-substitute had formed the opinion that the accident arose out of and in the course of the deceased's employment, and that the appellant, as an individual and as tutrix and administratrix in law of her pupil children, was entitled to compensation under the Workmen's Compensation Act, 1925; and continued:] The question put was whether the sheriff was entitled so to find. The First Division answered the question in the negative, being of opinion that nothing was actually known as to how he fell out of the carriage, and, that being so, the onus on the appellants, his widow and children, was not discharged.

First, let me say a few words about the facts. The crucial fact is that he obviously fell out of the carriage. The arbitrator did not, I think, need to find more than that. It was not, I think, necessary to decide between the window and the door as his place of exit. The door might easily have been insecurely fastened and have swung open, and in going to shut it he might have fallen out, and the draught in the tunnel might have been enough to cause the door to slam and remain shut, it being fitted with the class of lock that allows a slam to shut it. The arbitrator has preferred the exit by the window. LORD SANDS, whose judgments I so generally admire, seeks to criticise this finding by a *reductio ad absurdum*, and says that doubtless the window was large enough to let him through, but adds that this is as indisputable a proposition as that a hunted fox might leap through a window in a moving train. With deference to his Lordship, he leaves out the question of proved facts. If it had been proved that a pack in full cry was seen running towards an approaching train which was going slowly, and if, on arrival at Gourrock, a fox had been found by itself in a third-class compartment without a ticket, I think that the inference that the fox had gone through the window would be inevitable. Here, the man is in the compartment. He must have made his exit by the window or the door. I am not embarrassed by the choice, because there is nothing in either mode of exit that is incompatible with accidental exit. The learned Lord President in his judgment says that he had had a great difficulty in this case, a difficulty not dispelled by a copious citation of authority. I am not surprised at either statement. The case is a narrow and difficult one, and when a mass of cases decided under workmen's compensation statutes are cited, they may easily seem in contrast not only difficult but contradictory. One thing, however, I am clear about. It is no use trying to decide a case simply by looking at decided cases and then inquiring which case most resembles the present on the facts. Decided cases are only useful so far as they lay down principles, and then, to quote what I said myself in a case which I fear I shall often have to refer to, *Mackinnon v. Miller* (1) (1909 S.C. at p. 380):

"each case must be dealt with and decided upon its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

Your Lordships had the advantage of a very full and able argument in this case. I have examined every case cited by learned counsel, and I have looked at many more. The conclusion I have come to is that there is to be found in the cases what I may call two opposing tendencies of construction, and I think that this case

A depends on which of the two opposing tendencies commends itself to your Lordships. To mention names, I think it will certainly be found that the protagonist of one tendency is LORD LOREBURN and of the other LORD ATKINSON. But a decision cannot be rested on the question of names. It must rest on which shall be found most securely to be based on the actual decisions of this House. I may begin with stating two propositions as to which there is now no controversy. The first is that
B the questions of "arising out of the employment" and "in the course of the employment" are two separate questions and must both, as well as the fact that there was an accident, be made good by the claimant. The second is that the finding of an arbitrator cannot be set aside unless it is either wrong in law, or, if it is a finding in fact, is such as a reasonable man ought not to come to. Now, in the vast majority of cases, there is convincing testimony as to how the accident happened,
C and the controversy arises on the application of the phrases of the Act to the facts known. For the purposes of this case, these cases may be generally put aside. The only cases that are really in point are those in which it is not positively known exactly what happened.

Turning to that class of case, I will go at once to the often cited case, *Mackinnon v. Miller* (1). If it stood by itself, it would not be to your Lordships a binding
D authority, but it has been several times considered in this House, and it will, I think, be the best starting point for showing how what I have called the two tendencies develop. The facts were these. Miller was an engineer employed on a steam tug. The tug was moored to a barge, which was moored to a jetty in the harbour of Kinlochleven. Miller was seen in his bunk by others of the crew at 5 a.m. At 6 a.m. he had disappeared, leaving his working clothes beside his bed.
E A few days afterwards his body, clad in his night-dress, was found in the water close to where the tug had been lying. The arbitrator, finding the above facts, added that he was of cheerful disposition and happy in his home life, and that he could not swim. He then found (i) that he did not commit suicide; (ii) that he died by accident arising out of and in the course of his employment. The question put in the Special Case was whether the sheriff was entitled to make the findings
F he did. The answer given by the First Division of the Court of Session was that he was so entitled. Now, my judgment in that case embodied several propositions which I will state separately, because they have all been subjects of canvass. The first proposition was that which I have already stated, that the finding of the arbitrator must not be recalled unless it either can be said to be due to an error in law, or if, in so far as based on fact, it was a finding to which no reasonable man
G ought to come. I need not say more on this head, because I think now no one contends that that is wrong. The second proposition was that the proof incumbent on the applicant could be furnished by circumstantial evidence just as well as by direct testimony. I pointed out that there was no such thing as absolute certainty even when there was direct testimony, so that, if analysed strictly, any conclusion is one
H based on the balance of probabilities. I shall have more to say on this in regard to the question of the negation of suicide, but in the meantime I wish to go on to show the facts of the whole case. The third proposition was that if the arbitrator having, on the balance of probabilities, negatived violence and suicide, and, considering the circumstance that the man was in a place where his employment compelled him to be, which place had an element of danger sufficient to account for the death, drew the inference that the death was an accident arising out of and in the
I course of employment, that was an inference that could not be set aside merely because the evidence was merely circumstantial, and certainty as to how the accident actually happened was unattainable. That proposition was tersely expressed by LORD KINNEAR in his judgment in the same case. It contains the sub-proposition that a man may be in the course of his employment, though he is not at the moment actually working. LORD KINNEAR said (1909 S.C. at p. 383):

"It has been decided in many cases that it is not necessary, in order to bring the case within the scheme of the Act, to show that at the moment at which

the accident happened he was engaged in some particular duty, if the accident happened while he was in the ordinary course of his employment, and while he was on premises where his employment required him to be."

No appeal was taken against that decision.

Next year *Marshall v. Owners of the Wild Rose* (2) came before your Lordships' House. The facts of that case were as follows. Marshall was an engineer employed on board a trawler, the *Wild Rose*. The *Wild Rose* was moored in Aberdeen Harbour. Marshall, after being on shore, returned to the ship at 10 p.m. Steam had to be got up by midnight. He went below and took off his clothes except his trousers, shirt and socks. The night was hot. He came up on deck and remarked to the chief engineer that he was going up for a breath of air. He was missed at midnight. Next morning his body was found in the water, just under the place where the crew had the habit of sitting on the rail or bulwark. The arbitrator found that he was accidentally drowned, and that the accident arose out of and in the course of his employment. The Court of Appeal, following their own judgment in *Bender v. Owners of S.S. Zent* (3), where the circumstances were absolutely similar, recalled the decision of the arbitrator, and held that there were no circumstances which allowed him to draw the inference he did. Appeal was taken to this House, and the case was argued before LORD LOREBURN, L.C., LORD JAMES OF HEREFORD, LORD ATKINSON, LORD SHAW and LORD MERSEY. The judgment of the Court of Appeal was confirmed by a majority, the Lord Chancellor and LORD JAMES OF HEREFORD dissenting. It will be seen at once that it was desperately difficult, if not impossible, to reconcile this judgment with our judgment in *Mackinnon v. Miller* (1), but the terms of LORD LOREBURN's dissent are very important in view of what happened after. All the judges of the Court of Appeal had held, and all the noble Lords agreed with them, that the man was in the course of his employment. In other words, they agreed with what I have called the sub-proposition of the third proposition in *Mackinnon's Case* (1). And then LORD LOREBURN ([1910] A.C. at p. 488) quoted FARWELL, L.J.'s judgment, who had said that

"if an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment, but if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me there is absolutely nothing from which any court could draw the inference that he died from an accident arising out of his employment."

Having made that quotation LORD LOREBURN goes on as follows :

"Now, I am not able to take that distinction. The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have first to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident it equally arose out of his employment whether it occurred during that part of the voyage when he was actually working or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship. And if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I do think the accident arises out of the employment."

Now, LORD ATKINSON, who delivered the leading judgment for the majority, put in the forefront of his speech *Wakelin v. London and South-Western Rail. Co.* (4). That was a case at common law, where the representatives of a railway servant, who had been killed by a passing train at a level crossing, sued the railway company

A under Lord Campbell's Act [Fatal Accidents Act, 1846]. There being no available evidence as to how the accident really happened, it was held that the plaintiffs had not made out their case. I venture to think that the criterion in such a case is somewhat different from the criterion in workmen's compensation cases. There, to succeed, the plaintiff had to establish negligence against the defendant corporation. But under the Workmen's Compensation Act the point to be established has nothing to do with negligence. I may be wrong as to this, but at any rate I am not alone in my view. LORD HALDANE, in *Thom (or Simpson) v. Sinclair* (5), said, speaking of workmen's compensation cases ([1917] A.C. at p. 135):

B

"I think that the court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established."

C

But it matters not. There was ample ground for LORD ATKINSON's judgment without *Wakelin's Case* (4). Only I think his views as to *Wakelin's Case* (4) tinged his method of approach to other questions. He took the same view as the Court of Appeal that, where there was complete ignorance as to how the accident happened the case could not be said to be proved.

D After the decision of this case, I do not hesitate to say that any counsel who had to advise would have said that the matter was now settled, and that our judgment in the First Division in *Mackinnon v. Miller* (1) was inferentially overruled. *Mackinnon's Case* (1) had not been cited in the discussion, and probably the noble Lords were quite unaware of it. But it was not so to be. In 1912 came *Owners of Ship Swansea Vale v. Rice* (6). In this case a sailor had to be on watch from

E 4 a.m. to 8 a.m. He was seen on the bridge at 7 a.m. and never afterwards. The ship was at sea, the weather fine, and the sea calm. He had complained of being sick and giddy. The arbitrator made the award in favour of the applicants. It was affirmed by the Court of Appeal by a majority. The Lords before whom the case was heard were LORD LOREBURN, L.C., and LORD ASHBOURNE, LORD ALVERSTONE and LORD SHAW. This time *Mackinnon v. Miller* (1) was cited and not

F treated as overruled by the *Wild Rose Case* (2). LORD LOREBURN took practically no notice of the overruling of his judgment in the *Wild Rose Case* (2). LORD SHAW, who had been a party to it, distinguished the case upon the ground that the ship was at sea, and that the deceased man was on deck on duty.

Then, in 1914, came *Kerr (or Lendrum) v. Ayr Steam Shipping Co., Ltd.* (7). This time the point of distinction that the ship in the *Wild Rose Case* (2) was in the harbour and in the *Swansea Vale Case* (6) at sea, was not available. This

G again was the case of a ship in harbour. The man was a steward. He had gone to bed, was missed, and his body was found drowned, in his night-dress, next day in the water about where the ship had been. It was proved that he was frequently sick. The arbitrator found that the death was by accident arising out of and in the course of employment. The Second Division of the Court of Session, conceiving they were bound by the *Wild Rose Case* (2), reversed the decision. Appeal was

H taken to this House and the noble Lords who sat were LORD LOREBURN, L.C., LORD ATKINSON, LORD SHAW, LORD PARMOOR and myself. The House reversed the decision and restored the finding of the arbitrator, LORD LOREBURN practically repeating the opinion which he had given when dissenting in *Marshall v. Owners of the Wild Rose* (2). LORD ATKINSON dissented and again relied upon *Wakelin's*

I *Case* (4). LORD PARMOOR agreed with the Lord Chancellor. LORD SHAW, remembering his decision in the *Wild Rose Case* (2), rested his conclusion on the fact that the man was given to vomiting, and that that had led him to the dangerous place at the bulwark. I dissented because I thought the case was ruled by the *Wild Rose Case* (2), there being, in my opinion, not any evidence to show that he was near the bulwark, and his duties as steward not taking him there, as did the duties of the seaman on watch in the *Swansea Vale Case* (6). The case of *Mackinnon v. Miller* (1) was again cited and was approved by all the noble Lords and not treated as overruled by *Marshall's Case* (2).

Kerr (or Lendrum) v. Ayr Steam Shipping Co., Ltd. (7) is really the last word in this class of case, and it is, perhaps, worthy of notice to see how different minds work and yet arrive at the same result, by comparing the words of LORD LOREBURN with those of LORD SHAW in that case, they both being on the same side. LORD LOREBURN says ([1915] A.C. at p. 222):

"This class of case has led to much refinement. I do not find it very profitable to consider whether the arbiter's award proceeded on inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess, and surmise. I am not qualified to draw a precise line between the thoughts suggested by those several words. They seem to me to run into one another."

LORD SHAW says ([1915] A.C. at p. 233):

"I am responsible, I observe, in some of these decisions for raising a distinction between an inference and a conjecture. The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not."

May I suggest another form of words to which, perhaps, both of the noble Lords might have agreed. The question will always be whether the proved facts will reasonably support the conclusion which has rested upon them.

I think I have now quoted all the cases in this House which directly deal with the principles on which we have to decide the present case. I have forbore to quote dicta of learned judges in the courts below, because the authority of judgment in this House is the only authority that is binding on us, but I may say at once that one could quote many judgments in which are embedded the tendencies of which I have spoken either on the one side or the other. There are, of course, many other cases which deal with the phrase "arising out of and in the course of the employment." They may here be put aside. There are cases where the question was whether a man was away on his own business and had not reached the place of his employment, and there has been a great deal of difference of judicial opinion on these cases. I refer to such cases as *Moore v. Manchester Liners, Ltd.* (8); *Kitchenham v. Owners of S.S. Johannesburg* (9); and *Charles R. Davidson & Co. v. McRobb (or Officer)* (10).

Let me now say a word about what is accident. Violence of a certain sort—I cannot say of every sort, after *Trim Joint District School Board of Management v. Kelly* (11), in which I dissented—and suicide exclude accident. As to this, I would like to call attention to *Pomfret v. Lancashire and Yorkshire Rail. Co.* (12). In that case, as here, the man was held to have fallen out of a railway carriage window. The case was twice heard. At the first hearing there was a difference of opinion, and it is noticeable that the headnote rightly sets forth the effect of the first judgment as it would have stood, but really it does not do justice to the second hearing of the case. At the first hearing there was no evidence except that the man was found on the line, having previously been in the carriage. All that the extra evidence led before the second hearing did was that it proved that another man was in the compartment who, however, was looking the other way when the man fell out, and I cannot see how that conclusively proves that the act was not voluntary. I agree that the arbitrator was entitled to find as he did, but the point is that, after all, the question of suicide when nothing is absolutely known depends on a balance of probabilities. I would refer to what I said about probabilities in *Mackinnon's Case* (1). The passage is too long to quote, but I have nothing to retract in the opinion I then delivered. I do not think that there need be a substantial finding such as was found in that case negating suicide. Now, the outcome of this swing of the pendulum, for it cannot be controverted that there was such, and at the same time the only method of keeping to the theory which binds us that the judgments of this House cannot be contradictory, seems to me to be this. Putting aside violence from without, and such action of the deceased as is equivalent to suicide, or at least to some exposition to an added peril, the result of

A the cases of unaccounted-for death seems to me to be as follows: If the deceased was in the course of his employment, as that was explained in *M'Neice v. Singer Sewing Machine Co., Ltd.* (13), which was approved by this House in *Dennis v. A. J. White & Co.* (14), and *Thom (or Simpson) v. Sinclair* (5), if there are facts from which it may be deduced that his employment brought him within, or allowed him to be within proximity of, the peril to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed. Secus, if he comes to the opposite conclusion. I do not think the last proposition has ever been clearly laid down, but I think it ought to be, because we must not be swayed by mere feelings of sympathy. I now apply this to facts in the present case. It has been admitted from the first that the man was in the course of his employment. He was told to go to Gourrock by this train. His presence in the compartment was due to the orders he had received. The door and the window of a railway compartment are dangerous places in the same sense as the bulwark of a ship is a dangerous place. The arbitrator came to the conclusion that he fell accidentally out of the window. I think he had evidence on which he could so find, though I think that the finding that he fell out of the carriage would be quite enough. Upon that, he found that the accident arose in the course of and out of his employment. I do not think the Court of Session should have disturbed that finding, and I, therefore, move that the appeal be allowed and the finding of the arbitrator restored. The appellant must have her expenses in the Court of Session and such costs in this House as are allowed in the case of persons suing in forma pauperis.

E **LORD TOMLIN.**—The question for determination on this appeal is whether the accident which caused the death of the workman and which admittedly occurred in the course of his employment arose out of the employment. The facts of the case do not call for repetition. They have already been stated by the noble and learned viscount on the Woolsack. The function of the court upon a Special Case stated by an arbitrator under the Act in question is confined to considering whether the arbitrator has erred in point of law by drawing an inference without any evidence to support it or otherwise by misdirecting himself. It is not for the court to treat the case as one for fresh decision where the conclusion of the arbitrator, though unimpeachable in law, does not commend itself to the judgment of the court. This consideration necessarily determines the angle of approach to the problem.

G I think that a starting point for an examination of the matter is to be found in the judgment of the noble and learned viscount on the Woolsack, when Lord President, in *Mackinnon v. Miller* (1). That judgment concluded with these words (1909 S.C. at p. 380):

H “It seems to me that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony.”

That case has been referred to with approval in this House in *Owners of Ship Swansea Vale v. Rice* (6) and in *Kerr (or Lendrum) v. Ayr Steam Shipping Co.* (7). The real difficulty, however, occurs in determining in any given case what circumstances afford in point of law ground for drawing a particular inference. I propose to refer to one or two passages from opinions expressed in previous cases before your Lordships' House which, in my judgment, afford in such cases as the present a working rule for resolving this difficulty.

I In *Craske v. Wigan* (15) ([1909] 2 K.B. at p. 639) BUCKLEY, L.J., had expressed the view that the words “out of” point to the origin and cause of the accident and the words “in the course of” to the time, place and circumstances under which the accident takes place. In commenting upon this observation LORD HALDANE, in *Thom (or Simpson) v. Sinclair* (5), said ([1917] A.C. at p. 138):

"I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest."

In *Dennis v. A. J. White & Co.* (14), where a street accident had happened to a boy sent on a bicycle to deliver a message, LORD PARKER OF WADDINGTON's opinion contains the following passage ([1917] A.C. at p. 492):

"Most employments have peculiar risks inherent in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did so arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury."

The noble and learned Lord then added that there might be risks so general that without further evidence no such inference would arise as, for example, the case of man struck by lightning. In *A. G. Moore & Co. v. Barkey* (16), in which an accident occurred from an explosion of gas in a mine, LORD HALDANE made the following observations ([1923] A.C. at p. 795):

"Now, under these circumstances the sheriff-substitute has said:

'There is no doubt that the accident arose in the course of the employment, but I think that Barkey's representatives are bound to prove that it arose out of his employment, and they have not discharged the onus, and, therefore, Barkey's representatives are not entitled to recover.'

My Lords, I think in saying so the learned sheriff-substitute made a mistake as to the onus of proof. As soon as it was shown, as it was shown, that Barkey was acting in the course of his employment, and that the accident arose out of the employment in so far as he was actually doing his work when the accident took place, then *prima facie* he was within the statute, and he could only be taken outside the statute if it is proved that he himself added a peril or did something which took his action outside the scope of his employment."

To these expressions of opinion in your Lordships' House I will add one from a judgment in the Court of Session. In *Millar v. Refuge Assurance Co.* (17) (1912 S.C. at p. 43) LORD KINNEAR said:

"A risk is specially connected with a man's employment if it is due to the particular place where his employment required him to be at the time."

From these passages to which I have referred I think this rule may be deduced for application to that class of case which may be called unexplained accident cases, namely, that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk and to hold that the accident arose out of the employment, but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment. Such a rule so stated seems to me to be consistent with all the previous decisions of your Lordships' House, including *Marshall v. Owners of the Wild Rose* (2), where there was some evidence from which it could be inferred that the seaman who fell overboard had by action of his own outside his employment added a peril to his position. The learned sheriff-substitute has by findings excluded suicide and death by violence. Upon his findings up to and including No. (xxxvi) it must, in my opinion, be taken that at the time of the accident the deceased was travelling in the railway carriage in the course of his employment subject to the inherent risks, slight though they may ordinarily be, of falling from the carriage through insecurely fastened doors

A or open windows. In the absence of any evidence or action by the deceased outside his employment the rule which I have ventured to formulate makes it, I think, legitimate to infer that the deceased met his death accidentally by falling from the railway carriage and to hold that the accident arose out of the employment. In finding No. (xxxvii) the learned sheriff-substitute has pinned himself to a fall from the window. I think that the proper inference ought to have been one less precise, as I have already indicated. A fall through the door is not, to my mind, excluded by the evidence as to the position and condition of the door after the arrival of the train at Gourock. This, however, is not, in my view, a matter of any moment. The application to the case of the rule produces the same ultimate result and makes it impossible, in my judgment, for your Lordships' House to say that the question of law raised by the Special Case ought to be answered otherwise than in the affirmative.

D **LORD THANKERTON.**—The deceased workman, a railway guard, having signed on for his day's work on Sept. 17, 1928, was instructed to travel by the 9.3 a.m. train from the Central Station, Glasgow, to Gourock, in order to take charge of a train from Gourock to Glasgow. On his way to Gourock, being alone in a compartment, he lost his life by falling from the train in Bishopton Tunnel. It is admitted that he lost his life by accident in the course of his employment, and the question for decision by your Lordships is whether, on the facts stated by him, the learned arbitrator was entitled to find that the accident arose out of the deceased's employment. The province of your Lordships' House in this case may be stated in the words of my noble and learned friend, then LORD PRESIDENT DUNEDIN, in *Mackinnon v. Miller* (1) (1909 S.C. at p. 378), which was adopted by this House in *Kerr (or Lendrum) v. Ayr Steam Shipping Co.* (7), and was as follows:

E "If the learned sheriff-substitute's view was based upon such want of evidence, or such disregard of evidence, that we could say that it was a view to which no reasonable man had fairly a right to come, we could, although the question was one of fact, I think, correct his judgment. But I cannot say that I think that the inference that he drew from those facts was so violent as to entitle us to interfere with it."

F He adds (1909 S.C. at p. 380):

G "It seems to me that each case must be dealt with and decided upon its own circumstances and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

It is unnecessary to detail the facts again. There is no direct evidence as to how the deceased came to fall from the train, and the question is whether there was circumstantial evidence from which the learned sheriff-substitute was reasonably entitled to infer that the accident arose out of the deceased's employment. The sheriff-substitute has excluded death by violence or suicide, and his findings were H not challenged in that respect. Accordingly, the case is one where it is sufficiently established that the deceased met his death by accidental circumstances, but there is no direct evidence as to how the accident occurred.

I I am of opinion, on consideration of the many authorities cited, that the principle to be applied in such cases is that, if the accident is shown to have happened while the deceased was in the course of his employment and at a place where he was discharging the duties of his employment, and the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of such duties, the arbitrator is entitled to infer, in the absence of any evidence tending to an opposite conclusion, that the accident arose out of the employment. Turning to the decisions of your Lordships' House, the earliest to which I need refer is *Marshall v. Owners of the Wild Rose* (2), in which an engineer employed on board a steam trawler lying in harbour was found drowned near the rail on the starboard quarter where he was in the habit of sitting in hot weather. He was last seen emerging from his berth, half undressed, late at night, when he said he thought

he would go on deck for fresh air. The arbitrator awarded compensation, on the view that there was evidence to show that the deceased was sitting on the rail, from which he fell into the water, and that, it being in the course of his employment, it was legitimate to infer that the accident arose out of his employment. The Court of Appeal held that this conclusion was not justified by the evidence, and their decision was affirmed by a majority of this House, composed of LORD ATKINSON, LORD SHAW and LORD MERSEY, dissenting LORD LOREBURN, L.C., and LORD JAMES. LORD ATKINSON says ([1910] A.C. at p. 491):

"Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew, or some of them, usually sat, it is assumed apparently that he was sitting in that place, and in some way or other fell in from there; whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found."

And he further says ([1910] A.C. at p. 493):

"Even, therefore, if it had been proved (which it was not) that the deceased when he left his bunk sat upon this seat, then having regard to the time at and circumstances under which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incident to or connected with his employment, while his ship was in port and at such a time and under such circumstances, or his drowning an accident arising out of his employment; though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk."

LORD SHAW and LORD MERSEY express similar grounds for their conclusion. I understand the grounds of the decision to be that there was no evidence in the case to justify the finding by the arbitrator that the deceased fell off the ship at any one point, and that, even if he was entitled to find that the deceased fell off the rail in question, there was no evidence "to associate this man's duty with being at the side of the ship," i.e., at the rail, to apply the test of my noble and learned friend LORD DUNEDIN in *Kerr (or Lendrum) v. Ayr Steam Shipping Co., Ltd.* (7), to which I will refer later.

The next case is that of *Evans & Co., Ltd. v. Astley* (18). Astley was brakesman on the second of two trains which were running as one train, though not coupled, and which were approaching points, which would necessitate the brakesman from one of the trains getting down to work the points. Astley's train was shunting and he was on the foremost truck and endeavoured to climb on to the brake-van of the other train, but in doing so he fell and was killed; there was no direct evidence as to his purpose in doing so. The arbitrator drew the inference that the deceased was preparing to get down to attend to the points by the very dangerous way of first getting on to the brake-van ahead, where he would have steps to the ground, when the proper time arrived for him to alight, and awarded compensation. This House, in affirming the Court of Appeal, held that the arbitrator was entitled to draw the inference and sustained the award. Here again, though there was no direct evidence as to the deceased's purpose in climbing on to the other train, the accident occurred at a place where the discharge of his duties required him to be, and LORD ROBSON stated ([1911] A.C. at p. 687):

"When a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention."

In *Owners of Ship Swansea Vale v. Rice* (6) an officer, while on duty in his ship

A at sea, fell overboard and was drowned; no one saw him fall overboard. It was held that the arbitrator was entitled to draw the inference that the accident arose out of the employment. LORD LOREBURN, L.C., says ([1912] A.C. at p. 240):

“We know that this man at an early hour complained of being sick and giddy. He was on deck discharging a responsible office at the very time he disappeared from the ship. It is natural to suppose that he might have been at the side of the ship for the exact purpose of his duty. It was possible also that he might have been there because he was seized with a feeling of sickness. If he fell overboard, as undoubtedly he did, by slipping or losing his balance, while at the side discharging some duty—looking out, for example, or anything of that kind—that would be an injury by accident arising out of and in course of his employment. If he was taken giddy while at the side, or if, taken by nausea, he went to the side to vomit, that also would be the same.”

C In *Kerr (or Lendrum) v. Ayr Steam Shipping Co., Ltd.* (7) a ship steward, who was last seen in his bunk about 4 p.m., when the captain told him to get tea ready for the crew, was found drowned next day in the harbour close to the place where the ship had been lying, with only his underclothing on. He was subject to attacks of nausea and had been seen on previous occasions vomiting over the side of the ship. The arbitrator awarded compensation, and on appeal to this House from the Court of Session, which had set aside the award, the award was restored by a majority consisting of LORD LOREBURN, L.C., LORD SHAW and LORD PARMOOR, LORD DUNEDIN and LORD ATKINSON dissenting. I find difficulty in reconciling LORD LOREBURN's ground of judgment with the decision in *Marshall's Case* (2) or with the principle that I have suggested, but the other four judgments appear to me to apply it, the difference of opinion arising on the construction of the evidence stated by the arbitrator. LORD SHAW and LORD PARMOOR held that there was evidence which entitled the arbitrator to infer that the accident occurred during a vomiting fit while Lendrum was carrying out the orders of his captain. LORD PARMOOR expressly agrees with the opinion of LORD GUTHRIE who dissented in the Court of Session, and in whose opinion the following passage occurs (1913 S.C. at p. 343):

D “The arbitrator, as I read the evidence, had it sufficiently proved that immediately before the accident the deceased received an order to prepare and serve a meal for the crew, that he understood the order, and got up out of the bunk where he had been sleeping with the view of fulfilling the order, that when the accident must have happened he would naturally have been in the course of actively executing that order, and that the captain understood he was at the time of the accident so employed, and that the deck from which he must have gone overboard was a place where he might have occasion to be in the discharge of his duties. This being proved, it seems to me that very little more was required to lead reasonably to the inference at which the arbitrator has arrived.”

E LORD GUTHRIE found that additional circumstance in Lendrum's known liability to vomiting over the side of the ship. LORD LOREBURN's opinion is expressed in the following words (1914 S.C. at p. 92):

“This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived. Suicide is negatived. No suggestion was made, either of the one or the other, and the arbitrator has negatived both. He was on the ship—a place of some danger if you are careless—in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I think he must have fallen over by accident while on board as his duty required.”

I I find difficulty in distinguishing this from the noble and learned Lord's reasoning which placed him in the minority in *Marshall's Case* (2), already referred to. But, even accepting it as sound, it conforms to the principle that I have ventured to

state, that it must be shown that the accident occurred at a place where the discharge of the duty of the deceased required him to be. LORD ATKINSON and LORD DUNEDIN dissented on the ground that there was no evidence from which the arbitrator was entitled to infer that at the time when the accident occurred Lendrum was engaged in the discharge of the captain's order. LORD DUNEDIN says ([1915] A.C. at p. 240):

"I can only say that I look in vain for any evidence in this case. It all turns upon one point, whether there is any evidence which, so to speak, associates this man's duty with his being at the side of the ship. I can find none."

In *Owners of S.S. Serbino v. Proctor* (19) it was held that there was evidence to support the inference drawn by the arbitrator that the chief engineer, who was last seen going to the stern of the ship and was drowned, went to the stern to examine the propeller, which had been injured, and the finding that the accident arose out of the employment.

Of the other cases cited, *Grant v. Glasgow and South Western Rail. Co.* (20), *O'Brien v. Star Line, Ltd.* (21), and *Lynch v. Crown Steamship Co., Ltd.* (22) proceed on the principle suggested; but, in my opinion, *Mackinnon v. Miller* (1), already referred to, cannot stand with the subsequent decision of this House in *Marshall v. Owners of the Wild Rose* (2), in which, it may be noted, *Mackinnon's Case* (1) was not cited. In *Mackinnon's Case* (1) the engineer on a tug at Kinlochleven jetty was last seen in his bunk at 5 a.m. His body was found a few days later, clad only in a night-dress, in the water near where the tug had been moored. The accident admittedly arose in the course of the employment and the arbitrator was held entitled to draw the inference that it also arose out of the employment. My noble and learned friend, then LORD PRESIDENT DUNEDIN, based his judgment on a dictum of KENNEDY, L.J., to which he referred as follows (1909 S.C. at p. 380):

"In the case of *McDonald v. Owners of S.S. Banana* (23) a donkeyman, who had gone on shore and was returning on board his ship, fell off the gangway and was killed, and no more being known about it, the judges said that there were no facts there from which they were driven to draw the inference that it was in the course of his employment. But I think KENNEDY, L.J., foresaw just such a case as we have here, because, having given his opinion to the effect I have just stated, and having pointed out that the onus was upon those who sought to prove that the accident was in the course of the employment, he says this:

'At the same time I wish to be understood as deciding upon the particular facts of this case in this respect, that we have to consider the case of an accident happening to a man at a place where he would not necessarily or naturally be in order to fulfil the duties of his employment. I express no opinion as to the propriety or impropriety in point of law of an inference bringing an accident within the terms of the Act of Parliament where that accident has happened upon the premises where the workman's service is to be rendered to his employer, as, for example, if this workman had been found fatally injured by a fall in the stokehold or any other part of the ship, where, in the course of his duty, he might naturally and properly be, although there were no circumstances to show why at the particular moment he was there or what the particular duty was which called him there. In the present case the accident happened whilst McDonald was outside the ship, and without proof that there was anything which at the time and place of the accident made it part of the duty of his service to incur the risk which proved fatal.' "

LORD McLAREN says (1909 S.C. at p. 381):

"There are many cases where an accident may arise while a man is on the master's premises, but not engaged in active work, and whether he is there going about the premises in the ordinary course of business, or whether he is going about the premises in pursuance of the necessities of life, such as eating,

A drinking, respiration, and other things that need not be mentioned, and is not doing anything that is either wrong or against his contract or outside his employment, in such a case I do not doubt that the accident must be treated as one arising out of his employment."

B That decision was clearly based on the view that, it being sufficiently proved that the workman fell off the ship, which was so to speak the sphere of his employment, the arbitrator was entitled to draw the inference that the accident arose out of the employment, although it was not shown that he was discharging any particular duty at the point on the ship from which he fell or at the time when he fell. This is the view which was expressed by LORD LOREBURN in his dissent in *Marshall's Case* (2) and which was negated by the decision of the majority of your Lordships.

C As regards *Pomfret v. Lancashire and Yorkshire Rail. Co.* (12), I am unable to reconcile the views expressed by the majority of the Court of Appeal at the first stage of the case with the decisions of this House to which I have already referred, but the opinion of MATHEW, L.J., appears to me to be sound and in accordance with principle. COLLINS, M.R., applied the standard of proof of negligence as exemplified in *Wakelin v. London and South-Western Rail. Co.* (4), but the application of that test is clearly inconsistent with the decisions of this House, and in D

with *Lendrum's Case* (7) already referred to.

E Turning now to the facts of the present case, the deceased is proved to have been carrying out his orders to travel as an ordinary passenger at the time when, and at the place where, he fell out of the train, and, in my opinion, it cannot be disputed that it is possible for a railway passenger without any abnormal conduct on his part, to fall through an open window or through an insecurely fastened door of a train by pure accident, though the former may be less probable than the latter occurrence. The learned sheriff-substitute has preferred the alternative of the window in finding (xxxvii), but, in my opinion, the evidence as to the position and condition of the door after the accident is not inconsistent with the deceased having accidentally fallen through the door, and the door, the hinges of which were toward the front of the train, having been thereafter shut by the forward motion of the F train. But finding (xxxvii) is not essential to the conclusion of the sheriff-substitute, and, applying the principle above referred to, I am of opinion that he was entitled on findings (i) to (xxxvi) to draw the inference that the accident to the deceased arose out of his employment and that the award should be upheld by answering the question of law in the affirmative.

G *Appeal allowed.*

Solicitors: *Findlay, M'Clure & Co.*, for *C. M. Scott*, Glasgow; *W. T. Forrester*, Edinburgh; *H. L. Thornhill & Alexander Eddy*, for *James Wilson*, writer, Glasgow; *John C. Brodie & Sons.*, W.S., Edinburgh.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

ROGERSON v. SCOTTISH AUTOMOBILE AND GENERAL INSURANCE CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Russell and Lord Macmillan), October 19, 1931]

[Reported 146 L.T. 26; 48 T.L.R. 17; 75 Sol. Jo. 724;
37 Com. Cas. 23]

*Insurance—Motor insurance—“Car . . . being used instead of the insured car”—
Insured car sold—Subsequent use of new car—Liability of insurers.*

A policy of motor insurance, which covered, inter alia, claims against the assured for bodily injury “caused to any person or persons by a motor car described in the schedule hereto,” further provided that “this insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired car), provided that such motor car is at the time of the accident being used instead of the insured car.” The assured part-exchanged the motor car described in the schedule for a new car of the same make, but his brokers, despite his instructions to them to do so, failed to transfer the insurance. On a claim by the assured for indemnity against claims by a person injured by the new car, the assured contended that the new car was “being used instead of the insured car.”

Held: the policy depended on the hypothesis that there was, in fact, an insured car, and, the assured’s rights in respect of the car described in the schedule to the policy, having ceased when he sold it, the subsequent use of the new car was not covered by the policy.

Notes. Followed: *Tattersall v. Drysdale*, [1935] All E.R. Rep. 112. Considered: *Peters v. General Accident and Life Assurance Corp., Ltd.*, [1937] 4 All E.R. 628.

As to specific descriptions of the property insured, see 22 HALSBURY’S LAWS (3rd Edn.) 231, para. 436, text and note (o); as to reference to a particular car in a motor insurance policy, see *ibid.* 353, para. 725; and as to cover for the assured driving other cars, see *ibid.* 361, para. 742.

Appeal from the decision of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.) reported 144 L.T. 460.

By a policy of insurance dated May 23, 1928, renewed from time to time, the defendant insurers, the Scottish Automobile and General Insurance Co., Ltd., contracted to indemnify the plaintiff assured against, inter alia,

“All sums which the assured shall become legally liable to pay as compensation for . . . bodily injury . . . caused to any person or persons by a motor car described in the schedule hereto.”

The car was referred to in the policy as “the insured car.” The policy further provided that

“this insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired car), provided that such motor car is at the time of the accident being used instead of the insured car.”

In May, 1929, the assured wanted some repairs done to his Lancia motor car (the insured car), but on finding how much it would cost he decided to buy a new motor car instead of his Lancia motor car. He accordingly handed over his Lancia in part payment for a new motor car of the same make, and, in addition, he paid £100 in cash. A telephone message was sent to his brokers to have the insurance of the old motor car transferred to the new motor car, but that was not done.

On July 28, 1929, while the assured was using the new Lancia motor car, an accident occurred which caused personal injuries to a third person. Although the

A assured was then using a motor car which was not the insured motor car originally covered by the policy, he contended that the motor car which he was using was covered by the words in the policy "any car . . . being used instead of the insured car."

B In consequence of the accident of July 28, 1929, an action for damages was brought against the assured by the party injured, and the assured referred the matter to the insurers; but the insurers repudiated liability. The assured thereupon brought this action against the insurers claiming damages for alleged breach of contract, and a declaration that they were liable to indemnify him against any sums which he might have to pay in the action which had been brought against him. The insurers denied liability, and pleaded that they had been induced to renew the policy on May 19, 1929, by concealment on the part of the assured of the material fact that before the date of the renewal the assured had sold and/or parted with possession of "the insured car," and at that date was no longer the user or hirer of it.

C They accordingly contended that the renewal of the policy on May 19, 1929, was voidable at their option, and that by repudiating liability they had elected to avoid it.

D The Court of Appeal held (reversing the judgment of ROCHE, J.), that the words "instead of the insured car," must be construed as if a further proviso were added, namely, provided that "at the time of the accident the assured had an insurable interest in the insured car." It was a cardinal principle of insurance law that an assured person could not recover unless he had an insurable interest in the subject-matter in respect of which the claim was made and the parties in this case could not be held to have intended to depart from that principle. The assured having disposed of the insured car in part exchange for the new one had no insurable interest in the insured car at the time of the accident, and therefore could not recover.

E The assured appealed.

Schiller, K.C., and Norman Fox-Andrews for the assured.

F *Rayner Goddard, K.C., and G. O. Slade*, for the insurers, were not called upon to argue.

LORD BUCKMASTER.—The appellant in this case in May of 1928 effected an insurance with the respondent insurers upon a motor car which he then owned which was by make a Lambda Lancia, by type a torpedo-bodied car, horse-power 13.9, the date of manufacture being 1924. The term of the policy was one year, and would have expired on May 19, 1929. Shortly after the assured had effected this insurance he sold the car, or, rather, to be more accurate, exchanged it for another car of a similar type. On July 28, 1928, with this new car, he had a collision and caused serious injury to the occupants of the car that he struck. Proceedings were taken against him to recover damages in respect of that matter, and he thereupon took these proceedings for the purpose of obtaining a declaration that he was entitled to indemnity by virtue of the policy against any moneys that he might be called upon to pay.

H That he would have been entitled to indemnity had the car that he was driving at the time of the accident been the car that was insured is beyond dispute, but the insurers say that their liability had ceased because the car which had been the subject of the original insurance was no longer in the assured's possession. In order to see if that contention is right it is necessary to examine what the terms of the policy were. The policy begins with the schedule setting out all details with regard to the car, and then it effects a series of insurances with regard to different classes of matters. These were (a) as regards claims made by the public; (b) as regards the car itself; (c) as regards its motor-house, and (d) as regards personal accident; in addition to which there was, by virtue of an endorsement, a further insurance effected under the Employers' Liability Act or the Workmen's Compensation Act in favour of the driver of the car.

Now the terms of these insurances naturally differ slightly in their expression. The one that is relevant to the present case is (a), which relates to claims by the public. That clause provides that the insurance shall cover the liability as there described in respect of the use by the assured of any motor car other than a hired car, provided that such car is at the time of the accident being used instead of the insured car. With regard to personal accident to the assured himself, there are similar provisions; he is assured against bodily injury caused by driving, mounting, dismounting, or examining "the insured car" or any motor car (other than a hired car) used, provided that such car is at the time of the accident being used instead of 'the insured car.' " Again, by one of the special conditions of the policy, it is provided that,

"This policy is applicable only to a car for private personal use, and no liability will be incurred thereunder by the insurers if and when 'the insured car,' or its substitute as above provided, is being used in connection with any trade or business."

I do not consider that last condition throws any light whatever upon the construction of the earlier clauses, the "substitute as above provided" meaning no more than the car which at the time of the accident is being used instead of "the insured car." The whole question is, What is the meaning of those latter words?

The contention for the assured is that any car which, during the period of the insurance, is in fact taking the place of the insured car, is within the meaning of the phrase, and that an accident caused by its use is an accident the liability in respect of which is covered by the policy. That is not my view of the matter. To me this policy depends upon the hypothesis that there is, in fact, an insured car. When once the car which is the subject of this policy is sold, the owner's rights in respect of it cease and the policy so far as the car is concerned is at an end. It is perfectly true that in regard to two respects this policy covers matters that are not or may not be strictly applicable to the continuance of the possession of the car. I say "may not be" because with regard to the private motor-house, the car that is "usually stored" in that house might not be satisfied by another new car. Whether that be so or not, however, it makes but little difference, because that condition and the condition with regard to the chauffeur are completely outside the questions of the insurance relating to the third-party risks, and their introduction into the policy throws no light whatever upon what is the meaning of the car that is "used instead of the insured car" under clause (a). It is my opinion that the clause assumes that there is the insured car, the use of which, if an accident arises, would entitle the assured to the benefit of the policy. If, instead of the car that could be so used, another is used in its place, then the car that is used in its place is entitled to the same privilege as the original car. But if it be assumed that the original car be sold and another car taken in its place, the result would be, if the assured's contention were correct, that it might be possible to shift the insurance from car to car during the whole period of twelve months for which the policy runs, and that although there is no express limitation on the nature of the car that may be regarded as a substitute.

I do not, for a moment, believe that that was the intention of this policy, and, although no one disputes that it must be strictly construed against the insurers, even when so strictly construed, in order to make the provisions reasonable it is impossible to give it the meaning for which the assured contends.

LORD WARRINGTON.—I agree, and I do not think I can add anything usefully on my own account.

LORD RUSSELL.—I agree. The matter, in my view, turns entirely on the true terms of the proviso at the end of the second sentence in clause (a) of the policy of insurance, and my opinion has been so completely and accurately expressed by GREER, L.J., in his judgment that I do not desire to add anything to that. The passage to which I refer is the passage in which his Lordship used the following language:

- A "I think the clause is intended to deal with the temporary substitution of a car during the time when it is possible to describe the car mentioned in the schedule as a car which is insured by the policy, and if it is not possible so to describe the car mentioned in the schedule as a car insured by the policy in the sense that the owner is insured against certain happenings in relation to it, then I think it is no longer possible to say that within the meaning of this clause any car can be treated as a car used instead of the insured car."
- B

LORD MACMILLAN.—I also agree. In my opinion, the assured cannot within the meaning of the policy use another car instead of the insured car after he has parted with the property in the insured car. If he has parted with the property in the insured car and buys another car, he cannot be said to be using his new purchase instead of the car he has sold; he is, in my opinion, using it in succession to the insured car, not instead of it.

C

Solicitors: *William Charles Crocker; Stanley Evans & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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WEDDELL AND ANOTHER v. ROAD TRANSPORT AND GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Rowlatt, J.), October 30, November 2, 1931]

[Reported [1932] 2 K.B. 563; 101 L.J.K.B. 620; 146 L.T. 162;
48 T.L.R. 59; 75 Sol. Jo. 852]

- F *Insurance—Motor insurance—Permitted driver—Co-existing policies independently covering same risk—Each policy excluding risks covered by any other policy—Rateable proportion clause in one policy—Loss of rights under other policy by failure to give notice—Liability of insurers.*

A policy of motor insurance provided by s. 2 that the insurers "will at the request of the assured treat as though he were the insured any relative or friend of the insured while driving [the insured] motor car . . . with the insured's general knowledge and consent, provided (a) that such relative or friend is not entitled to indemnity under any other policy." On Aug. 4, 1930, the insured's brother, while driving the insured's car, injured a third party. The brother owned a car and was insured with different insurers by a policy which "extended to cover the insured while driving any private motor car not belonging to him . . . if no indemnity is afforded the insured by any other insurance." On Aug. 6, 1930, the third party claimed against the brother in respect of the accident. The brother failed to give his own insurers notice of the accident within the time prescribed by his policy, and so, on Aug. 20, 1930, those insurers repudiated liability. On Aug. 16, 1930, the third party commenced an action against the brother for damages for the personal injury caused by the accident, and on Nov. 5, 1930, the insured requested the insurers to treat the brother as himself in the matter of the third party's claim. The insurers claimed to avoid liability by virtue of proviso (a). Clause (4) of the policy provided that "if at any time any claim arises under this policy there is any other existing insurance covering the same . . . liability [the insurers] shall not be liable to pay . . . [or] . . . contribute more than [their] rateable proportion. . . . Provided always that nothing in this condition shall impose on [the insurers] any liability from which but for this condition [they] would have been relieved under the provisions of s. 2.

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Held: (i) proviso (a) and the similar provision of the brother's policy were each to be construed as excluding from the category of co-existing cover any cover which was expressed to be itself cancelled by such co-existence, and, therefore, both insurers were liable to indemnify the brother, subject in the one case to cl. (4) and in the other case to the defence afforded by the brother's failure to give notice; (ii) the fact that after the time when the claim arose the brother lost his right to indemnity did not affect the operation of cl. (4); and, accordingly, the insurers were liable to indemnify the brother only to the extent of one-half of the third party's claim. A
B

Notes. Considered: *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E.R. 243. Referred to: *Tattersall v. Drysdale*, [1935] All E.R. Rep. 112.

As to conditions as to other insurances, see 22 HALSBURY'S LAWS (3rd Edn.) 265, para. 524; as to conditions giving rise to contribution, see *ibid.*, 267, para. 528; and for case on the subject, see 29 DIGEST 83, 427; and as to scope of a permitted driver clause, see 22 HALSBURY'S LAWS (3rd Edn.) 359, para. 739. C

Case referred to:

- (1) *Gale v. Motor Union Insurance Co., Ltd., Loyst v. General Accident Fire and Life Assurance Corpn., Ltd.*, [1928] 1 K.B. 359; 96 L.J.K.B. 199; 138 L.T. 712; 43 T.L.R. 15; 70 Sol. Jo. 1140; Digest Supp. D

Special Case stated by an arbitrator. On May 22, 1930, the respondent insurers issued an insurance policy to the first claimant, Mr. Justin R. Weddell. It contained, *inter alia*, a condition as follows:

"(4) If at any time any claim arises under this policy there is any other existing insurance covering the same loss damage or liability the company shall not be liable . . . to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of s. 2 of this policy." E
F

By s. 2 of the policy the insurers agreed with Mr. J. R. Weddell, the insured, in the following terms:

"The company will indemnify the insured in the event of injury or damage caused by or through or in connection with any motor car (described in the schedule to the policy) . . . against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (A) Accidental bodily injury to any person other than a person engaged in and upon the service of the insured at the time of sustaining such injury. . . . In terms of and subject to the limitations of and for the purpose of this section the company will at the request of the insured treat as though he were the insured any relative or friend of the insured while driving such motor car for social domestic or pleasure purposes with the insured's general knowledge and consent, provided (a) that such relative or friend is not entitled to indemnity under any other policy." G
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The car referred to in the above policy was registered as G.U. 3634, and at the time of the issue of the policy was the property of the insured. On Aug. 19, 1929, the Cornhill Insurance Co., Ltd. issued a motor insurance policy to the other claimant, Mr. Laurens Weaver Weddell, the insured's brother, agreeing to indemnify him against all sums which he should become legally liable to pay by way of compensation for: I

"(A) Accidental loss of life or bodily injury to any person, including any passenger, not in the service of the insured and not being a member of his family."

A By s. 50 of the Cornhill policy the company further agreed with the brother as follows:

"The indemnity granted . . . is hereby extended to cover the insured while driving any private motor car not belonging to him for pleasure or professional purposes if no indemnity is afforded the insured by any other insurance."

B One of the conditions of the Cornhill policy required the insured immediately, and in any case within three days, to give the company notice of any accident or claim. Each of the above policies was in effect for one year from the date thereof.

C On Aug. 4, 1930, the brother, while driving the car G.U. 3634, with the general knowledge and consent of the insured, accidentally struck and injured a Mr. Frederick Ward. On Aug. 6, 1930, a claim on behalf of Mr. F. Ward was made against the brother for damages. The latter failed to give the Cornhill company notice of the accident or of the claim until Aug. 19, 1930, and on Aug. 20 the Cornhill company repudiated all liability on the ground that due notice had not been given. On Aug. 16, 1930, an action was begun in the King's Bench Division by Mr. F. Ward against the brother claiming damages for personal injuries. On Nov. 5, 1930, the insured wrote to the insurers requesting them to treat the brother as himself in the matter of the claim for damages. The insurers, in reply, repudiated all liability in respect of the claim. Subject to the opinion of the court, the arbitrator awarded that the respondent insurers, the Road Transport Company, were liable to indemnify the brother against one-half of all sums which he might become legally liable to pay in respect of Mr. F. Ward's action.

Ronald Smith for the claimants, the insured and the brother.

E Willoughby Jardine, K.C., and N. R. Fox-Andrews for the insurers.

Cur. adv. vult.

Nov. 2. ROWLATT, J., read the following judgment: In the motor car policy issued by the respondent insurers, the Road Transport Co., to Mr. Justin Weddell, cl. (4) and s. 2 are material. The claimant's brother, Mr. Laurens Weddell, while driving the insured car with the claimant's consent, had an accident, and the claimant made the request referred to in s. 2. The brother also had a car, in respect of which he held a policy of the Cornhill Co., which contained the following provision. [His Lordship read s. 50 of the second policy, and continued:] That policy contains no rateable proportion clause. The question is as to the position between the claimant and the insurers, the Road Transport Co. The brother could not recover against the Cornhill Co. because he omitted to give notice within three days, which by his policy was a condition precedent to liability. The arbitrator held that the insurers were liable, but by reason of cl. (4) only for a rateable proportion, treating the Cornhill policy as being "another existing insurance" within cl. (4). For the claimant it was argued before me that he was entitled to recover in full, and the first point made was that the Cornhill policy was not "another existing insurance," because, owing to the omission to give notice of the accident liability under it could not be enforced. That is too obviously unsound to require further notice. The position is to be regarded before the time for giving the notice expired.

I The second point made was that the insurers were liable notwithstanding the proviso relating to collateral insurance, but only on the footing that, according to the decision of ROCHE, J., in *Gale v. Motor Union Insurance Co., Ltd.* (1), that proviso was cut down by the operation of the rateable proportion clause, and that the Cornhill Co. were not liable because in their case there was no rateable proportion clause. Therefore, the argument concluded, the insurers being alone liable there was no "other existing insurance," and they were liable in full. It was pointed out by counsel for the insurers that on that basis, if neither policy contained a rateable proportion clause, they would destroy each other entirely; and further, that such might be the position in this case, seeing that the proviso to the rateable proportion clause in cl. (4) of the Road Transport policy seemed to negative

its use to cut down the proviso as to collateral insurance in the case of a friend or relative. However, he did not contend for that result, his clients being content to accept the decision of the arbitrator. It is to be borne in mind that the risk covered by the clause as to a relative or friend was an extension of the scope of the policy. It gave protection to a person other than the assured. So, too, the clause in the Cornhill policy covering the assured when driving a car not belonging to him is an extension of the primary purpose of the policy, which was to cover risks to and in connection with a particular car, or cars, mentioned in the schedule. The general purpose of the proviso seems to be to make such extensions operate only as secondary cover, available only in the absence of other insurance regarded as primary, not including, it would be supposed, other insurance also of a secondary character. It is unreasonable to suppose that it was intended that clauses such as that should cancel each other (by neglecting in each case the proviso in the other policy), with the result that, on the ground in each case that the loss was covered elsewhere, it was covered nowhere. On the contrary, the reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold in such cases that both companies are liable, subject, of course, in both or either case, to any rateable proportion clause which there might be. In other words, it is true to say that the relative or friend was "not entitled to indemnity under any other policy" within the meaning of the Road Transport policy, and not "afforded indemnity by any other insurance" within the meaning of the Cornhill policy, when the other policy negatived liability where there were two policies. At this point the process must cease. If one proceeds to apply the same argument to the other policy and let that react on the policy under construction, one would, of course, reach the absurd result that whichever policy one looked at it was always the other one which was effective.

In these circumstances I come to the conclusion that the Cornhill Co. (apart from the omission to give the notice) is liable, notwithstanding that their policy contained no rateable proportion clause, and I confirm the decision of the arbitrator. It does not escape me that in the result the Cornhill policy is disregarded for the purpose of s. 2, but not for the purpose of cl. (4). The considerations are, however, different.

Solicitors: *Redden & Booth; Joynton-Hicks & Co.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

A

R. v. JUDGE. Ex parte ISLE OF ELY JUSTICES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Macnaghten, JJ.), February 3, 1931]

B

[Reported [1931] 2 K.B. 442; 100 L.J.K.B. 350; 144 L.T. 647; 95 J.P. 97; 47 T.L.R. 263; 75 Sol. Jo. 120; 29 L.G.R. 418]

Contempt of Court—Disobedience to subpœna by quarter sessions—Power of High Court to punish—Remedies for disobedience.

The High Court has no power to punish by attachment for contempt in the case of disobedience to a subpœna issued by quarter sessions.

C

R. v. Brownell (1) (1834), 1 Ad. & El. 598, followed.

Per **Curiam**: The four possible remedies for such disobedience are (i) to issue a Crown Office subpœna, disobedience to which was punishable as a contempt by the High Court; (ii) to apply to quarter sessions to impose a fine on the person who had disobeyed a subpœna issued by them: *R. v. Clement* (2) (1821), 4 B. & Ald. 218, approved; (iii) the remedy by indictment or information for the disobedience to the inferior court; and (iv) an action for damages if it could be shown that the party had been damaged by the non-attendance of the witness.

D

Notes. As to contempt of inferior courts, see 8 HALSBURY'S LAWS (3rd Edn.) 19, para. 35; and for cases on the subject, see 16 DIGEST 11-12, 43-54.

Cases referred to:

E

(1) *R. v. Brownell* (1834), 1 Ad. & El. 598; 3 L.J.M.C. 118; 110 E.R. 1335; sub nom. *R. v. Room*, 3 Nev. & M.K.B. 725; 2 Nev. & M.M.C. 368; 33 Digest 388, 991.

(2) *R. v. Clement* (1821), 4 B. & Ald. 218; 106 E.R. 918; 16 Digest 10, 28.

(3) *R. v. Ring* (1800), 8 Term. Rep. 585; 101 E.R. 1560; 22 Digest (Repl.) 416, 4476.

F

(4) *R. v. Davies*, [1906] 1 K.B. 32; 75 L.J.K.B. 104; 54 W.R. 107; 50 Sol. Jo. 77; sub nom. *R. v. Davies, Ex parte Hunter*, 93 L.T. 772; 22 T.L.R. 97, D.C.; 16 Digest 11, 43.

(8) *R. v. Burchett* (1723), 1 Stra. 567; 8 Mod. Rep. 208; 93 E.R. 704; 16 Digest 12, 49.

(9) *R. v. Daily Mail, Ex parte Farnsworth*, [1921] 2 K.B. 733; 90 L.J.K.B. 871; 125 L.T. 63; 37 T.L.R. 310, D.C.; 16 Digest 12, 54.

G

Rule nisi for attachment for contempt.

One, Saunders, lodged an appeal to quarter sessions from a refusal by petty sessions to make an affiliation order against one, Monkton, whom she alleged to be the father of her illegitimate child. On Oct. 7, 1930, a subpœna was issued by the court of quarter sessions requiring one, Judge, to attend and give evidence in the appeal, and 10s. conduct money was tendered. Judge refused to take the conduct money, and did not attend on his subpœna. The appeal was dismissed on the ground that the evidence of the complainant was uncorroborated. It was alleged that the evidence which Judge could have given would have supplied the requisite corroboration. The justices resolved

H

I

"that the clerk of the peace do take such steps as are necessary to bring the contumacious witness, William Judge, to account for his contempt in disobeying the said subpœna."

A rule was applied for at the instance of the justices, and the King's Bench Division granted a rule nisi.

R. J. Sutcliffe, showing cause, referred to *R. v. Ring* (3); *R. v. Brownell* (1); *R. v. Davies* (4); and *R. v. Clement* (2).

S. R. Bosanquet, K.C. (*Linton Thorp* with him), in support of the rule, referred to *R. v. Burchett* (8); *R. v. Room* (1); and *R. v. Daily Mail* (9).

LORD HEWART, C.J.—This is a rule nisi for attachment for contempt of the court of general quarter sessions of the Isle of Ely by refusal and neglect to obey a writ of subpoena of the court of quarter sessions ordering the respondent to attend and give evidence in an appeal. The case raises an interesting question whether the doctrine laid down in *R. v. Brownell* (1) is still law. In spite of the eloquent and learned argument of counsel in support of the rule, I have come to the conclusion that it is. There is no ambiguity in the judgment of LORD DENMAN, C.J., or of LITTEDALE, J., or of TAUNTON, J. TAUNTON, J., put the matter very briefly:

“Disobedience to a Crown Office subpoena is a manifest contempt of the authority of this court; disobedience to a subpoena from quarter sessions is not”;

and a clear distinction is recognised between contempt which consists in disobeying an order or other process of the court and contempt which consists in interfering with the due administration of justice by acts done or writings published calculated to obstruct or interfere with the due course of justice in the court. It may be a little difficult perhaps to find a perfectly clear and logical differentia between the two, but it has been recognised for a long time, and I am not satisfied that we ought at this time to disturb it. It has been urged upon us that much has happened since the year 1834. That is true; but no case has been cited which shows that the decision in *R. v. Brownell* (1) is no longer law; on the contrary, in one comparatively recent case upon which great stress was laid, *R. v. Davies* (4), in an elaborate judgment there delivered, the judgment of the whole court, it appears ([1906] 1 K.B. at p. 45) that the distinction is still recognised between mere interference with the process of the court, on the one hand, and the grave danger to the public of prejudicing the fair trial of the case, on the other.

It is said that if there is not this remedy then there is no remedy; but, after all, attachment is something which happens afterwards just as an indictment or a fine is; and there can be little doubt, I think, especially in view of the decision in *R. v. Clement* (2), that quarter sessions have power to fine. The recalcitrant witness may also be tried upon indictment, and there may be other remedies open also. Moreover, if the subpoena is issued from the Crown Office, these questions do not arise. Much as I was interested in counsel's careful argument in support of the rule, I am not satisfied that *R. v. Brownell* (1) has been superseded or that the lapse of time has introduced the vital change for which he contends. I think, therefore, that this rule ought to be discharged.

AYORY, J.—I am of the same opinion. I cannot find in the judgment of WILLS, J., which was the judgment of this court in *R. v. Davies* (4), anything which is inconsistent with the principle laid down in *R. v. Brownell* (1). On the contrary, I think the passage in the judgment to which I called attention ([1906] 1 K.B. at p. 45) rather seems to recognise that there may be a distinction between interference with the process of the magistrate's court and an interference which involves a grave danger to the public of prejudicing the fair trial of a case to be heard in an inferior court. Although it is true that that observation arose on a consideration of *R. v. Burchett* (8), which was a decision of a single judge—EYRE, J.—undoubtedly that decision was in accordance with the practice at that time prevailing. I agree with my Lord that it cannot be said in this case that by refusing to make this rule absolute we are depriving an injured party of any remedy, because there seem to be clearly four remedies open for this state of things which is complained of; one is to issue a Crown Office subpoena instead of a subpoena from quarter sessions; another is to apply to the court of quarter sessions to impose a fine on the person who has disobeyed a subpoena when it is issued by the clerk of the peace. I do not doubt that HOLROYD, J., had good authority for saying, as he did in *R. v. Clement* (2), that the courts inferior to the courts of Westminster may clearly fine and imprison for a contempt; and he goes on to give as an illustration the constant practice for those courts to fine jurors who do not attend. I can see no greater difficulty in imposing a fine on a person who has been subpoenaed as a witness than

A in imposing a fine upon a juror who does not attend. It is obvious that some process must be necessary to enforce the fine, and there can be no more difficulty in enforcing a fine upon an absent witness than there is in enforcing it upon an absent juror. The third remedy which has been often referred to and which seems to be undisputed, is a remedy by indictment or information for the disobedience to the inferior court; and the fourth possible remedy is one which has been certainly

B recognised, and that is an action for damages if it can be shown that the party has been damaged by the non-attendance of the witness. Therefore, there being these adequate remedies, I do not see any sufficient justification for saying that we are prepared to differ from the law as it was clearly laid down in *R. v. Brownell* (1). Therefore, I agree that the rule should be discharged.

C **MACNAGHTEN, J.**—I agree.

Rule discharged.

Solicitors: *Smiles & Co.*, for *Mossop & Mossop*, Holbeach; *Wilthers & Co.*, for *Metcalfes, Copeman & Pettefar*, Wisbech.

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

D

E

R. v. JONES. Ex parte McVITTIE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and MacKinnon, JJ.), January 23, 1931]

F [Reported [1931] 1 K.B. 664; 100 L.J.K.B. 193; 144 L.T. 597]

Contempt of Court—Service of process—Precincts of court.

A judgment debtor, who was plaintiff in an action tried at assizes, was served with a judgment summons while waiting in the corridor of the court.

Held: it is no longer law that service of process within the precincts of a court is in itself a contempt of the court, and in the circumstances of this case

G no contempt had been committed.

Cole v. Hawkins (1) (1738), Andr. 275, disapproved.

Dictum of MARTIN, B., in *Poole v. Gould* (2) (1856), 1 H. & N. 99, at p. 100, applied.

Notes. As to obstructing parties to proceedings by serving process upon a party in court, see 8 HALSBURY'S LAWS (3rd Edn.) 15, para. 24, text and note (a).

H Cases referred to:

(1) *Cole v. Hawkins* (1738), Andr. 275; 2 Stra. 1094; 95 E.R. 396; 16 Digest 34, 341.

(2) *Poole v. Gould* (1856), 1 H. & N. 99; 25 L.J.Ex. 250.

Rule nisi for attachment for contempt.

I The respondent, Henry Gilman Jones, had acted as solicitor for one Stewart in an action in the Salford County Court, in which Stewart recovered judgment against one McVittie. McVittie appealed to the Divisional Court, and his appeal was dismissed with costs. As McVittie paid nothing on account of the damages and costs recovered against him in these proceedings a bankruptcy notice was served on him in June, 1929. In October, 1929, the first of a series of judgment summonses was issued against the debtor, but it was found impossible to effect service, and fresh judgment summonses issued in March and June, 1930, respectively could not be served. Another summons was issued on Nov. 25, 1930,

and was served on McVittie on Nov. 28 in the corridor of the Manchester Assize Court, a few minutes before the sitting of the court. McVittie was attending the court upon the trial of an action in which he was plaintiff. A

A rule nisi was granted calling upon Jones to show cause why a writ of attachment should not issue against him for contempt in serving McVittie with process in the precincts of the court.

B. L. O'Malley showed cause. B

B. H. Waddy supported the rule.

LORD HEWART, C.J.—This is a rule nisi for attachment for contempt. [His Lordship stated the facts and continued:] Unless the proposition be universally true that service of process within the precincts of a court of any kind in any circumstances amounts to a contempt of court, it is difficult to see how the particular service in this case can be contempt. The case relied on in support of the rule is *Cole v. Hawkins* (1), which is nearly 200 years old. What was being considered in that case was the serving of the copy of a bill of Middlesex. It is stated in the report that the whole court (except *PAGE, J.*, who hesitated) C

"were clearly of opinion that the service of a process in the sight of the court is a great contempt and punishable by attachment. And they said that persons have been frequently laid by the heels for making arrests in those cases, where they have refused to discharge the party arrested." D

The matter there relied on was that of arrest. This case is commented on in *Poole v. Gould* (2), but that case is not precisely in point, the question there at issue being not whether there was a contempt but whether the service was void. *POLLOCK, C.B.*, said: E

"Even admitting the conduct of the party serving the writ to be improper, it does not follow that the service of the writ is void,"

and *MARTIN, B.*, said:

"The courts ought to give assistance to creditors and not throw unnecessary impediments in the way of their service of process." F

I do not say that there may not be circumstances in which service of process within the precincts of the court may amount to contempt; but on the particular facts of this case I think it is not possible to say that there was any contempt committed here, and therefore the rule should be discharged with costs.

AVORY, J.—I agree.

MACKINNON, J.—I agree that this rule should be discharged. Personally, I regret that it is the only penalty that we can impose upon the applicant, because in my opinion a more impudent application has never been made in this court. Here is a man against whom judgment was obtained in February, 1929, and he paid nothing. In June, 1929, a bankruptcy notice was served on him, and still he paid nothing. On Aug. 15, 1929, an order for payment by instalments of £2 per month was obtained. He disobeyed that order flatly. Thereupon a series of judgment summonses was taken out to call upon him to appear before the court, and incidentally to give some answer to what was apparently a contempt by him of the court which had made that order. All efforts to serve him with those judgment summonses failed because he kept out of the way. Eventually he was served with this summons in the corridor of the Assize Court. For him, in these circumstances, to say that the service of that judgment summons is a contempt of court seems to me to be farcical. G

His application is supported by a case—*Cole v. Hawkins* (1)—almost 200 years old, decided at a time when the rule clearly was based on the necessity that litigants who were to appear in a court should not be exposed to the risk of being arrested. I regard that supposed rule as being nowadays entirely obsolete, and I agree thoroughly with what was said by *MARTIN, B.*, in *Poole v. Gould* (2), namely, that the courts ought to give assistance to creditors and not throw impediments in the way of their service of process. H

- A** It is possible, as has been pointed out by my Lord, that there might conceivably be circumstances in which service of a writ somewhere in a court might amount to a contempt. Personally, I cannot conceive what these circumstances might be, but in this case I am perfectly satisfied that no such circumstances exist.

Rule discharged.

- B** Solicitors: *Braikenridge & Edwards; Light & Fulton.*

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

C

Re SMITH. PUBLIC TRUSTEE v. SMITH

- D** [COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.J.J.), October 26, 27, 1931]

[*Reported* [1932] 1 Ch. 153; 100 L.J.Ch. 409; 146 L.T. 145;
48 T.L.R. 44; 75 Sol. Jo. 780]

Charity—Benefit to community—Bequest “unto my country England”—Payment to such person as His Majesty should direct.

- E** By his will made in 1917, S. bequeathed all his estate whether real or personal “unto my country England to and for . . . own use and benefit absolutely.”

Held: (i) the bequest was a gift to a defined entity, England, and so was to be interpreted as a valid charitable bequest for the benefit of the inhabitants of England.

- F** *West v. Knight* (1) (1669), 1 Cas in Ch. 134; *A.-G. v. Earl Lonsdale* (2) (1827), 1 Sim. 105; *A.-G. v. Carlisle Corpn.* (3) (1828), 2 Sim. 437; *Mitford v. Reynolds* (4) (1842), 1 Ph. 185; *Nightingale v. Goulbourn* (5) (1847), 5 Hare 484, affirmed (1848), 2 Ph. 594; and *A.-G. v. Webster* (6) (1875), L.R. 20 Eq. 483, applied. *Re Macduff, Macduff v. Macduff* (7), [1896] 2 Ch. 451; *Blair v. Duncan* (8), [1902] A.C. 37; and *Houston v. Burns* (9), [1918] A.C. 337, distinguished.

- G** Dicta of LORD CAVE in *A.-G. v. National Provincial and Union Bank of England* (10), [1924] A.C. at p. 264, explained. Dictum of YOUNGER, L.J., in *Re Tetley* (10), [1923] 1 Ch. 258 at p. 275, dissented from.

(ii) the gift should be paid to such person as His Majesty should direct under his sign-manual.

- H** **Notes.** This case must be read subject to the explanation of it by the Court of Appeal in *Re Strakosch*, [1949] 2 All E.R. 6 at pp. 9–10, that “the principle laid down [by it] is that general words that money is to be applied for the benefit of a district or a country are construed as meaning for such purposes as are recognised by the law as charitable.”

- I** Considered: *Williams’ Trusts Trustees v. I.R. Comrs.*, [1947] 1 All E.R. 513; *Re Driffill, Harvey v. Chamberlain*, [1949] 2 All E.R. 933. Explained and distinguished: *Re Strakosch, Temperley v. A.-G.*, [1949] 2 All E.R. 6. Referred to: *Re Baynes, Public Trustee v. Leven Corpn.*, [1944] 2 All E.R. 597.

As to gifts for the general benefit of a community, see 4 HALSBURY’S LAWS (3rd Edn.) 227, para. 507; and for cases on the subject, see 8 DIGEST (Repl.) 349–351, 296–311. As to crown jurisdiction over gifts to charity generally without a trust, see 4 HALSBURY’S LAWS (3rd Edn.) 408, para. 849; and for cases on the subject, see 8 DIGEST (Repl.) 503, 2227–2237.

Cases referred to :

- (1) *West v. Knight* (1669), 1 Cas. in Ch. 134; 22 E.R. 729; 8 Digest (Repl.) 342, 237. A
- (2) *A.-G. v. Earl Lonsdale* (1827), 1 Sim. 105; 5 L.J.O.S.Ch. 99; 57 E.R. 518; 8 Digest (Repl.) 421, 1116.
- (3) *A.-G. v. Carlisle Corpn.* (1828), 2 Sim. 437; 57 E.R. 851; affirmed (1830), 8 L.J.O.S.Ch. 146, L.C.; 8 Digest (Repl.) 344, 251. B
- (4) *Mitford v. Reynolds* (1842), 1 Ph. 185; 12 L.J.Ch. 40; 7 Jur. 3; 41 E.R. 602, L.C.; 8 Digest (Repl.) 344, 254.
- (5) *Nightingale v. Goulbourn* (1847), 5 Hare 484; 16 L.J.Ch. 270; 11 Jur.O.S. 383; affirmed (1848), 2 Ph. 594; 17 L.J.Ch. 296; 11 L.T.O.S. 169; 12 Jur. 317; 41 E.R. 1072, L.C.; 8 Digest (Repl.) 350, 297.
- (6) *A.-G. v. Webster* (1875), L.R. 20 Eq. 483; 44 L.J.Ch. 766; 8 Digest (Repl.) 342, 238. C
- (7) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, 879.
- (8) *Blair v. Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, 865. D
- (9) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, 889.
- (10) *Re Tetley, National Provincial and Union Bank of England, Ltd. v. Tetley*, [1923] 1 Ch. 258; 128 L.T. 737; 92 L.J.Ch. 351; 39 T.L.R. 218; 67 Sol. Jo. 350, C.A.; affirmed sub nom. *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; 93 L.J.Ch. 231; 131 L.T. 34; 40 T.L.R. 191; 68 Sol. Jo. 235, H.L.; 8 Digest (Repl.) 397, 892. E
- (11) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 836.
- (12) *Jones v. Williams* (1767), Amb. 651; 27 E.R. 422, L.C.; 8 Digest (Repl.) 344, 247.
- (13) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 298, H.L.; 8 Digest (Repl.) 440, 1306. F
- (14) *Re Christchurch Inclosure Act* (1883), 38 Ch.D. 520; 57 L.J.Ch. 564; 58 L.T. 827; 4 T.L.R. 392, C.A.; affirmed sub nom. *A.-G. v. Meyrick*, [1893] A.C. 1 H.L.; 8 Digest (Repl.) 394, 776.
- (15) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, 1. G
- (16) *A.-G. v. Lord Hotham* (1823), Turn. & Russ. 209; affirmed (1827), 3 Russ. 415; 38 E.R. 631, L.C.; 8 Digest (Repl.) 480, 1842.
- (17) *A.-G. v. Peacock* (1676), Cas. temp. Finch, 245; 23 E.R. 135; sub nom. *A.-G. v. Matthews*, 2 Lev. 167; 8 Digest (Repl.) 503, 2233.
- (18) *Newland v. A.-G.* (1809), 3 Mer. 684; 36 E.R. 262, L.C.; 8 Digest (Repl.) 504, 2253. H
- (19) *Hill v. Burns* (1826), 2 Wils. & S. 80; 8 Digest (Repl.) 399, *304.
- (20) *Crichton v. Grierson* (1828), 3 Bli.N.S. 424; 4 E.R. 1390, H.L.; 8 Digest (Repl.) 399, 900.
- (21) *Miller v. Rowan and Miller (Black's Trustees)* (1837), 2 Sh. & Macl. 866; 8 Digest (Repl.) 399, *305. I

Appeal from a decision of BENNETT, J., as to the validity of a bequest.

The testator, Theodore Wynford Smith, by his will dated Jan. 13, 1917, bequeathed all his estate as follows :

"I give devise and bequeath all my estate and effects whatsoever and where-soever both real and personal whether in possession or reversion remainder or expectancy unto my country England to and for . . . own use and benefit absolutely."

A The testator died on April 23, 1930. The Public Trustee proved the will on Aug. 16, 1930, and took out this summons to determine the question whether the gift was (a) a valid charitable gift, or (b) was a valid gift in favour of His Majesty's Treasury, or (c) was void.

BENNETT, J., held

B "that, assuming that this gift 'unto my country England' ought to be interpreted as meaning a gift for the general benefit of the community of England as a whole, it is not a gift which must necessarily be confined to charitable purposes, and therefore is one which, on the authority of *Re Tetley* (10), I must hold to be void."

C He further held that it was not a gift to the King in right of his crown, and accordingly found that the residuary estate of the testator had not been disposed of and devolved as on an intestacy.

The Attorney-General and the Solicitor-General appealed.

Stafford Crossman for the Attorney-General, in favour of the validity of the bequest as a good charitable trust to be carried out by a scheme under the sign-manual.

D A. Andrewes-Uthwatt for the Solicitor-General: this is a gift to the King in right of his crown, and so operates in favour of H.M. Treasury.

J. H. Stamp for the plaintiff, the Public Trustee, the trustee of the will.

Wilfrid M. Hunt for some of the next-of-kin.

H. F. F. Greenland for executor of one of the next-of-kin.

E LORD HANWORTH, M.R.—On Jan. 13, 1917, Mr. Theodore Wynford Smith, of 5, Palace Gardens Mansions, Notting Hill Gate, and Newton Abbot, in South Devon, made his will. On April 23, 1930, he died, and his will was duly proved on Aug. 16, 1930. The will is quite short. He directs the payments of his funeral and testamentary expenses and all his just debts, and then he bequeaths

F "all my estates and effects whatsoever and wheresoever both real and personal whether in possession or reversion remainder or expectancy unto my country England to and for own use and benefit absolutely,"

and he appointed the Public Trustee to be his executor. We are told that the will was made upon a printed form and that is why the words appear a little curiously and the words "own use and benefit" appear to be put in the place in which a space was left for them, and the grammar leaves something to be desired, though the sense is not difficult to gather.

G We have to construe the will, and it is said that that bequest "to my country England . . . for own use and benefit absolutely" is vague, uncertain, and void for uncertainty, that it cannot be held to be a charitable bequest so as to take it out of the rule against perpetuities, and that, therefore, the will is ineffective and the property would pass to the next-of-kin. It is noticeable that it is an out-and-out

H gift without any conditions at all "for own use and benefit absolutely to my country." The court leans in favour of making the testamentary dispositions of a testator effective, if possible, within the limitations and in accordance with the principles of law. First of all, on the construction to be placed on the will there appears to be an entity indicated, namely, England. But is that so vague that it contains no meaning at all? I cannot so interpret the bequest. I think that there

I is an entity, although it would be possible to raise, I will not say doubts, but to raise a criticism that England itself is now joined to Scotland and to Wales and Northern Ireland, and that one uses a different and more comprehensive term when one is speaking of that collocation of countries. At the same time, the word "England" does connote to many an entity, and I think that if a man was asked where he was born he would be content to say, "I was born in England," without any more specific identification.

I then come to the question, Is a bequest to a country, here England, good? Two questions are somewhat mixed up. One has to consider at the same time

whether it is good as not being uncertain, and whether it is a charitable gift so as to eliminate any danger from the other rules of law. As far back as *West v. Knight* (1) it was decided that a gift by a testator to the parish of Great Creaton where he was born, without saying to what use, was good. There were no specific indications of the purposes for which it should be used, and all that was indicated was the parish where the testator was born. It was held that it was good and that the matter was to be referred for a scheme to see that the money was disposed of for the benefit of the poor of the parish. That ultimate destination is a matter which I will deal with later on, but the noticeable fact is that a gift to the parish without any specific use is held to be good as a gift to that area, or, rather, of course, for the benefit of those who live within that area. A

Then *A.-G. v. Earl Lonsdale* (2) is a noticeable case. There there had been a deed and a will whereby a certain sum was to be used for charity, and the particular charity that was then indicated was a school. In due course the school was established and carried on for some forty years. At the end of that time the school came to an end and the tenant for life who was in enjoyment of the estates used the money that was coming and had been devoted to the school for his own purposes. The Attorney-General then brought proceedings, claiming that the money ought to be restored to a charitable purpose. The alternative to the school was this: B

"or otherwise upon such other trusts, and for such other purposes as my executors shall think most conducing to the good of the county of Westmorland, and especially of the parish of Lowther." C

The observation that is made there by the Vice-Chancellor is: D

"This amounts to a clear direction that if, for any reason, the testator's intention as to the school should fail, the manor, lands, and rectory intended for the endowment of the school should be applied to other charitable purposes; and the court is bound to carry this intention into effect." E

I say the case is a noticeable one because it was argued with cogency that, inasmuch as the specific bequest to the school had come to an end or failed, the indefinite purpose ought not to be brought out of its obscurity into which it had got; but it was held by the Vice-Chancellor that the second bequest upon the failure of the first was effective and good, and clearly indicated the bequest valid because the money was to be applied to charitable purposes, although it was given simpliciter to the good of the county of Westmorland, and especially to the parish of Lowther without any more specific indication being given. F

Then there is *A.-G. v. Carlisle Corpn.* (3), in which a grant from the Crown of certain privileges and property for the defence of and preservation of the peace within the city of Carlisle is held to be a charitable gift. That again is vague in its ultimate terms, but the persons who are to benefit are the particular city, namely, Carlisle. G

In *Mitford v. Reynolds* (4) the testator disposed of his property, first, for the making of a suitable, handsome, and durable monument, and so on, H

"after which he gave the remainder of his property to the Government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants." I

It was held that that was good. It is for the express purpose of charitable, beneficial, and public works. The Lord Chancellor, LORD LYNDHURST, said (1 Ph. at p. 190):

"If these words . . . are to be taken distributively and not conjunctively, and any one of the purposes or of the alternatives would not constitute a valid charitable bequest, the whole disposition will, of course, fail";

but it was held there that they were to be taken conjunctively, with the result that the bequest was held to be good. He said this (1 Ph. at p. 195):

"Now, it is argued that this is a void bequest; and that this being a void

- A** bequest, and the amount which it will be necessary to expend for the purpose of carrying this design into effect, if it could be legally carried into effect, being uncertain . . . and the remainder of the residue being to be applied to the charitable objects to which I have already adverted, that if the sum to be applied to this object is uncertain, the balance also must be made uncertain," and therefore that the whole bequest was void for uncertainty. However, he held
- B** otherwise, and that the bequest to the Government of Bengal for the purposes of the natives of Dacca was good—another illustration, in line with the other cases, where a gift to the inhabitants of an area larger than a parish or a county or a city is also held to be good.

Then comes *Nightingale v. Goulbourn* (5), where there was a bequest:

- C** "to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain."

That bequest was held to be valid so far as related to the personalty. The question that is there discussed is whether or not the bequest given to the benefit and advantage of Great Britain is so wide and vague as to be void. WIGRAM, V.-C., in his judgment, draws attention to the well-known case of *Morice v. Bishop of Durham*

- D** (11), which I will refer to in a moment, and he says this:

"I do not understand the observations of SIR WILLIAM GRANT in *Morice v. Bishop of Durham* (11) as deciding that no general words could be equivalent to the word 'charity'; nor do I think it would be right, with reference to the decided cases, to lay down any such general rule."

- E** Then he founded himself on *West v. Knight* (1), *Jones v. Williams* (12), *A.-G. v. Carlisle Corpn.* (3), *A.-G. v. Earl Lonsdale* (2), and *Mitford v. Reynolds* (4); and he said this, that something which is to be in favour of or for the benefit of the inhabitants of Dacca is good, and he held it to be good. As to the word "charitable" he said that the bequest was for the benefit of all the native inhabitants in general, both rich and poor, and that it was, therefore, good. He also added that the
- F** British public in that case would stand in the situation of the person indicated by a bequest to a trustee for the advantage of A B. *Nightingale v. Goulbourn* (5) went before the Lord Chancellor on appeal, and after a discussion the Lord Chancellor said (2 Ph. at p. 595):

- G** "Many bequests have been held good charitable gifts to parishes, towns, counties, and provinces [and he cites the cases to which I have already referred]. Why, then, is the present gift not good? Why is this kind of charitable gift to be held void because the particular objects are not specified, when that objection does not prevail in what have been called proper charities? It is no criterion of the invalidity of a charity bequest, that it is not capable of being administered in this court, for that is the case in every charitable gift which is administered under the sign-manual."

- H** Again he refers to *Morice v. Bishop of Durham* (11), and continues:

"If a gift to the Government for the benefit of the public be good, can it become bad because it is given to one member of that Government for the same purpose?"

- I** He points out that in such a case the Chancellor of the Exchequer does not take for his own benefit, but a discretion would have to be exercised as to how it is used. After the bequest has been held good there may be some question arising as to how it can be best used for the benefit of the parish, the town, the county or the province. What we have, first of all, to determine, however, is whether or not this is a good bequest to what is really a defined class, that class being, in some cases to which I have referred, to be found in the parish or sometimes in the city, sometimes in the province and sometimes in a still larger area, but none the less defined.

Those cases have all been considered from time to time and held good. In *Goodman v. Saltash Corpn.* (13) LORD SELBORNE, a master of accurate diction, says (7 App. Cas. at p. 642):

"A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust; and no charitable trust can be void on the ground of perpetuity,"

and he cites some of the cases to which I have already referred. LORD CAIRNS says (7 App. Cas. at p. 650):

"It appears to me that there is no difficulty in supposing such a grant, a grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant . . . that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities."

It is quite impossible, certainly in this court, to set aside the weighty opinions of two such distinguished lawyers and Lord Chancellors. There seems to be abundant and clear approval of the cases to which I have already referred. The matter does not stop there, however, for the same approval is again given by LINDLEY, L.J., in *Re Christchurch Inclosure Act* (14).

Lastly, in *Income Tax Special Purposes Comrs. v. Pemsel* (15) ([1891] A.C. at p. 544) LORD HALSBURY says this:

"A gift

'to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain' . . .

is a 'charitable purpose.' "

I will not stop to note that the gift being to the Chancellor of the Exchequer does not seem to have been the root of the decision in *Nightingale v. Goulbourn* (5), and recent authorities would seem to indicate that one ought not to draw any particular deduction from the person who is made trustee. But put in the way in which it is by LORD HALSBURY, "appropriated to the benefit and advantage of my beloved country," it is a good charitable bequest.

One case more I must refer to is *A.-G. v. Webster* (6), where there was a trust in favour of parishioners of a parish for ever, which, it was decided, can only be upheld on the ground of its being a charitable trust. However, it is worth noting what was decided there. A certain number of charitable funds or moneys for centuries had percolated down into the hands of particular persons, and those moneys had always been used for charitable purposes in the sense of their benefiting the parish. SIR GEORGE JESSEL says (L.R. 20 Eq. at p. 491):

"We have a case where property was purchased for the benefit of a parish, and which has been used now for nearly three centuries for charitable purposes; and, that being so, I have not the slightest doubt or hesitation in saying that if there had been no authority whatever on the subject, there could be no question that this was properly held for charitable purposes."

A Then he cites *A.-G. v. Lord Hotham* (16), where there was a conveyance "for the use and benefit of the said parish." Therefore, if you want authority there is express authority, but I say none was wanted, because it is impossible for the defendants to make out how you can have a valid trust for the benefit of the parish without its being charitable. The interest of that case appears to me to be this, that where you have a bequest to a parish, a city, a province or the like, that seems, B and is apparently held by SIR GEORGE JESSEL, to connote, first of all that it is good, but that it is good in the sense that it is for charitable purposes in that parish; in other words, you do not want further words when you are giving to the city, the parish or the county to indicate that it is to be for charitable purposes, because the destination which you have indicated is one which the court endeavours to uphold and finds in that very bequest the indication that the money so disposed of is to C be used for charitable purposes.

I want to turn back for a moment to *Morice v. Bishop of Durham* (11), for that is always cited, or at least it is the basis on which the judgment of LORD MAC-NAGHTEN in *Pemsel's Case* (15) is founded. What was decided there was this, that a bequest "for such objects of benevolence and liberality as the trustee in his own discretion shall most approve," cannot be supported as a charitable legacy. They D were objects of benevolence and liberality. Those words are certainly too wide within the decision in *Pemsel* (15), and were held within the decision in *Morice v. Bishop of Durham* (11) to be too wide. It would be too indefinite. That was the ground on which the trust failed. LORD ELDON, however, when the latter case came before him on appeal, made this observation (10 Ves. at p. 521):

E "With reference to those in which the court takes upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects, but it falls upon the King, as *parens patriæ*, to apply the property, it is enough at this day to say, the court by long habitual construction of those general words has fixed the sense; and, where there is a gift to charity, in general, whether it is to be F executed by individuals, selected by the testator himself, or the King, as *parens patriæ*, is to execute it (and I allude to *A.-G. v. Matthews* (17)), it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense, which the determinations have affixed to that word in this court; namely, either such charitable purposes as are expressed in the statute or to purposes having analogy to those."

G That passage, to my mind, is of importance because it clearly shows that the Lord Chancellor was saying that a charity in general terms may be good, although it would fall to those who have the responsibility of executing it to see that it is confined to objects which fall within the proper sense of the word "charitable" as construed in these courts and that you may have a general bequest in which that duty falls upon the King as *parens patriæ*. However, he does not say that a H bequest general in its terms is to be held void by the court because of those general terms; he seems to indicate, in close alliance with the authorities that I have already cited, that you may have a gift to charity in general, afterwards to be devoted to purposes chosen by, it may be, the King, or it may be other persons. In *Newland v. A.-G.* (18) we have an illustration of that, because one sees (3 Mer. at p. 684) that in the will of Abraham Newland there was a bequest of stock to His Majesty's I Government in exoneration of the national debt. There the Lord Chancellor directed it to be transferred to such person as the King under his sign-manual should appoint—an indication of carrying out the method suggested by LORD ELDON in *Morice v. Bishop of Durham* (11).

Those cases seem to me so clear that we have a sequence of authority over a long series of years which must be respected and, of course, followed in this court. It is said, however, that there are other cases which have been decided in recent years which militate against that view. Before I pass to those I want to call attention to the fact that this class of cases to which I am now coming had a different

problem to solve, such as, for instance, that which is found in *Re Macduff, Macduff v. Macduff* (7). From time to time you find cases in which you have, as in *Macduff's Case* (7), a bequest of money to some one or more purposes, charitable or philanthropic; and it is held that they must be treated as either charitable or philanthropic purposes, and that such a bequest is not good because the alternative was given to those who had to determine how the bequest should be made use of to devote it to philanthropic purposes; and there are many philanthropic purposes which cannot be held to be charitable, within the well-known definition, as we now know it, of LORD MACNAGHTEN in *Pemsel's Case* (15). In *Re Macduff* (7) LINDLEY, L.J., deals with *Pemsel's Case* (15). Dealing with the words of LORD MACNAGHTEN he says that they are a paraphrase of the words of SIR SAMUEL ROMILLY, and continues ([1896] 2 Ch. at p. 467):

“ ‘Charity’ in its legal sense comprises four principal divisions: Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads,’ ”

leaving out those somewhat significant words of SIR SAMUEL ROMILLY as to the fourth head, ‘which is the most difficult,’ which showed perfectly plainly that SIR SAMUEL ROMILLY saw, and I do not doubt that LORD MACNAGHTEN saw also, that there might be some purposes of public general utility which might be charitable and some which might not.”

That was a case in which you have an alternative offered in the terms of the bequest itself. Such an alternative was also to be found in *Blair v. Duncan* (8) ([1902] A.C. at p. 43). There LORD DAVEY deals with the cases in this way:

“There are three cases in this House to which your Lordships’ attention was called. In *Hill v. Burns* (19) a bequest to trustees was held valid, whereby a testatrix appointed the residue of her estate to be applied by her trustees in aid of

‘the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow, or neighbourhood thereof,’ ”

to be appropriated in such manner as to the trustees might seem proper. In *Crichton v. Grierson* (20) a gift to trustees of a residue to be applied in such charitable purposes and bequests to such of the testator’s friends and relations as might be pointed out by his wife, with the approbation of the majority of the trustees, was also held valid. Lastly, in *Miller v. Rowan and Miller (Black’s Trustees)* (21) a bequest for such charitable and benevolent purposes as the trustees might think proper was held valid. If, therefore, the words in the present case were merely ‘charitable purposes,’ or were ‘charitable and public purposes,’ I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character.”

In other words, where you can treat the words conjunctively, there they may be overshadowed by the word “charitable,” but where you get an alternative proposed, as in *Re Macduff* (7), or in *Blair v. Duncan* (8), “for charitable or public purposes,” using the words disjunctively, that shadow cannot be brought forward from the word “charitable” so as to prevent a distribution of the money for some objects which are not charitable. That is the class of cases in which a difficulty arises because of the more specific words which are used.

One of the cases which are relied on by the next-of-kin is *Houston v. Burns* (9). In that case there was a bequest to public purposes to be selected by a third party, though limited to a particular locality; the words in that case were “for such public benevolent or charitable purposes” in connection with a particular parish. It will be observed that the words are disjunctive, and that they fall definitely within the prohibition, I was going to say, or, at least, within the difficulty pointed out by LORD DAVEY in *Blair v. Duncan* (8). It is impossible to construe such words as united together under the word “charitable.” So it was held that the words were

A too wide and that the mere local limitation did not cure the ambiguity of the wide words: you could bestow the moneys to purposes not charitable, even though that was to be done within a particular area. I do not find that any of those cases militate against the principle adopted by the cases to which I have already referred.

Then I come, lastly, to the case which was relied on by the learned judge, *Re Tetley, National Provincial and Union Bank of England, Ltd. v. Tetley*; on appeal, sub nom. *A.-G. v. National Provincial and Union Bank of England* (10). In that case the testator directed his trustees to apply a fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution," and so on, "as they, in their absolute discretion should select." It was held that "patriotic purposes or objects" was again disjunctive and too wide. RUSSELL, J., said:

C "The Attorney-General contended before me that the clause should be read conjunctively, and that so read the trustees in selecting any purpose, object, or institution were confined to selecting such as were both patriotic and charitable, or, at all events, that every object selected by them must be charitable. I am unable so to read the gift. The repetition of the word 'such' and the reference both to patriotic objects and to charitable objects makes such a reading, in my opinion, impossible. The testator has by this clause, according to its natural and grammatical interpretation, given to the trustees a four-fold choice in the exercise of which he authorises them to devote the funds to any one or more of the following, namely, 'patriotic purposes,' 'patriotic objects,' 'charitable institutions,' and 'charitable objects.'"

E LORD STERNDALE said he agreed with those words of RUSSELL, J. WARRINGTON, L.J., does the same, and we have the key of the case in those words used by RUSSELL, J.; in other words, *Tetley's Case* (10), so far, is a case which falls exactly into line with *Blair v. Duncan* (8) and *Houston v. Burns* (9). However, reference is made to some words which were used (and this was what created the difficulty in the mind of the learned judge below) by LORD CAVE in his speech, in which he said ([1924] A.C. at p. 264):

F "Now the general rule is clear that if you are making a will you must declare your wishes, and not leave it in wide and uncertain terms to someone else to make a will for you."

Again he says:

G "So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. My Lords, I am not able to say that this is a charitable trust. The expression 'patriotic purposes' is vague and uncertain."

I have read those words very carefully. I think that they are intended to be directed to the cases where there is an alternative, where you cannot make the word "charitable" conjunctively limit the other purposes; they are intended to indicate that where an alternative is given it cannot be shown that it is necessarily for a charitable trust. I cannot find that those words are intended to overrule the principle of the sequence of cases from *West v. Knight* (1) right away down to *Nightingale's Case* (5), and the approval expressed of them, to which I have already referred. I think one must interpret those words in reference to the case upon which they were spoken, and not otherwise; they were simple words to which can be given full effect if one reads them side by side as intending the same result as LORD DAVEY's words in *Blair v. Duncan* (8).

The result is that I come to the conclusion that there is a definitive purpose, namely, that the bequest is to be for England. That is good in the same sense that, although general, when the sum bequeathed is to be used it is to be applied to charitable purposes as in *A.-G. v. Webster* (6). There is no area or purpose of distribution suggested which is not charitable. Why not then give effect to the plain meaning that it is for the advantage, within the meaning of the rule as to

the interpretation of the word "charitable," of the inhabitants of England? In my opinion, therefore, the Attorney-General succeeds in his appeal. A

Under these circumstances, the right course is to hand over this money to the person designated under the sign-manual by the supreme head of the country for the advantage of the country, England. That supreme head, as LORD ELDON said in *Morice v. Bishop of Durham* (11) (10 Ves. at p. 521), being the *parens patriæ*, will cause it to be distributed in accordance with the law applicable to charitable moneys. It appears to me that *Re Tetley* (10) does not authorise us, still less compel us, to overrule the long series of cases which have been approved in the House of Lords; and I have come to the conclusion, therefore, that we are free from the difficulty which oppressed the learned judge below, and that we must give effect to this bequest as one which is good as a charitable bequest and not avoiding or militating against any rule which the learned judge conceived he had to find ought to be applied after *Re Tetley* (10). B C

LAWRENCE, L.J.—In my judgment this case is covered by the decision in *Nightingale v. Goulbourn* (5), where the court had to consider the validity of a residuary bequest to the Queen's Chancellor of the Exchequer to be appropriated by him for the benefit of Great Britain. In the court below, WIGRAM, V.-C., after reviewing the earlier authorities, states (5 Hare at p. 491) as follows: D

"This is not simply a bequest to trustees for purposes of a general and wholly unrestricted nature, but for the benefit and advantage, that is, for the good of a particular class, a large class, it is true, but still a class coming within some defined limits, and which is within the decision in *Mitford v. Reynolds* (4). If a bequest were made to a trustee to be appropriated, at his discretion, for the benefit and advantage of A B, that would in equity be a bequest to A B. The British public, in this case, stand in the situation of A B, in the case I have supposed; but it has not been argued that that difference alone was fatal to the bequest." E

The learned Vice-Chancellor then proceeds to consider whether the fact that the Chancellor of the Exchequer was the person appointed to administer the trust militated against the view that he had formed that the bequest was valid, and concludes that it does not. His words are (5 Hare at p. 491): F

"I am of opinion that this bequest is valid, unless it can be shown that the Chancellor of the Exchequer may, consistently with the trust under the will, appropriate the fund to purposes in which the British public have no direct and immediate interest—no interest except incidentally and indirectly—or that he is at liberty in fact to appropriate it to any other than such general public purposes as the Attorney-General might protect and control. I cannot conceive a purpose to which these trust funds could be lawfully applied, according to the will, which would not be so general and public in its character as to constitute a charitable use." G H

In the Court of Appeal LORD COTTENHAM affirmed the decision of WIGRAM, V.-C., on the same grounds as those upon which the learned Vice-Chancellor had founded his judgment, and also was of opinion that the fact of the Chancellor of the Exchequer having been appointed as trustee did not operate to invalidate the gift; but he added that it might have a bearing on the question as to the manner in which the bequest should be applied. The judgments, both of VICE-CHANCELLOR WIGRAM and of LORD COTTENHAM, were expressly based on the earlier cases in which bequests to parishes, towns, counties and provinces had been held good charitable bequests, and particularly on *West v. Knight* (1), *A.-G. v. Earl Lonsdale* (2), and *Mitford v. Reynolds* (4), none of which in any way depended on the particular office occupied by the person selected by the testator as his trustee. To this line of cases can now be added *Goodman v. Saltash Corp'n.* (13). The effect of the decision in *Nightingale v. Goulbourn* (5) is that a bequest to a trustee for the benefit of Great Britain is not simply a bequest to the trustee for public purposes I

A generally, which would be void for uncertainty, but is a bequest for the benefit of a particular class, albeit a large class, coming within some definite limits, and is, therefore, a bequest for a specified public purpose, and, as such, a valid charitable bequest. The decision in *Nightingale v. Goulbourn* (5), so far as I know, has never been contested, and in *Pemsel's Case* (15) LORD HALSBURY refers to it without suggesting any doubt as to its correctness.

B It follows, if my view of the effect of the decision in *Nightingale v. Goulbourn* (5) is right, that a bequest "for the benefit of England," such as we have in the present case, is a fortiori a valid charitable bequest.

Counsel for the next-of-kin contended that the decision in *Nightingale v. Goulbourn* (5) is inconsistent with a number of cases decided by the House of Lords in recent years and, in view of those cases, could only be supported, if at all, on the ground that it was a gift to the Chancellor of the Exchequer and, therefore, in aid of taxation. In my judgment, this contention, which succeeded in the court below, is not well-founded. The cases on which counsel for the next-of-kin more particularly relied were *Blair v. Duncan* (8), *Houston v. Burns* (9), and *Re Tetley, National Provincial and Union Bank of England, Ltd. v. Tetley* (10), all of which are, in my judgment, distinguishable from *Nightingale v. Goulbourn* (5) and from the present case. The House of Lords had to consider bequests for public purposes generally under which, to quote LORD DAVEY's words in *Blair v. Duncan* (8) ([1902] A.C. at p. 44):

"It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable, though they might be of a public character."

E Such trusts, that is to say, trusts for public purposes of a general and wholly unrestricted nature, were, as appears from the judgment of WIGRAM, V.-C., in *Nightingale v. Goulbourn* (5), at the date when that case was decided recognised to be void for uncertainty. It is interesting to note that in *Blair v. Duncan* (8) the learned counsel for the respondents relied on *Mitford v. Reynolds* (4) and *Nightingale v. Goulbourn* (5) as showing that a trust for public purposes generally would be invalid. It is to be observed that the House of Lords in the cases relied on by counsel for the next-of-kin did not cast any doubt on the line of cases of which *Nightingale v. Goulbourn* (5) and the present case are examples, nor were any cases coming within that category even referred to in the speeches of the learned law Lords. In *Tetley's Case* (10), in the report in the court of first instance and in the court of appeal, *Nightingale v. Goulbourn* (5) was cited by the counsel for the Attorney-General. In the Court of Appeal YOUNGER, L.J., was the only member of the court who referred to that case in his judgment. He said ([1923] 1 Ch. at p. 275):

H "I cannot myself, however, escape from the impression that, whether consciously or not, the fact that the gift was in that case made to the holder of the office of Chancellor of the Exchequer for the time being led the court to conclude that the way in which the public was necessarily to be benefited as a result of the gift made the gift unobjectionable."

I In the House of Lords *Nightingale v. Goulbourn* (5) was not even cited. In view of the language of the judgments of both WIGRAM, V.-C., and LORD COTTENHAM, as reported, I cannot accept the view expressed by YOUNGER, L.J., in the passage I have quoted. It seems to me plain that both the Vice-Chancellor and the Lord Chancellor, so far as from considering that the fact that the trusteeship was vested in the Chancellor of the Exchequer helped the contention that the trust was a valid charitable trust, were at pains to explain that in spite of that fact the bequest was a valid charitable bequest—the Vice-Chancellor on the ground that the Chancellor of the Exchequer would not under the trust be at liberty to appropriate the fund to any other than general public purposes under the control, if need be, of the Attorney-General; LORD COTTENHAM on the ground stated by him, that it is no ground for the invalidity of a charitable bequest that it is not capable of being

administered in this court, for that is the case in every charitable gift which is administered under the sign-manual. At the conclusion of LORD COTTENHAM's judgment he expressly says this: A

"I see no reason for doubting the propriety of the many similar cases which have been referred to, and if I did, thinking as I do that the present falls within the principle of them, I should be bound to follow them." B

The conclusion I have arrived at, after considering all the authorities to which our attention has been drawn, is that the present case falls within the principle of the cases in which the gift is for the benefit of a particular class, and, therefore, for a specified public purpose, and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature.

In the result, therefore, I am of opinion that the bequest is a valid charitable bequest, and that the appeal of the Attorney-General should be allowed. C

ROMER, L.J.—The first thing to be done, in order to decide the questions arising on this appeal, is to ascertain the meaning of the words used by the testator "my country England." It was at one time suggested, though perhaps not very strongly, on behalf of the Solicitor-General, that these words mean His Majesty the King. Such a construction would no doubt avoid much difficulty, but it is not one which, in my opinion, can be extracted from the words the testator has used. The words "my country England" must, I think, mean "my countrymen, the people of England," or "my countrymen inhabiting England"; for, of course, it is obvious that they cannot mean that portion of the surface of the globe which is called England. It is equally obvious that we cannot construe the gift as a gift to the people of England, that is to say, a gift of a residue which is to be divided equally between every inhabitant of this country. We are, accordingly, as it seems to me, driven to treat the gift as a gift for the benefit of the testator's countrymen, the people of England. If that be a good charitable gift, no trustee having been appointed, I should myself have thought that the fund would have to be administered under the sign-manual. D E

But, however that may be, the important question to be decided is as to whether it be a good charitable trust or not. In my opinion, it is well established by authority that a gift for the benefit of the inhabitants of a particular place is a good charitable gift. The authority most in point in the present case is *Nightingale v. Goulbourn* (5), where there was a gift. F

"to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain." G

It was held by LORD COTTENHAM, affirming the decision of WIGRAM, V.-C., that that was a good charitable gift. I am not going to read the judgment, I only wish to say this: like LAWRENCE, L.J., I find myself unable to agree with YOUNGER, L.J., as he then was, when, in giving his judgment in *Re Tetley* (10), he said that the foundation of that decision was the fact that the gift was to the Chancellor of the Exchequer. Reading the judgment of LORD COTTENHAM, it is, in my opinion, reasonably plain that the effect of it was this, that a gift for the benefit of the country, Great Britain, was a good charitable gift, and that, that being so, it did not cease to be a good charitable gift because the gift was to Great Britain through the Chancellor of the Exchequer. Secondly, he held that when at a later stage it became necessary to formulate a scheme for the administration of the charity, the fact that the gift was through the Chancellor of the Exchequer would serve as a useful guide to those whose duty it was to prepare the scheme. That case was merely a particular application of a still more general principle that has been established by cases decided both before and since *Nightingale v. Goulbourn* (5). It is sufficient to refer to *West v. Knight* (1), a gift for the benefit of a parish; to *A.-G. v. Earl Lonsdale* (2), a trust for the benefit of a country; to *Mitford v.* H I

A *Reynolds* (4), a gift to the Government of Bengal for the benefit of native inhabitants; to *A.-G. v. Webster* (6); to *Goodman v. Saltash Corpn.* (13), a decision of the House of Lords; to *Re Christchurch Inclosure Act* (14), a decision of this court, where there was a trust for the benefit of the occupiers of certain cottages.

It has been said that those decisions have been affected and must no longer be treated as law by reason of certain dicta to be found in this court in *Re Tetley* (10), B and in the House of Lords in *Re Tetley* (10), when it went to that House, and to certain dicta in *Houston v. Burns* (9). However, those dicta—and they not unnaturally affected the mind of BENNETT, J., and were indeed responsible for his decision in favour of the next-of-kin in this case—must be read in connection with the facts of the case in which they were uttered, and with reference to the points that had to be decided in those cases. When one looks at them it will be found C that what the authors of those dicta were concerned with was the proposition that every gift, the purpose of which was the public benefit, was necessarily a good charitable gift, and it was that proposition that the authors of the dicta in question were endeavouring to combat. It is impossible to think that any of the authors of those dicta intended, even if it was open to them, to dissent from the decision of the House of Lords in *Goodman v. Saltash Corpn.* (13), and it is incredible that D any of them would have dissented from those decisions without making any reference to them whatsoever. In every one of the judgments in which those dicta occur it will be found—I think I am speaking accurately—that although many cases are referred to, no reference is made to any one of the decisions to which I referred at the beginning of my judgment. In those circumstances, it appears to me that it would be quite wrong to regard the dicta in question as in any way E affecting the decisions which establish the principle that a gift or trust for the inhabitants of a particular place is a good charitable gift or trust. That this comes within this principle seems to me to be clear. England is a larger district, of course, than a county; but it is impossible, in my opinion, to distinguish this case from those by reference to the size of the particular district which has been selected by the testator.

F For these reasons I agree that this appeal must be allowed.

Stafford Crossman asked for an order

G “that the order [of the Court below] may be reversed so far as it declares that on the true construction of the will of the above-named testator, Theodore Wynford Smith, the residuary gift therein contained ‘unto my country England to and for own use and benefit absolutely’ does not constitute a valid charitable gift or operate in favour of His Majesty’s Treasury, and is undisposed of by the said will. And that in lieu of such declaration it may be declared that the said residuary gift is a valid charitable gift, and that it may be ordered that the plaintiff do pay and transfer the residuary estate of the said testator to the Treasury Solicitor or such other person as His Majesty shall direct to be applied H for charitable purposes under the directions of His Majesty.”

[After some discussion.]

LORD HANWORTH, M.R.—The last part of the order will run, then,

I “and in lieu of such declaration this court doth declare that the said residuary gift is a valid gift for charitable purposes, and doth order that the plaintiff do pay and transfer the residuary estate of the said testator to such person as His Majesty shall direct under his sign-manual.”

Appeal allowed.

Solicitors: *The Treasury Solicitor; Walter Crimp & Co., for Harold Michelmores & Co., Newton Abbot; Sharpe, Pritchard & Co., for W. C. Cripps, Son, & Harries, Tunbridge Wells.*

[Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.]

NEWS OF THE WORLD, LTD. v. ALAN FAIRHEAD & SONS, LTD.

[CHANCERY DIVISION (Farwell, J.), June 26, 29, 30, July 1, 1931]

[Reported [1931] 2 Ch. 402; 100 L.J.Ch. 394; 146 L.T. 11]

Easement—Light—Dominant tenement pulled down—New building erected—Small coincidences between ancient and new lights—Rights of owners of dominant tenement.

In 1925 a building which was entitled to ancient lights was pulled down and a new building erected on the site. No proper record was taken of the extent of the identity of the old and new windows, but it was shown that on the ground floor there were pencils of ancient light admitted through some of the new windows. The servient tenement was afterwards pulled down and a new building of greater height was being erected on the site when the owners of the dominant tenement claimed an injunction to restrain the obstruction of their ancient lights.

Held: mere lack of evidence of any intention by the plaintiffs to preserve their ancient lights was not by itself sufficient to prove an intention on their part to abandon them, even though the amount of coincidence between the old and the new lights was comparatively small; but, as the plaintiffs had pulled down a building with ancient lights and erected a new building totally different in every respect, though having windows to some extent in the same positions as the old windows, they could not require the defendants to do more than see that the ancient lights to which they were still entitled were not obstructed to the point of nuisance; especially having regard to the great uncertainty which existed as to the exact dimensions of the windows and lights, it was impossible to determine the result of the threatened obstruction; and the plaintiffs' claim must fail.

Notes. Referred to: *Smith v. Evangelization Society (Inc.) Trust*, [1933] Ch. 515.

As to the right to light generally, see 12 HALSBURY'S LAWS (3rd Edn.) 582 et seq.; and for cases see 19 DIGEST 123 et seq.

Cases referred to:

- (1) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 123, 830.
- (2) *Scott v. Pape* (1886), 31 Ch.D. 554; 55 L.J.Ch. 426; 54 L.T. 399; 50 J.P. 645; 34 W.R. 465; 2 T.L.R. 310, C.A.; 19 Digest 126, 847.
- (3) *Tapling v. Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34 L.J.P.C. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617; 144 E.R. 1067, H.L.; 19 Digest 125, 841.
- (4) *Andrews v. Waite*, [1907] 2 Ch. 500; 76 L.J.Ch. 676; 97 L.T. 428; 19 Digest 129, 871.
- (5) *Ankerson v. Connelly*, [1906] 2 Ch. 544; 75 L.J.Ch. 804; 95 L.T. 716; 22 T.L.R. 743; affirmed, [1907] 1 Ch. 678; 76 L.J.Ch. 402; 96 L.T. 681; 23 T.L.R. 486, C.A.; 30 Digest (Repl.) 177, 258.
- (6) *Bailey & Son, Ltd. v. Holborn and Frascati, Ltd.*, [1914] 1 Ch. 598; 83 L.J.Ch. 515; 110 L.T. 574; 58 Sol. Jo. 321; 19 Digest 140, 956.
- (7) *Frechette v. Compagnie Manufacturière de St. Hyacinthe* (1883), 9 App. Cas. 170; 53 L.J.P.C. 20; 50 L.T. 62, P.C.; 44 Digest 13, 49.
- (8) *Higgins v. Betts*, [1905] 2 Ch. 210; 74 L.J.Ch. 621; 92 L.T. 850; 53 W.R. 549; 21 T.L.R. 552; 49 Sol. Jo. 535; 19 Digest 123, 829.
- (9) *Dyers' Co. v. King* (1870), L.R. 9 Eq. 488; 39 L.J.Ch. 339; 22 L.T. 120; 34 J.P. 373; 18 W.R. 404; 19 Digest 144, 983.

- A The judgment of LORD LINDLEY in *Colls v. Home and Colonial Stores, Ltd.* (1), [1904] A.C. 179, explained.

Witness Action.

- B The plaintiffs were the lessees of certain premises at the corner of Fleet Street and Whitefriars Street in the city of London, known as 67, Fleet Street, and 1, 2, and 3, Whitefriars Street, which they held for a term of ninety-four-and-a-half years from March 25, 1925. The defendants were the owners of premises on the other side of Whitefriars Street, opposite to the plaintiffs' premises known as 68, Fleet Street, and 41, Whitefriars Street. In 1925 the first-mentioned premises were entitled to a right of light over the other premises. In 1925 the premises of the plaintiffs were pulled down and new buildings were erected on the site, with a number of windows facing on Whitefriars Street. Their architect prepared a plan of the proposed buildings, so as to obtain the licence of the district surveyor, but no plan or survey was made which showed accurately the coincidences, partial or otherwise, of the new and old windows. From the evidence at the trial it was clear that the architect never devoted his attention in any way to preserving the ancient lights. It was evident that there were partial coincidences, but these were accidental. After the new buildings had been completed the defendants pulled down their buildings at 68, Fleet Street, and 41, Whitefriars Street, and began to erect on the site new buildings which were intended to be of much greater height than the old buildings. The plaintiffs began this action, alleging obstruction of their light and claiming an injunction, damages and costs. The defendants pleaded that by their conduct the plaintiffs had abandoned all their ancient lights, and that there was no nuisance caused by the new buildings.

- E *Swords, K.C.*, and *A. Guest Mathews*, for the plaintiffs, referred to *Scott v. Pape* (2); *Tapling v. Jones* (3); *Andrews v. Waite* (4); *Ankerson v. Connelly* (5); *Bailey & Son v. Holborn and Frascati, Ltd.* (6); and *Colls v. Home and Colonial Stores, Ltd.* (1); and GALE ON EASEMENTS, 10th Edn., pp. 473-6.

- F *Sir Herbert Cunliffe, K.C.*, and *W. E. Vernon*, for the defendants, referred also to *Frechette v. St. Hyacinthe* (7) and GALE ON EASEMENTS, 10th Edn., p. 477.

- G FARWELL, J., stated the facts and held that mere lack of evidence of any intention by the plaintiffs to preserve their ancient lights was not by itself sufficient to prove an intention to abandon them, even though the amount of coincidence between the old and new windows was comparatively small, but the lack of precise evidence of the identity of the ancient and present lights above the ground floor of the plaintiffs' buildings rendered it impossible to hold that above the ground floor there was any diminution of light. On the ground floor, however, there were undoubtedly substantial coincidences between certain new apertures and the old windows, and the plaintiffs still had a right to ancient lights in regard to those particular apertures. His Lordship continued: That being so, I have to consider whether the defendants' building will obstruct the plaintiffs' ancient lights to a sufficient extent to cause a nuisance. In *Higgins v. Betts* (8), FARWELL, J., said:

- H "The test of nuisance is not—how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that the owner previously had?—but how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?"

- I But, in applying this test, how am I to ascertain whether there is a nuisance or not?

The plaintiffs say that the right way is to treat the windows as only consisting of the portion through which the ancient light passes and to treat the remaining portion as blocked up. I am then to ascertain whether the obstruction to the window so treated is such as to cause a nuisance. They rely on the judgment in *Colls v. Home and Colonial Stores* (1), where LORD LINDLEY said:

"As regards light from other quarters, such light cannot be disregarded; for, as pointed out by JAMES, V.-C., in *Dyers' Co. v. King* (9), the light from other

quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time ought not to be taken into account."

The plaintiffs say that, in applying that principle in order to see whether there is a nuisance, I must exclude all light except that passing through those portions of the new apertures which correspond with the old. They say that *Tapling v. Jones* (3) is to the same effect. If that be so, I am bound to give effect to those decisions, but I cannot accept the view that *Tapling v. Jones* (3) decided anything of the kind, or that LORD LINDLEY ever intended to suggest that it did. In *Tapling v. Jones* (3) there was no question of what, if any, portion of ancient light survived the demolition of an old building. The plaintiff had added to his ancient lights; then came the obstruction. Before action the plaintiff made his building conform again to what it was before the alteration, and then claimed in respect of his previous lights. In other words, there was no alteration of the building as a whole. There was an increase of the means of access of light which was altered before action by reinstating the building in its old condition, and the question really determined was whether that alteration and reinstatement amounted to abandonment. Of course, I accept LORD LINDLEY's statement, but I accept it in full and not in part. He is clearly speaking of light to which a right has not been acquired, and of which the plaintiff can be deprived at any time. I can well understand that if a man has a room lighted both by ancient lights and by non-ancient lights which may be obstructed by outsiders, then, if an obstruction is threatened to the ancient lights, the court cannot say to the plaintiff: "You are at present getting enough light from the other windows to prevent the obstruction being a nuisance, and therefore you cannot complain." The result might be that, if the windows open to obstruction were subsequently blocked, the plaintiff might be left with a room wholly unsuitable for ordinary occupation. But, on the other hand, it cannot be right that anything the plaintiff himself does should increase the burden on the servient tenement, and I cannot believe that the learned Lords in *Tapling v. Jones* (3), or LORD LINDLEY in *Colls v. Home and Colonial Stores, Ltd.* (1) ever contemplated that a plaintiff could pull down his old building and put up a new building totally different in every respect except for some slight coincidences in the old and new window-spaces, and then say to the court: "Treat all my present light facilities as blocked out, leaving me nothing but a comparatively small peephole of ancient light, and then give me relief because that very inadequate amount of ancient light space will be made more inadequate by the defendant's proposed acts." If that were the law the plaintiff by his own acts would have greatly increased the burden on the servient tenement. The true view is this. If the plaintiff pulls down the building with ancient light windows and erects a new building totally different in every respect, but having windows to some extent in the same position as the old windows, he cannot require the servient owners to do more than see that the ancient lights (if any) to which he is still entitled are not obstructed to the point of nuisance. He cannot require them not to obstruct non-ancient lights merely because a portion of the window through which that non-ancient light enters his premises also admits a pencil of ancient light. If the obstruction of the pencil itself causes a nuisance, the plaintiff is entitled to relief, but if, taking the building as its stands, the pencil obstruction causes no nuisance at all, the plaintiff is not entitled to relief.

In *Ankersson v. Connelly* (5) the servient owner asked for a declaration that, having regard to the dominant owner's alterations, he had no easement of light. WARRINGTON, J., came to the conclusion that the burden on the servient tenement had been increased and that the servient owner was entitled to relief. He said:

"How is it possible so to sever the increased burden as to preserve to [the dominant owner] that to which he was entitled, and to impose upon the

A servient tenement that obligation only which was previously imposed upon it without the obligation attempted to be imposed upon it by the alterations. In a case like this it seems to me absolutely impossible. It seems to me that it is beyond human ingenuity to say what may be done by the owner of the servient tenement on his land which would not be a nuisance to so much of the old light as still passed through the new windows under the existing altered circumstances brought about by [the dominant owner] himself."

B Here also it is really impossible, especially having regard to the great uncertainty as to the exact dimensions of the windows and lights, to determine the result of the threatened obstruction, having regard to the way in which the plaintiffs have built their new buildings, without preserving any evidence as to the identity of the ancient windows. But, in whichever way it is put, I am satisfied that the plaintiffs have failed in this case to establish any nuisance. The result is that the action must be dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co.; Cardew Smith & Ross.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

D

E Re PARK. PUBLIC TRUSTEE v. ARMSTRONG

[CHANCERY DIVISION (Clauson, J.), November 25, 27, 1931]

[Reported [1932] 1 Ch. 580; 101 L.J.Ch. 295; 147 L.T. 118]

Power of Appointment—Power to appoint to anyone other than donee—Validity.

F A testator by his will gave his residuary estate to his trustee in trust to pay the income thereof to any person, or persons, or charitable institutions, and in such shares and proportions as his sister, J.A., should from time to time during her lifetime direct in writing, other than herself, and from and after her decease in trust as to both capital and income for a named charity.

Held: the power conferred on J.A. was a valid power exercisable by her.

G **Notes.** Followed: *Re Jones, Public Trustee v. Jones*, [1945] Ch. 105. Applied: *Re Gestetner, Barnett v. Blumka*, [1953] 1 All E.R. 1150. Referred to: *I.R. Comrs. v. Broadway Cottages Trust*, *I.R. Comrs. v. Sunnyslants Trust*, [1954] 3 All E.R. 120.

As to general and special powers, see 25 HALSBURY'S LAWS (2nd Edn.) 511-512; and as to cases relating to the creation of powers by will, see 44 DIGEST 517 et seq.

H Cases referred to:

- (1) *Re Byron's Settlement, Williams v. Mitchell*, [1891] 3 Ch. 474; sub nom. *Re Reynolds, Williams v. Mitchell*, 60 L.J.Ch. 807; 65 L.T. 218; 40 W.R. 11; 37 Digest 437, 429.
- (2) *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley, A.-G. v. National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, 892.
- (3) *Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208; 91 L.J.Ch. 10; 127 L.T. 117; 37 Digest 523, 1137.
- (4) *Re Combe, Combe v. Combe*, [1925] 1 Ch. 210; 94 L.J.Ch. 267; sub nom. *Re Coombe, Coombe v. Coombe*, 133 L.T. 473; 69 Sol. Jo. 397; 37 Digest 527, 1181.
- (5) *Vezey v. Jamson* (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 864.

I

- (6) *Platt v. Routh* (1840), 6 M. & W. 756; 10 L.J.Ex. 105; 3 Beav. 257; 10 L.J.Ch. 131; on appeal sub nom. *Drake v. A.-G.* (1843), 10 Cl. & Fin. 257; 8 E.R. 739, H.L.; 36 Digest (Repl.) 371, 117.
- (7) *O'Grady v. Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; 114 L.T. 1097; 32 T.L.R. 456; 60 Sol. Jo. 456, H.L.; 23 Digest (Repl.) 339, 4045.
- (8) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, 889.

Adjourned Summons.

By his will, dated Dec. 31, 1925, the testator appointed the Public Trustee sole executor and trustee thereof, and after making certain bequests and directions he directed the sale, conversion, and investment of the ultimate balance of the proceeds of sale of the residue of his estate, and he directed his trustee to stand possessed of the investments in trust to pay the normal income to arise therefrom to such person or persons or charitable institutions, and in such shares and proportions as his sister, the defendant, Jane Armstrong, should from time to time during her lifetime direct in writing, other than herself, and from and after her decease in trust both as to capital and income for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely. The testator died on Aug. 6, 1927, and, questions having arisen whether the trust or power purported to have been created or given was valid and effectual, a summons was taken out by the Public Trustee for their decision. The defendants, who were interested in any undisposed of estate of the testator as on an intestacy, were, besides Jane Armstrong, the testator's widow, Zoe Park, and his niece, Marie Park. The defendant, Charles Kingsley Mitchell, was the treasurer of the Imperial Merchant Service Guild.

Wilfrid Hunt for the plaintiff.

G. D. Johnston, for Jane Armstrong, referred to *Byron's Settlement* (1), *A.-G. v. National Provincial Bank* (2), *Re Hughes* (3), and *Re Combe* (4).

Andrewes-Uthwatt, for the defendant Mitchell, referred to *Vezey v. Jamson* (5).

Stafford Crossman, for the Attorney-General, referred to *JARMAN ON WILLS* (7th Edn., vol. 2, p. 763), *Drake v. A.-G.* (6), and *O'Grady v. Wilmot* (7).

A. T. N. Bellamy, for Marie Park, referred to *Houston v. Burns* (8).

Waite, for Zoe Park, referred to *Houston v. Burns* (8); *A.-G. v. National Provincial Bank* (2).

CLAUSON, J., stated the facts and continued: On the true construction of this clause it seems to me to be an absolute gift to the stress fund of the Imperial Merchant Service Guild, with the proviso that during her life Jane Armstrong may by writing, to such an extent as she thinks proper, direct any part of the income to any object other than to her own personal use. Jane Armstrong is not a trustee. If she refused to act in the matter the court could not appoint another person to act in her place.

It is clearly settled that, if a testator creates a trust, he must mark out the metes and bounds which are to fetter the trustee, or, as has been said, the trust must not be too vague for the court to enforce, and that is why a gift to trustees for such purposes as they may in their discretion think fit is an invalid trust; there are no metes and bounds within which the trust can be defined, and unless the trust can be defined the court cannot enforce it. A testator must define for himself the trusts which he created; he must not leave it to his trustees to define them; he cannot leave it to his trustees to make a will for him; and that is, I conceive, what LORD HALDANE means when he says in *A.-G. v. National Provincial Bank* (2) that a testator cannot leave it to someone else to make a will for him. In the present case, however, the trust seems to me to be perfectly definite and marked out by definite metes and bounds. If Jane Armstrong designates a definite object in writing, that will be the object to which the trustees or the court will apply the income. In so far as there is no such direction, the charitable gift to the stress fund of the Imperial Merchant Service Guild will operate.

- A** It was argued that the clause in this will which gives Jane Armstrong power, as I construe it, to direct the income during her lifetime to any object other than her own personal use, was bad as an attempt pro tanto to leave it to Jane Armstrong to make a will for the testator, which, in the language used by LORD HALDANE, cannot be done. This argument, however, fails to pay due regard to the well settled principle, which LORD HALDANE obviously did not intend to question, that a testator may by will confer on any person a power to appoint to whomsoever such person pleases, i.e. (see "SUGDEN ON POWERS," p. 394), a general power, and also may confer on any person a power to appoint with a restriction, namely, that the appointees are to be among certain objects designated in the will, i.e. (see SUGDEN, p. 394), a particular power. To this the ingenious answer was suggested that the creation of a general power is lawful because it is a mere equivalent of conferring on the donee the property in the subject-matter of the power; that the creation of a particular power is lawful if, but only if, there is a defined class of objects among whom the donee of the power is given a power of selection; that in the present case the testator has not given Jane Armstrong a general power, for it is of the essence of a general power that the donee may exercise it in his own favour, and thus, in effect, obtain through it property and not mere power; neither has the testator in the present case created a particular power, for there are no objects designated in the will among whom or which the donee is to elect. Accordingly, the argument proceeds, the so-called power in the present case is no such power as can be recognised by the courts as a power which can validly be created by a will. The provision in question is, therefore, so it is said, a mere attempt to delegate the testator's will-making power to Jane Armstrong, and, pro tanto, inadmissible.
- E** The argument appears to me to overlook the fact that the division of valid powers into general and particular is not exhaustive. As is pointed out in JARMAN ON WILLS, 7th Edn., vol. 2, p. 763, there is a third class of powers where the donee can appoint to anyone, with certain exceptions—e.g., an exception as in the case before me—of himself, or an exception of named persons or classes of persons. I have not been referred to any case where the object excepted was the donee, but
- F** there is the highest authority in *Platt v. Routh* (6), reported in the House of Lords as *Drake v. A.-G.* (6), for recognising the validity of a power created by will for the donee to appoint to anyone except certain persons named as indicated, and I am not astonished to find that the validity of a similar power was assumed in *Re Byron's Settlement* (1). I know of no authority to justify me in holding that a power to A B to appoint to any object except himself is invalid, while a power to
- G** A B to appoint to any object except to X Y is valid, and I have the opinion of Mr. JARMAN and his learned editors to support me in refusing so to hold. For these reasons I hold that the trust is an effectual and valid trust, and that the power conferred thereby on Jane Armstrong is a valid power exercisable by her.

H Solicitors: *Gregory, Rowcliffe & Co.*, for Paisley, Falcon, Skerry & Hight, Workington; *Jacques & Co.*, for Miller, Taylor & Holmes, Liverpool; *Treasury Solicitor*.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

FELL v. DERBY LEATHER CO., LTD.

[CHANCERY DIVISION (Bennett, J.), May 7, 8, 1931]

[Reported [1931] 2 Ch. 252; 100 L.J.Ch. 311; 145 L.T. 356]

Company—Articles of association—Table A—Special articles substituted for some of Table A—Application of Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 1 (1).

Section 1 (1) of the Interpretation Act, 1889, which provides that words in the singular shall include the plural and vice versa, and which applies to Table A in Sched. I to the Companies Act, 1862, applies also to special articles of a company which have replaced certain articles of Table A and are used together with the remaining articles of Table A.

Notes. Table A is now to be found in Sched. I to the Companies Act, 1948.

As to the management of a company under Table A and special articles, see 6 HALSBURY'S LAWS (3rd Edn.) 268 et seq.; and for cases see 9 DIGEST (Repl.) 591 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch.D. 610; 48 L.J.Ch. 65; 27 W.R. 377; 9 Digest (Repl.) 465, 3038.

Action.

The articles of association of the Derby Leather Co., Ltd., which was incorporated in 1906, provided that Table A in Sched. I to the Companies Act, 1862, should apply to the company, but that certain articles of Table A should be excluded. The plaintiff, Mr. Edward Fell, who was one of the directors of the company, brought this action against the company, claiming a declaration that a certain notice given to him on Sept. 4, 1930, by his sole co-director requesting him to resign his office of director was invalid. In the trial of the action the question arose whether s. 1 (1) of the Interpretation Act, 1889, which enacts that words in the singular shall include the plural and vice versa, applied to the special articles that had been substituted for some of the articles of Table A that had been excluded. One of the special articles used in conjunction with Table A (namely, art. 16) provided as follows:

"The office of director shall be vacated . . . (4) if he is requested in writing by his co-directors to resign."

The Interpretation Act, 1889, s. 1 (1), provides as follows:

"In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears—

(a) words imparting the masculine gender shall include females; and (b) words in the singular shall include the plural, and words in the plural shall include the singular."

It was contended by the plaintiff that the notice was wholly inoperative, for it had only been given by one co-director instead of by his co-directors. The defendants contended that, by operation of the Interpretation Act, 1889, one director was entitled to give the notice.

G. R. B. Whitehead, for the plaintiff, referred to *Pulbrook v. Richmond Consolidated Mining Co.* (1).

Vaisey, K.C., and *R. H. Hodge* for the defendants.

BENNETT, J.—The defendants say that Table A of the Companies Act, 1862, is an Act of Parliament, and that, accordingly, in the interpretation of Table A, words in the singular include the plural unless the contrary appears. Counsel for the plaintiff did not, I think, seriously contest that contention. Then the defendants say that, if the provision applies to Table A, it must also be applied to special

A articles which are used with Table A, otherwise there would be two different principles of interpretation, one governing Table A and the other governing the special articles. It seems to me that the contention of the defendants is the one which ought to be adopted. [His Lordship considered the special articles, and after stating his view that no contrary intention was shown therein, continued:] Applying the Interpretation Act, 1889, art. 16 is to be read as providing that a director

B is to resign if requested in writing by his co-directors or co-director. The plaintiff was, on Sept. 4, 1930, requested in writing by his co-director to resign, and, in my judgment, on that day he ceased, by virtue of art. 16, to be a director of the company. It follows that this action fails.

Solicitors: *Maude & Tunnicliffe*, for *Taylor, Simpson & Mosley*, Derby; *Peacock & Goddard*, for *Moodey & Woolley*, Derby.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

D

Re BEALE'S SETTLEMENT TRUSTS. HUGGINS v. BEALE

E [CHANCERY DIVISION (Maugham, J.), October 22, 1931]

[Reported [1932] 2 Ch. 15; 101 L.J.Ch. 320; 147 L.T. 334]

Settlement—Trust for sale—Sale subject to consent of tenant for life—Refusal of consent—Power to order sale—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 30—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 57 (1).

F A trust for sale with consent of the tenant for life could not be exercised by reason of the refusal of the tenant for life to give his consent.

Held: there was power in the court to direct a sale under s. 30 of the Law of Property Act, 1925, and s. 57 of the Trustee Act, 1925.

Notes. As to trusts for sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 763 et seq; and for cases see 43 DIGEST 896 et seq. For Law of Property Act, 1925, and Trustee Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427 and *ibid.*, vol. 26, 50, respectively.

Adjourned Summons.

By a deed of even date with a settlement of the proceeds of sale certain property was conveyed to trustees upon trust with the written consent of the first tenant for life and his wife to sell the same and invest the proceeds as therein mentioned.

H The first tenant for life subsequently became bankrupt and the trustee in the bankruptcy desired to sell the property on the ground that it remained unoccupied and was deteriorating, but the tenant for life refused to give consent. This summons was then taken out by the trustees of the deed asking that, if the court should be of opinion that the property ought to be sold, an order might be made under the Law of Property Act, 1925, s. 30, and the Trustee Act, 1925, s. 57, directing them to execute the trust for sale without the consent of the tenant for life. The Law of Property Act, s. 30, provides:

I "If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit."

By the Trustee Act, 1925, s. 57 (1):

"Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

Eardley Wilmot for the summons.

I. V. Nesbitt for the life tenant.

Winterbotham for the wife and a child, an infant.

Vanneck for the trustee in bankruptcy.

MAUGHAM, J.—In my opinion, the court has jurisdiction under s. 30 of the Law of Property Act, 1925, and s. 57 of the Trustee Act, 1925, to direct a sale by trustees for sale where the necessary consent cannot be obtained by reason of the refusal of the person who is the one to give it. Accordingly, in the exercise of my discretion, in the circumstances I make the order asked for on the summons.

Solicitors: *Marson & Toulmin*; *Arthur C. Dowding*; *Wood, Nash, Hewett & Riddett*, for *J. Eldridge & Sons*, Newport, I.W.; *Wingfields, Halse & Trustram*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re BRUCE. BRUDENELL v. BRUDENELL

[CHANCERY DIVISION (Clauson, J.), November 12, 19, 1931]

[Reported [1932] 1 Ch. 316; 101 L.J.Ch. 204; 146 L.T. 363]

Settlement—Mining lease—Capitalisation of part of rent—Original lease made in 1907 for forty years—Extension in 1931 till 2006—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 47.

By the Settled Land Act, 1925, s. 47: "Under a mining lease . . . unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely—where the tenant for life or statutory owner is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

The plaintiff, as tenant for life under the will of the testator, was entitled to the rents and profits of a mining lease, which was for a term of forty years, expiring on March 25, 1947. On March 25, 1931, the plaintiff and the lessees, acting under the provisions of s. 59 of the Settled Land Act, 1925, executed a deed whereby the term of the lease was extended to one of ninety-nine years, expiring on March 25, 2006. It was agreed that after the end of the original term in 1947 one fourth part of the rents and royalties would have to be capitalised in accordance with s. 47 of the Settled Land Act, 1925, for the rents

A and royalties payable during the extended period were payable under the deed of 1931, and, in the absence of a contrary intention expressed in the settlement, came within the provisions of s. 47.

B **Held:** on the true construction of the settlement in its application to the lease of 1907 the tenant for life was entitled to the whole of the rents and royalties reserved by the lease; the application of the principles of s. 47 to those rents and royalties during the original term of the lease would contradict the settlement; conceding that as between the tenant for life and the lessees the tenant for life was estopped from denying that the deed of 1931 operated as a surrender of the term created by the lease of 1907 and a re-grant, the tenant for life was not so estopped as against remaindermen; and, therefore, the tenant for life was entitled to the whole of the rents and royalties during that term.

C **Notes.** Followed and applied: *Re Arkwright's Settlement, Phoenix Assurance Co. v. Arkwright*, [1945] 1 All E.R. 404.

As to the powers of a tenant for life regarding leases, &c., see 29 HALSBURY'S LAWS (2nd Edn.) 734 et seq.; and for cases see 40 DIGEST 757 et seq.

Cases referred to:

- D (1) *Re Kemeys-Tynte*, [1892] 2 Ch. 211; 61 L.J.Ch. 377; 66 L.T. 752; 40 W.R. 423; 36 Sol. Jo. 380; 34 Digest 643, 406.
 (2) *Re Hall*, [1916] 2 Ch. 488; 86 L.J.Ch. 59; 115 L.T. 481; 34 Digest 644, 416.
 (3) *Lyon v. Reed* (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 8 Jur. 762; 153 E.R. 118; 31 Digest (Repl.) 570, 6911.
 (4) *Re Savile Settled Estates, Savile v. Savile*, ante, p. 556; 100 L.J.Ch. 274; 145 L.T. 17; 31 Digest (Repl.) 571, 6922.

E Adjourned Summons.

By an order made on July 20, 1916, it was declared that the plaintiff's predecessor in title was entitled as tenant for life in possession, being unimpeachable for waste, under the will of the testator, Lord Robert Bruce, to the rents and royalties of a mining lease executed in 1908, which lease was for a term of forty years expiring on F March 25, 1947. On the death of the plaintiff's predecessor in title in 1917 the plaintiffs became the second tenant for life under the will of the testator, and, therefore, entitled to the whole of the rents and royalties. By a deed of Nov. 2, 1923, made between the plaintiff and the lessees, certain modifications of the method of calculating royalties were made. By a deed of March 25, 1931, made between the plaintiff, of the one part, and the lessees, of the other part, pursuant to s. 59 G of the Settled Land Act, 1925, it was agreed that the lease should operate as if the minerals had been demised for a term commencing on March 25, 1907, and expiring on March 25, 2006, and the plaintiff demised to the lessees the minerals and mining rights demised by the lease as from March 25, 1931, until March 25, 2006, subject to the rents and royalties provided in the original lease as varied by that deed and the deed of 1923. This summons asked whether the plaintiff, as tenant for life in H possession, being unimpeachable for waste, under the settlement was entitled to the whole of the rents and royalties payable under the lease as varied by the deeds of 1923 and 1931 during (i) the period from March 25, 1931, to March 25, 2006, or (ii) the period from March 25, 1931, to March 25, 1947; or whether during (i) the period from 1931 to 2006 or (ii) the period from 1947 to 2006 one-fourth of the rents and royalties ought to be capitalised under s. 47 of the Settled Land Act, 1925.

I A. F. Topham, K.C., and John Bradley Dyne, for the plaintiff, referred to *Re Kemeys-Tynte* (1), *Re Hall* (2), and *Lyon v. Reed* (3).

Cleveland Stevens, K.C., and Maurice G. Hewins, for the tenant in tail in remainder, referred to *Lyon v. Reed* (3) and *Re Savile Settled Estates* (4) ([1931] 2 Ch. at p. 217).

CLAUSON, J.—Lord Robert Bruce died on Feb. 15, 1912, being then entitled, among other lands, to certain beds of ironstone and other minerals. Lord Robert was absolutely entitled to those minerals subject to (a) a life interest vested in

Lady Cardigan, which terminated in 1915; (b) a jointure rentcharge in favour of Lord Robert's widow, which terminated in 1921; and (c) a lease of the minerals in question, which had been executed in 1908, and bound Lord Robert and anyone claiming title under him. On Lord Robert's death his will became operative, and thereunder the beneficial interest in the minerals in question, subject always to the 1908 lease and to the prior interests which I have mentioned, became vested in the late James Brudenell Bruce for life. He died in 1917. On his death his brother, the plaintiff, George Lionel Thomas Brudenell, became, and he still is, a tenant for life. His son, the infant defendant, Edmund Brudenell, is tenant in tail in remainder.

In the year 1916 a question was raised whether or not the whole of the rents and royalties payable under, among other leases, that now in question, were payable to the then tenant for life in respect of his life tenancy, and by an order of July 20, 1916, SARGANT, J., declared that on the true construction of Lord Robert's will the whole of the rents and royalties in question were payable to the tenant for life. That decision, which is, of course, binding on me, means that neither in the provisions of the will nor in any statutes (the only possibly relevant statutory provision being presumably s. 11 of the Settled Land Act, 1882, which is identical in its terms with s. 47, hereinafter to be mentioned, of the Settled Land Act, 1925) is there anything to be found which derogates from the right of the tenant for life to receive as income the whole of the rents and royalties, but that on the contrary what is given to the tenant for life by the provisions contained in the will is the right to receive the whole of the rents and royalties in question. In 1923 the plaintiff, as tenant for life, and the persons then entitled to the benefit of the lease as lessees, or assigns of the lessees, were minded to agree upon a modification of the method of arriving at the royalties. Under the then subsisting Settled Land Acts there was no express power vested in the plaintiff to modify the lease of 1908, though he had power under s. 13 of the Settled Land Act, 1882, to accept a surrender of the lease and grant a fresh lease containing varied provisions as to royalties. No question has been raised in these proceedings as to the operation of the deed which the plaintiff and the lessees executed on Nov. 2, 1923, embodying the modification to which I have referred. The question whether the modifications would bind the inheritance has not arisen. It has never been suggested that that deed operated as a surrender of the lease of 1908, and a re-grant for the unexpired period of the lease on the modified terms. It is quite obvious from the tenor of the deed that to construe the deed as amounting to such a surrender and re-grant would be to contradict the intentions of the parties; but it may be that, as between the lessees and the plaintiff, the latter may be estopped from denying that the deed so operated. On this point reference may be made to PARKE, B.'s judgment in *Lyon v. Reed* (3). I do not, however, know of any authority for the proposition that anyone but the lessee or someone claiming through or under him could rely on the estoppel as against the plaintiff, and, accordingly, had it been suggested that the remainderman could, as between himself and the tenant for life, have relied on this deed of 1923 as a surrender and destruction of the lease of 1908, I should have been prepared to hold the suggestion as unfounded. The question whether estoppel might operate in favour of the lessees as against the remainderman so as to make the deed one to which the remainderman might have to give effect as between himself and the lessees, is a question with which it is not necessary to deal; but it is not easy to see on what ground it could be suggested that such an estoppel could operate.

On Jan. 1, 1926, the Settled Land Act, 1925, superseded the former Settled Land Acts. The effect of s. 59 of that Act is to vest in the plaintiff a right to vary the 1908 lease (with, of course, the consent of the present tenants) within certain limits which I do not pause to define. In exercise of this power the plaintiff, on March 25, 1931, entered into an arrangement with the present tenants modifying the lease of 1908 in various respects, and, in particular, so as to extend the term of the lease beyond the original term. There is no question but that these variations are

A within the limits of variation laid down by s. 59. There is also no question but that this deed is binding on the plaintiff and on the tenants, and that, as it is within the power conferred on the plaintiff by s. 59, it is also binding on the inheritance and on the tenant in tail. It is further clear, on the face of the deed, that it is the intention of the parties that the lease of 1908 is not to be surrendered and terminated, but is to be kept alive and extended. As regards rents and

B royalties accruing in respect of the extended portion of the term, it is suggested on behalf of the tenant in tail, and the suggestion is accepted by the tenant for life as correct, that one-fourth of such rents and royalties must be capitalised, and that the tenant for life will be entitled to retain for himself three-fourths only of those rents and royalties. The argument for the tenant in tail, which is accepted as correct by the tenant for life, is as follows: So far as the new period of years added

C to the 1908 lease by the deed of 1931 is concerned the rents and royalties will be payable under the deed of 1931; the deed of 1931 is, as regards this new period, the mining lease, and, indeed, as regards these particular minerals, the only mining lease subsisting; the rents and royalties arising under it in respect of the new period are, accordingly, such as are referred to in s. 47 of the Settled Land Act, 1925, and, unless a contrary intention is expressed in the settlement, one-fourth of them must

D be capitalised, the tenant for life being unimpeachable for waste. This the tenant for life, as I say, accepts, and indeed, the proposition put forward by the tenant in tail is unanswerable.

The difficulty arises on a further proposition which the tenant in tail puts forward and which may, I think, be fairly stated thus: True it is, says the tenant in tail, that, as SARGANT, J., decided in 1916, so long as the 1908 lease subsisted, I could

E not claim a capitalisation of any part of the rents and royalties accruing thereunder, but, by the action of the tenant for life in executing the deed of 1931, the lease of 1908 has come to an end; it may be that on the face of the deed it is clear that the tenant for life intended not to terminate the lease of 1908, but to keep it on foot and extend it, but, as a matter of law, so the argument runs, the tenant for life cannot vary the terms of the 1908 lease without in law accepting a surrender

F of the 1908 lease and granting a new lease in its place. I will assume, first, that this argument, so far as it goes, is sound. I still am not convinced that the execution by the tenant for life of the deed of 1931 has had this quasi-magical effect, against everyone's intention, or depriving him of one-fourth of the rents and royalties for the rest of the original term of years created by the 1908 lease. The section which occasions this result, if it does occasion it, is s. 47 of the Act. Be it

G observed, however, that this section operates only "unless a contrary intention is expressed in the settlement." I have the decision, unquestionably binding on me, that on the true construction of this settlement, in its application to (among other leases) this particular lease of 1908, the life tenancy carries to the tenant for life, by its own force, the whole of the rents and royalties reserved by the 1908 lease. It results that the application of the provisions of s. 47 to those rents and royalties

H during the original term of the 1908 lease would contradict the settlement. For this reason, as it appears to me, the tenant in tail's submission as regards the rents and royalties accruing during the original term of the 1908 lease fails by reason of the true construction of the settlement. I may observe that it was not suggested that the variations effected in 1931 operated to increase the revenue of the tenant for life at the expense of the tenant in tail. If the variations had so operated, the

I operation of s. 107 of the Act of 1925, which places the tenant for life in a fiduciary position in relation to the exercise of his statutory powers, would be amply sufficient to prevent any detriment to the tenant in tail. It is not, however, suggested that on the facts of this case any such point could be raised.

I ought to deal with the further point, namely, the question whether the argument put forward by the tenant in tail that the deed of 1931 operates as a surrender of the term created by the lease of 1908 is valid for any material purpose. I will concede for the purposes of the argument that as between the tenant for life, on the one hand, and the lessees, on the other, or even as between all the persons

interested under the settlement, on the one hand, and the lessees, on the other, the principle of estoppel prevents any allegation that the deed of 1931 operates otherwise than as a surrender. But what is the authority which forces me to hold that this fiction must be treated as truth as between the tenant for life and remaindermen? No such authority was cited to me, and it is an elementary principle that, as has been picturesquely said, "estoppels are odious," and the principle of estoppel is not to be lightly extended, or, to use more modern parlance, while established legal fictions must be respected, new legal fictions ought not to be introduced. The Settled Land Act, 1925, by s. 59, has expressly given a power to vary leases within certain defined limits. Why should I hold that this clear and simple legislative power cannot be exercised without operating as between tenant for life and remaindermen, against everybody's wish and intention, as a destruction instead of a variation? I am, for the reasons I have endeavoured to explain, prepared to declare that the plaintiff, if and so long as his tenancy for life in possession subsists under the settlement, is entitled to the whole of the rents and royalties which accrue under the lease of 1908 as varied by the deed of 1923 and the deed of 1931, during the residue still unexpired of the original term of forty years created by the said lease of 1908, but that as from the expiration of the said original term of forty years, one fourth part of the rents and royalties accruing under the said lease, as so varied, ought to be set aside as capital pursuant to s. 47 of the Settled Land Act, 1925. I desire to add, in order that I may not seem to have overlooked it, that, in view of the possible question on the operation of the deed of 1931, the plaintiff and the lessees entered, also on March 25, 1931, into a contingent agreement for the surrender of the 1908 lease. That agreement is contingent, and, so far as I can see, is likely to remain contingent. Its existence seems to me to have no bearing on the point which I have decided, and I gathered that all the counsel concerned concurred in this view. I therefore say no more about it.

Solicitors: *Hopgood, Mills, Steele & Lonsdale; Hunters.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Re BARNARD. MARTIN'S BANK v. TRUSTEE

[CHANCERY DIVISION (Farwell, J.), November 16, 17, 20, 1931]

[Reported [1932] 1 Ch. 269; 101 L.J.Ch. 43; 146 L.T. 191;

[1931] B. & C.R. 73]

Bankruptcy—Limited partnership—Same person general partner in two firms—Bankruptcy of both firms—Bill accepted by one firm—Proof in bankruptcy of other firm—Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 4 (2)—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 33 (6).

X was the sole general partner in the limited partnerships, firm A and firm B. Bills of exchange were drawn on firm B and accepted on behalf of the firm by X as a general partner. Receiving orders were subsequently made against both firms on X's petition before the bills fell due, X being adjudicated bankrupt in each case.

Held: (i) under s. 4 (2) of the Limited Partnership Act, 1907, the receiving order against firm A operated against X, the sole general partner, and the holders of the bills could prove for the amount of the bills in the bankruptcy of that firm; but (ii) applying the principle underlying s. 33 (6) of the Bankruptcy Act, 1914, the assets of firm A must first be applied in discharging

- A the debts incurred by or on behalf of that firm, the surplus must be applied in repaying to the limited partners their actual contributions, and the balance would then form part of X's estate out of which would be paid his own private debts and debts incurred by him on behalf of firm B.

Notes. See now the Bankruptcy Rules, 1952, rr. 282-290; 3 HALSBURY'S STATUTORY INSTRUMENTS.

- B As to proof of debts in a partnership bankruptcy, see 2 HALSBURY'S LAWS (2nd Edn.) 328, 491, 492, 504; and for the Limited Partnership Act, 1907, and the Bankruptcy Act, 1914, see 17 HALSBURY'S STATUTES (2nd Edn.) 606 and *ibid.* vol. 2, 321.

Motion.

- C A limited partnership was registered on Sept. 29, 1928, under the name of W. H. Barnard, as a firm of metal brokers, for a term of seven years from Sept. 25, 1928, terminable at the death of W. H. Barnard, who was the sole general partner. There was one limited partner for £100. Another limited partnership was registered on May 17, 1929, under the name of the Scrap Metal Co., as an accepting house conducting financial operations in connection with the business of a metal broker. This partnership was for seven years from May 14, 1929, terminable on the death of W. H. Barnard, who was again the sole general partner. There were three other limited partners for £100 each. Between March 12 and May 12, 1931, five bills of exchange were drawn on the Scrap Metal Co. for aggregate sums of £9,869, which were accepted by W. H. Barnard as managing partner of the firm. These bills were now in the hands of Martin's Bank as holders. On June 8, 1931, a receiving order was made against the firm of W. H. Barnard (hereinafter called firm A) and Barnard on the petition of Barnard. On June 26 Barnard was adjudicated bankrupt, and a trustee was appointed. On July 24, 1931, a receiving order was made against the Scrap Metal Co. (hereinafter called firm B) and Barnard on the petition of Barnard, and on the same day Barnard was again adjudicated bankrupt. In this case the Official Receiver remained trustee. Martin's Bank at first lodged a proof for the £9,869 due on the bills in the bankruptcy of firm B, but subsequently withdrew that proof, and on Oct. 1, 1931, lodged a proof for this amount in the bankruptcy of firm A. The trustee on Oct. 23 rejected this proof on the ground that "the bankrupt is not a party to the bills upon which the proof is made." The bank now moved that this decision be reversed and the proof admitted.

- G *Clayton, K.C.*, and *Herbert Jacobs* for Martin's Bank.
Tindale Davis for the trustee.

Cur. adv. vult.

- H Nov. 20. **FARWELL, J.**, read the following judgment. It is well settled that an ordinary partnership is not a legal entity like a limited company, and, although the Limited Partnership Act, 1907, recognises a limited partnership, and requires it to be registered and gives liberty to inspect the register, it does not create it a legal entity. It is merely a combination of persons for the purpose of carrying on a particular trade or trades, and is in no sense strictly speaking a legal entity.

- I The principal provision for the purposes of this motion is in s. 4 (2) of the 1907 Act, by which the liability for "all debts and obligations of the firm" is cast upon the general partners. In this case Barnard, the sole general partner, is personally liable for the firm's debts. The limited partners are not so liable unless they have taken some active part in the management, which is not the case here. The result is that Barnard is now personally liable for the £9,869 debt to Martin's Bank. It is a debt for which he can be made liable at law, and, in my judgment, it is clearly a debt provable in his bankruptcy under s. 30 (3) of the Bankruptcy Act, 1914. Rule 286 of the Bankruptcy Rules, 1915, provides that a receiving order made against a limited partnership firm shall operate as a receiving order against each general partner. Here, therefore, the receiving order against firm A operated

against Barnard alone. On that he was adjudicated a bankrupt, and I cannot see **A**
on what ground his £9,869 debt is not provable in his bankruptcy. The trustee has
rejected the proof on the ground that the bankrupt is not a party to the bills. But
s. 23 (2) of the Bills of Exchange Act, 1882, provides that

"the signature of the name of a firm is equivalent to the signature by the
person so signing of all persons liable as partners in that firm."

The firm's signature by Barnard is, therefore, equivalent to his own signature, he **B**
being the person liable as a partner. It is, therefore, a fallacy to say that he is
not a party to the bills. He is, in fact, a party, and the party liable. In these
circumstances, the proof has been wrongly rejected, and it must be admitted in his
bankruptcy.

That disposes of the motion, but I desire to say that it does not necessarily follow **C**
from the admission of the proof that the debt is payable out of the assets of firm A.
Section 127 of the Bankruptcy Act, 1914, provides that, subject to such general
modifications as may be made by general rules, the provisions of the Act

"shall apply to limited partnerships in like manner as if limited partnerships
were ordinary partnerships, and on all the general partners being adjudged
bankrupts the assets of the limited partnership shall vest in the trustee."

Then r. 286 provides that a receiving order against the firm operates as a receiving **D**
order against each general partner. Rule 289 gives the limited partners the right
to inspect the file, attend creditors' meetings, and so on. Rule 290 provides that
the assets vesting in the trustee under s. 127 include the liability (if any) of the
limited partners to contribute to the assets. The result is that, so far as applicable,
the method of administering an estate in bankruptcy in the case of an ordinary **E**
partnership is to be applied in the case of a limited partnership.

Now, if the separate debts of Barnard, the individual, are payable in the first
instance out of the firm A assets, a grave injustice might be done to the limited
partners. Subject to the payment of the firm's debts and liabilities out of the
firm's assets, the limited partners are entitled to recover their own contributions;
and if the general debts of Barnard, the individual, including his separate debts **F**
and debts incurred by him on behalf of some other limited partnership, are to be
paid out of firm A assets, the limited partners in that firm may be seriously
prejudiced. Is there any provision in the Bankruptcy Act to avoid that result?
Section 33 (6) provides that in the case of partners the joint estate shall be
applicable in the first instance in payment of their joint debts, and that the separate
estate of each partner shall be applicable in the first instance in payment of his **G**
separate debts. If there is a surplus of the separate estate it shall be dealt with as
part of the joint estate. If there is a surplus of the joint estate it shall be dealt
with as part of the separate estates in proportion to the right and interest of each
partner in the joint estate. The bank rightly points out that here there is no
question of joint liability, because there is only one general partner, Barnard, who
alone is liable for the debts. But, on the other hand, it seems to me, as at present **H**
advised, that the principle underlying s. 33 (6) ought to be applied in this case.
The firm A assets must first be applied in discharging the firm's debts, i.e., the
debts incurred by or on behalf of that firm. The surplus must be applied in re-
paying to the limited partners their actual contributions. The balance will form
part of Barnard's separate estate, and out of that will be paid Barnard's own
private debts and any other debts incurred by him on behalf of any other limited **I**
partnerships. The same thing applies mutatis mutandis in the case of firm B.
The debts proved in the bankruptcy which have been incurred on behalf of that
firm, will be payable out of that firm's assets. The balance will be applied in the
first instance in repaying the limited partners, and the surplus will be part of
Barnard's separate estate available for the payment of his private debts, and debts
incurred by him on behalf of any other limited partnership, which for that purpose
must be treated as separate debts.

That is the way in which in a case of this kind the matter must be dealt with.

- A The method is derivable from the provisions of the Bankruptcy Act. Injustice to the limited partners will be prevented, and the assets will be dealt with in a way that is equitable between all the parties interested therein. These observations do not, of course, affect my decision that the trustee has wrongly refused to admit the proof, and in the result I must make an order that the trustee's decision be reversed, and the proof admitted, and the trustee must pay the bank's taxed costs.
- B Whether in the result the bank, having regard to the view I have just expressed, will get any advantage from proving in the firm A bankruptcy rather than in the firm B bankruptcy is a question with which I am not concerned. Since the only matter which has been fully argued is as to the rejection of the proof, my decision must be confined to reversing the trustee's decision and admitting the proof, but I thought it right to make the above observations for the trustee's guidance and to
- C prevent him from being misled by my decision. If the trustee acts upon my observations any one who takes exception can come to the court and get the matter finally determined.

Solicitors: *Charles Stevens & Drayton; Linklaters & Paines.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

D

E Re PITTS. COX v. KILSBY

[CHANCERY DIVISION (Farwell, J.), February 25, 1931]

[Reported [1931] 1 Ch. 546; 100 L.J.Ch. 284; 145 L.T. 116;
47 T.L.R. 293]

- F *Intestacy—Administration of estate—Distribution—Exclusion of killer from benefit—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 46.*

A man murdered his wife and child and then committed suicide. The wife died intestate. It was found on the evidence that when he killed his wife and child the man was insane.

- G **Held:** the rule, based on public policy, that where a person had feloniously killed another neither he nor his personal representatives would be granted letters of administration to the estate of the deceased postulated a mens rea, and, therefore, as the murderer in the present case was insane at the material time, it did not apply and his estate could not be deprived of his distributive share in the wife's estate under s. 46 (1) (i) of the Administration of Estates Act, 1925.

- H **SEMBLE:** the rule applies to an intestacy as it applies to a case where the murdered person has made a will under which the murderer benefits.

Notes. The Administration of Estates Act, 1925, s. 46 (1) (i), has been amended by the Intestates Estates Act, 1952, s. 1.

Followed: *Re Sigsworth, Bedford v. Bedford*, [1934] All E.R.Rep. 113. Referred to: *Beresford v. Royal Insurance Co., Ltd.*, [1937] 2 All E.R. 243.

- I As to general grants of administration, see 16 HALSBURY'S LAWS (3rd Edn.) 212 et seq.; and for cases see 24 Digest (Repl.) 923 et seq. As to claims to benefit from crime committed by the claimant's predecessor, see 1 HALSBURY'S LAWS (3rd Edn.) 10, 11. For Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718; and for Intestates Estates Act, 1952, see *ibid.*, vol. 32, 115.

Cases referred to:

- (1) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 12 (Repl.) Digest 271, 2082.

- (2) *In the Estate of Crippen*, [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 55 Sol. Jo. 273; sub nom. *In the Estate of Cunigunda (otherwise Cora Crippen, deceased)*, 27 T.L.R. 258; 12 Digest (Repl.) 273, 2099. **A**
- (3) *In the Estate of Hall, Hall v. Knight and Baxter*, [1914] 1 P. 1; 83 L.J.P. 1; 109 L.T. 587; 30 T.L.R. 1; 58 Sol. Jo. 30, C.A.; 12 Digest (Repl.) 270, 2077.
- (4) *Bird v. Keep*, [1918] 2 K.B. 692; 87 L.J.K.B. 1199; 118 L.T. 633; 34 T.L.R. 513; 62 Sol. Jo. 666; 11 B.W.C.C. 133, C.A.; 22 Digest (Repl.) 316, 3294. **B**
- (5) *Prince of Wales, etc., Association Co. v. Palmer* (1858), 25 Beav. 605; 53 E.R. 768; 13 Digest 260, 405.
- (6) *Re Houghton, Houghton v. Houghton*, [1915] 2 Ch. 173; 84 L.J.Ch. 726; 113 L.T. 422; 31 T.L.R. 427; 59 Sol. Jo. 562; 44 Digest 226, 506.
- (7) *Felstead v. R.*, [1914] A.C. 534; 8 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 3133; 30 T.L.R. 469; 58 Sol. Jo. 534; 24 Cox, C.C. 243; 10 Cr. App. Rep. 129, H.L.; 14 Digest (Repl.) 365, 3546. **C**

Witness Action.

On Aug. 19, 1929, Ernest Pitts murdered his wife and infant son and immediately afterwards committed suicide. The verdict at the coroner's inquest on the bodies of the wife and child was that they were murdered by Pitts, and at the inquest on the body of Pitts the verdict was that he killed himself while of unsound mind. The wife died intestate possessed of £1,755 on deposit with a building society, and of £55 on deposit at a bank. There was also a deposit of £251 with the building society in her name on trust for her infant son and there was a further deposit account of £55 in the son's name. Pitts died intestate, and administration to his estate was taken out by the defendant, who also took out administration to the wife's estate. **D**

The wife's mother, the plaintiff, commenced this action on Oct. 14, 1930, claiming against the defendant a declaration that she was entitled to the whole of the wife's estate and also to the infant's estate on the ground that the husband's interest in the estates of his wife and child under the Administration of Estates Act, 1925, s. 46 (1) (i) and (iv), was barred, on the ground of public policy, by his having committed the murders. The defendant contended that the rule of public policy—which was admitted—did not apply, as the husband was insane at the time of the murder, and further that the rule was confined to the case of wills and did not apply in the case of an intestacy, in which case s. 46 of the Administration of Estates Act, 1925, applied. On the evidence FARWELL, J., held that the husband was insane at the time of the murder and, therefore, that the rule as to public policy did not apply. The court, therefore, did not decide the question whether the rule would apply in the case of an intestacy. **E**

Sir Gerald Hurst, K.C., and *H. S. G. Buckmaster*, for the plaintiff, referred to *Cleaver v. Mutual Reserve Fund Life Association* (1); *In the Estate of Crippen* (2); *In the Estate of Hall, Hall v. Knight and Baxter* (3); *Bird v. Keep* (4); and *Prince of Wales, etc., Association Co. v. Palmer* (5). **F**

Grant, K.C., and *Heckscher*, for the defendant, referred to *Re Houghton, Houghton v. Houghton* (6). **G**

FARWELL, J. [after stating the facts, and holding on the evidence that Pitts was insane at the time of the murder, continued:] As a general proposition it is well settled that no sane murderer can benefit under his victim's will. If, therefore, the husband had not been insane, his personal representative here would have claimed through a sane murderer, and, if the wife had made a will in her husband's favour, it is plain that the husband's personal representative could not have taken under it. That rule is based upon public policy. But a question has been raised whether the rule prevents a sane murderer from taking a distributive share under his victim's intestacy. **H**

In *Re Houghton* (6) JOYCE, J., thought that the rule did not apply to an intestacy, as the intestate succession was settled by statute. His observations were only obiter, as the murderer in that case was insane, but that may be the law, though **I**

- A it is difficult to see why. If public policy prevents a murderer from taking under his victim's will, why should it not prevent him from taking under his victim's intestacy? If it had been necessary to decide the point I should have thought that the view of FRY, L.J., in *Cleaver v. Mutual Reserve Fund Life Association* (1) would prevail, and that the provision of the Administration of Estates Act, 1925, s. 46, however peremptory, would be read as subject to the rule of public policy.
- B But it is unnecessary to decide it in this case, and I do not decide it.

The rule of public policy postulates a mens rea, and on a trial a verdict of "guilty but insane" would have been equivalent to an acquittal as regards murder: see *Felstead v. R.* (7); and, therefore, the rule does not apply here, and the husband's estate cannot be deprived of his distributive share. His personal representative will, therefore, take £1,000 out of the wife's estate, and will also take the whole estate of the infant, who under s. 184 of the Law of Property Act, 1925, is presumed to have survived the wife.

Solicitors: *Ranger, Burton & Frost*, for *J. D. Douglas, Beattie & Douglas*, Northampton; *James, Mellor & Coleman*, for *Phipps & Troup*, Northampton.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

D

E

Re C. B. & M. (TAILORS), LTD.

[CHANCERY DIVISION (EVE, J.), October 13, 26, 1931]

[Reported [1932] 1 Ch. 17; 101 L.J.Ch. 6; 146 L.T. 118;

[1931] B. & C.R. 69; 75 Sol. Jo. 797]

Company—Winding-up—Costs—Costs of resisting petition—Taxation as between party and party—Right of solicitor to further solicitor and client costs—Companies (Winding-up) Rules, 1929, r. 192.

In October, 1930, a petition for the compulsory winding-up of a company was presented by a contributory, and the applicant, a solicitor, was instructed to appear and oppose and to investigate charges which had been made against the company's officers. On Dec. 1 a compulsory winding-up order was made, it being directed that the company's costs relating to the petition should be taxed and paid out of the assets. The taxation was made on the footing of insolvency, and £183 3s. 10d. was allowed. At the time of the order the company was indebted to the solicitor for costs subsequent to the presentation of the petition to the sum of £433 8s. 6d., including the above-mentioned sum. The company proved to be solvent, and the solicitor claimed to prove for the balance subject to taxation. This proof was rejected by the liquidator on the ground that the solicitor was not entitled to prove for an amount which had been taxed off the bill brought in.

Held: the taxation under the order of Dec. 1, which was between party and party, did not deprive the solicitor of his right to recover further sums found to be due to him on a solicitor and client taxation, and, therefore, the liquidator must admit the proof subject, if he so wished, to taxation.

Notes. Rule 192 of the Companies (Winding-up) Rules, 1929, has been replaced by r. 195 of the Companies (Winding-up) Rules, 1949.

As to payment of costs in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 593, 594, 672–676, 726 et seq.; and for cases see 10 DIGEST (Repl.) 1004–1005. For Companies (Winding-up) Rules, 1949, see 4 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

- (1) *Re Foss, Bilbrough, Plaskett and Foss*, [1912] 2 Ch. 161; 81 L.J.Ch. 558; 106 L.T. 835; 56 Sol. Jo. 574; 10 Digest (Repl.), 1005, 6908.
- (2) *Re Liverpool Household Stores Association, Ltd.* (1890), 59 L.J.Ch. 616; 62 L.T. 873; 2 Meg. 217; 10 Digest (Repl.), 948, 6510.
- (3) *Re Osborn and Osborn*, [1913] 3 K.B. 862; 83 L.J.K.B. 70; 109 L.T. 505, C.A.; 42 Digest 153, 1531.
- (4) *Re General Exchange Bank* (1867), L.R. 4 Eq. 138; 16 L.T. 338; 10 Digest 897, 6057.
- (5) *Re Beer, Brewer and Bowman* (1915), 113 L.T. 990; 59 Sol. Jo. 510; 36 Digest (Repl.) 630, 1942.
- (6) *Re Humber Iron Works Co.* (1866), L.R. 2 Eq. 15; 35 Beav. 346; 14 L.T. 216; 12 Jur.N.S. 265; 55 E.R. 929; 10 Digest (Repl.) 897, 6054.

Motion in winding-up of C.B. & M. (Tailors), Ltd.

The applicant, Cosmo Rose Cran, a solicitor practising as Cran & Co., moved that the order of Mr. Registrar Stiebel of July 27, 1931, dismissing his application that the decision of the liquidator of the company, rejecting a proof of debt by him, should be reversed and proof allowed in full. On Oct. 23, 1930, a contributory of the company petitioned for its compulsory winding-up, making allegations of misfeasance against officers of the company in regard to its flotation, and the applicant was instructed by the company and the directors to oppose the petition, investigate the allegations, and brief leading counsel for the hearing. These costs were large, and would not have been allowed on a taxation as between party and party. On Dec. 1 an order was made for the compulsory winding-up of the company. The applicant's costs were taxed, the sum of £183 3s. 10d. being allowed, which was ordered to be paid out of the assets of the company. On June 18, 1931, the applicant delivered bills of his charges in connection with the opposition to the petition which amounted to £433 8s. 6d., including the £183 3s. 10d., and lodged a proof for the balance of his costs as between solicitor and client. This the liquidator rejected on the ground that that sum having been disallowed on taxation, it could not be obtained by a proof in the winding-up. The company, however, proved to be solvent, the liquidator having funds in hand more than sufficient for all its liabilities.

The applicant took out a summons to reverse the liquidator's decision, which the registrar refused on the ground that r. 192 of the Companies (Winding-up) Rules, 1929, precluded the payment of any further costs beyond those of the petition which had been taxed.

H. A. Rose, for the applicant, referred to *Re Foss, Bilbrough, Plaskett and Foss* (1); *Re Liverpool Household Stores Association, Ltd.* (2); *Re Osborn and Osborn* (3); *Re General Exchange Bank* (4); and *Re Beer, Brewer and Bowman* (5).

J. M. McCringle, for the liquidator, referred to *Re Humber Iron Works, Co.* (6).

Cur. adv. vult.

Oct. 26. **EYE, J.**, read the following judgment.—This is a motion in the winding-up of C.B. & M. (Tailors), Ltd., on the part of Mr. Cosmo Rose Cran, a solicitor practising as Cran & Co., to set aside an order of the learned registrar dated July 27, 1931, affirming on somewhat different grounds the liquidator's rejection of a proof carried in by Mr. Cran in the winding-up proceedings. The proof is for costs and arises in the following circumstances.

On Oct. 23, 1930, a petition was presented by a contributory for the compulsory winding-up of the company, and on the following day Mr. Cran was instructed to appear thereon for the company and to oppose the making of the order. On Dec. 1 the usual compulsory order was made whereby it was, among other things, ordered that the costs of the company of the petition should be taxed and paid out of the assets of the company. These costs, according to the affidavit filed in support of the motion, were taxed upon the basis that the company was insolvent, and on

- A April 1 were allowed at the sum of £183 3s. 10d. But at the date of the winding-up order the company was indebted to Mr. Cran for costs incurred subsequent to the presentation of the petition in the sum of £433 8s. 6d., including the costs subsequently taxed at £183 3s. 10d., and on June 18 Mr. Cran rendered to the company a detailed bill for the larger amount, and after giving credit for the £183 3s. 10d. claimed to prove as a creditor for the balance subject to taxation.
- B The company, it is to be noted, is solvent, the liquidator having assets in hand more than enough to meet all the liabilities. The liquidator rejected the proof on the ground that the amount claimed was the amount taxed off the bill brought in under the order of Dec. 1, and, therefore, was an amount which, having been disallowed, could not be recovered by another method, namely, by proof of debt against the company.
- C I do not think that this objection can be maintained. The taxation under the order of Dec. 1 was in the nature of a taxation *inter partes*, wherein many items in the bill might properly be disallowed or reduced and still be recoverable against the client in the solicitor and client taxation. The solicitor does not abandon his right to recover from his client items disallowed or reduced merely because he has made an unsuccessful attempt to recover them in the party and party taxation. The client is, of course, relieved of his obligation to pay the sums recovered in the party and party taxation, but cannot be heard to assert that the disallowance or reduction of items in that taxation operates to release him from his obligation subject to taxation to pay such items. For example, the client may have instructed his solicitor to brief a particular counsel and agreed the fees to be paid to him. In such a case the reduction of counsel's fees in the party and party taxation could not be relied on as relieving the client from his liability to pay the amounts which he had agreed should be paid. And the same observations may be made of other charges properly made against the client, but not recoverable on the party and party taxation. The taxation under the order of Dec. 1 fixed the sum to be allowed as between party and party, but did not deprive the solicitor of his right to recover payment of such further sums as might be found to be due to him on a solicitor and client taxation. The ground, therefore, on which the liquidator rejected the proof cannot in my opinion be supported.

On appeal the learned registrar adopted the view that r. 192 of the Companies (Winding-up) Rules, 1929, must be construed as dealing exhaustively with the costs payable out of the company's assets, and inasmuch as it makes no provision for the payment out of the assets of any costs owing to the solicitor over and above the taxed costs of the petition the solicitor has no right of proof in the winding-up of such further costs. Such a construction is calculated to bring about injustice, and ought not to be adopted unless the rule makes it imperative. The contract with the solicitor was entered into and the costs were incurred before the winding-up order and at a time when the company had power to enter into such a contract. The rule deals with the costs of the winding-up order and other costs, charges, and expenses incurred in the winding-up, and determines the priority of payment of these costs, but it does not purport to affect in any way costs for the recovery of which a proof may thereafter be tendered in a winding-up. It certainly does not say, and I cannot interpret it as raising an implication, that a proof may not be lodged for payment out of the assets which remain after discharging these priority costs of further costs incurred by the company over and above those for which priority is given by the rule. No doubt, in practice the solicitor not infrequently requires a guarantee from some third party for these costs, but that is due to the fact that, even though he proves for the full amount, he is unlikely in most cases to get more than a dividend on the amount of his proof. A proof for unpaid costs is not less meritorious than proofs for work done, services rendered, or goods supplied by other creditors, and I see no ground for construing the rule as raising an unjustifiable distinction between the creditor for costs and other creditors.

In the present case, where there is enough to pay all costs and all the creditors in full, questions of priority are of comparative unimportance, and I cannot see any

valid ground for holding that the client—that is the company—ought to escape from its obligations to pay the solicitor the balance of costs properly incurred by him on the instructions of the company over and above those costs which he has recovered on the party and party taxation under the order of Dec. 1. The bill he has delivered appears to be strictly in accord with approved practice (*Re Osborn and Osborn* (3), see in particular BUCKLEY, L.J., [1913] 3 K.B. at p. 368), and I must discharge the order appealed from and direct the liquidator to admit the proof, subject if he so wishes to taxation of the whole bill under the statute in the ordinary course. The costs of this appeal and of the hearing before the registrar to be paid by the company.

Solicitors: *Cosmo Cran & Co.*; *Anstey & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

EVERETT v. SHAND

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 29, 1931]

[Reported [1931] 2 K.B. 522; 100 L.J.K.B. 612; 145 L.T. 216;
95 J.P. 147; 47 T.L.R. 415; 75 Sol. Jo. 393; 29 L.G.R. 390;
29 Cox, C.C. 309]

Gaming—Totalisator—Greyhound racing track—“Game or pretended game of chance”—Vagrant Act Amendment Act, 1873 (36 & 37 Vict., c. 38), s. 3.

The operation of a totalisator on a greyhound racing track does not constitute an offence under the Vagrant Act Amendment Act, 1873, s. 3, as, although betting takes place on the premises, that betting is not “at any game or pretended game of chance.”

Tollett v. Thomas (1) (1871), L.R. 6 Q.B. 514, not followed.

A.-G. v. Luncheon and Sports Club, Ltd. (2), [1929] A.C. 400, applied.

Notes. As to betting in public places at a game of chance, see 18 HALSBURY'S LAWS (3rd Edn.) 195, para. 386; and for cases on the subject see 25 DIGEST 434–435, 320–325. For the Vagrant Act Amendment Act, 1873, s. 3, see 18 HALSBURY'S STATUTES (2nd Edn.) 217.

Cases referred to:

- (1) *Tollett v. Thomas* (1871), L.R. 6 Q.B. 514; 40 L.J.M.C. 209; 24 L.T. 508; 35 J.P. 359; sub nom. *R. v. Wolverhampton JJ., Tollett and Lyshon v. Thomas*, 19 W.R. 890; 25 Digest 434, 322.
- (2) *A.-G. v. Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141 L.T. 153; 45 T.L.R. 294, H.L.; Digest Supp.
- (3) *Ridgeway v. Farndale*, [1892] 2 Q.B. 309; 61 L.J.M.C. 199; 67 L.T. 318; 56 J.P. 697; 41 W.R. 128; 8 T.L.R. 696; 17 Cox, C.C. 561, D.C.; 25 Digest 435, 323.

Case Stated by the deputy stipendiary magistrate of Liverpool.

Two informations were preferred by the appellants Mr. Everett, the chief constable, and Mr. Glover, the assistant chief constable, of Liverpool, against the respondents, James Shand, the secretary and managing director of Electric Hare Greyhound Racing, Ltd., the occupiers of the Stanley greyhound racing track, and about thirty clerks employed by the company.

The first information charged the respondents with betting at the Stanley Track,

- A** a place to which the public were permitted to have access, with an instrument of gaming—namely, a hand totalisator, at a game of chance, or pretended game of chance—namely, a dog race, contrary to the Vagrant Act Amendment Act, 1873, s. 3. The second information charged them with aiding and abetting Electric Hare Greyhound Racing, Ltd., or other persons unknown, to play, or bet, by way of wagering and gaming, in an open place at or with a table or instrument of gaming
- B**—namely, a totalisator, at a game of chance—namely, a dog race, contrary to the Summary Jurisdiction Act, 1848, s. 5.

The following facts were proved or admitted. The Electric Hare Greyhound Racing, Ltd., occupied land known as the Stanley Track, Liverpool. The first respondent was the secretary and managing director of the company, and the other respondents were clerks employed by the company. Entrance to the Stanley Track

- C** was obtained by a gate which led to the 1s. ring, to which the public had access. On each side of the ring there was a large permanent wooden structure. Each of those two structures was divided into two by means of a covered passage, and on each side of the covered passage there were seven windows, each of which was manned by a clerk. The windows on one side of the passage were marked as follows :

- D** “No. 1, change; No. 2, dog No. 1; No. 3, dog No. 2; No. 4, £1 all dogs; No. 5, dog No. 3; No. 6, dog No. 4; No. 7, dog No. 5.”

The dog number related to the number of the dog referred to in the official race card for each race in the day. Of the windows on the other side of the passage, No. 1 was marked “Change” and the other six were marked “Pay out.” The

- E** structure on the right-hand side of the ring was confined to 2s. units and the structure on the left-hand side was confined to 1s. units, and differed only from the 2s. side in that it had no window marked “£1 all dogs.” At each window, a ticket was issued in exchange for the value of the unit, that is to say, 2s. or 1s. The ticket bore the number of the race on the race card, the number of the dog, the rotation number and E.H.G.R., Ltd., Stanley Track, Liverpool. At each end of each structure, a board was displayed showing the progress of the various units
- F** and final units placed, and the dividend placed on the winning dog. The boards were blackboards and were operated by clerks. There were several notices exhibited stating that the totalisator was placed at the disposal of the public by the company.

- All the money subscribed by the public on any race was returned to those members of the public who had secured tickets bearing the number of the winning dog,
- G** divided to the nearest 3d., less 5 per cent. for expenses. The calculations were made by a representative of a firm of chartered accountants. There was a representative in each booth. There were several loudspeakers round the ring, and at the end of each race the first respondent announced the winning dog, the time and distance by which it won, and the dividend paid.

- H** It was contended for the respondents that (i) the transactions effected by the totalisator method at the Stanley Track were not bets; alternatively, that such transactions were bets between the members of the public inter se and not with the owners or managers of the track or totalisator; (ii) none of the respondents did bet, either by way of wagering or gaming or at all; none of the respondents had any interest in the transactions complained of or in the money they received or disbursed; (iii) none of the respondents did bet with any table or instrument of gaming
- I** or wagering or with any coin, card or token or other article used as such an instrument; (iv) there was no “game of chance” being carried on or taking place at the Stanley Track; (v) none of the respondents did aid, abet or assist Electric Hare Greyhound Racing, Ltd., or any other person to do any unlawful act; (vi) none of the charges of aiding, abetting or assisting disclosed any principal offender or principal offence. No proceedings against any alleged principal offender had been brought or were contemplated at the date of the charges. The charges of aiding, abetting or assisting were all bad for uncertainty and/or duplicity. It was contended for the appellants that the respondents, by inviting the public to lay out

their money, and by receiving money to be disposed of by them on behalf of Electric Hare Greyhound Racing, Ltd., according to the result of the races, and by using the instrument or card or coin or token or other article as a means of registering the amount received, and also as an advertisement of the process of betting on a dog or dog races, were essentially betting by way of wagering or gaming with an instrument or card or token or other article used as an instrument or means of gaming or were aiding and abetting and assisting in the process of betting within the meaning of the section of the statute.

The deputy stipendiary magistrate was of opinion that, in view of the decision in *A.-G. v. Luncheon and Sports Club, Ltd.* (2), no betting had taken place on the premises, and, therefore, no offence had been committed by any of the respondents. He accordingly dismissed both the informations, and appellants now appealed. It was conceded on behalf of the appellants that the dismissal of the first information was correct in law, and that the second information only should be considered by the court.

Section 3 of the Vagrant Act Amendment Act, 1873, provides :

"Every person playing or betting by way of wagering or gaming in any . . . public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming or any coin, card, token or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond . . . and as such may be convicted and punished . . ."

J. E. Singleton, K.C., and *R. C. Essenhugh* for the appellants.

Sir John Simon, K.C., and *Wilfrid Clothier* for the respondents.

LORD HEWART, C.J.—This is a Case Stated by the learned deputy stipendiary magistrate for the city of Liverpool. I need not read the Case again. It is enough to say that he dismissed all the informations. He dismissed them because, as he says, he was of opinion that, in view of the decision in *A.-G. v. Luncheon and Sports Club, Ltd.* (2), no betting had taken place on the premises. I think that was wrong. I think it is quite clear that betting had taken place on the premises, but, nevertheless, I think the question for us is whether he was right in coming to the conclusion that the informations ought to be dismissed. Counsel for the appellants no longer lays any stress on the first information. He founds himself only on the second, which charges wilfully aiding and abetting and assisting, and he frankly admits that the only authority he can rely on is the decision of this court sixty years ago in *Tollett v. Thomas* (1). But, in my opinion, the effect of the decision of the House of Lords in *A.-G. v. Luncheon and Sports Club, Ltd.* (2) was to overrule the decision in *Tollett v. Thomas* (1), although, oddly enough, so far as the reports go, that case does not seem to have been mentioned either in the House of Lords or in the Court of Appeal. In view, however, of the existing state of the decisions, I am of the opinion that the decision of this court in *Tollett v. Thomas* (1), eminent as were the judges who gave it, is no longer binding on this court, and, therefore, on the second information we are remitted to the words of the statute itself. Much has been said on those words, and I shall not attempt to repeat or to summarise the arguments, but the essence of s. 3 of the Vagrant Act Amendment Act, 1873, is that there should be wagering or gaming "at any game or pretended game of chance." I am not going to criticise textually the words which were employed in *Tollett v. Thomas* (1). I think that, in view of what has taken place, the construction of this section is now open to us, and that, before a court can find that there was wagering or gaming within the meaning of s. 3, it is necessary to find that there was a game or pretended game of chance, and that, although the wagering or gaming, considered by itself, might amount to a game of chance, that is not enough. There must be a game or pretended game of chance at which the wagering or gaming takes place. I think, therefore, that, although the reasoning which the learned deputy stipendiary magistrate for Liverpool employed cannot be

A supported, nevertheless the conclusion to which he came was correct and, therefore, that this appeal ought to be dismissed.

AYORY, J.—I am of the same opinion. In view of the admission made to-day by counsel for the appellants, the only question we have to consider is whether these respondents, or any of them, aided or abetted or assisted any of the persons who were engaged in making use of the totalisator on the occasions in question. B The learned magistrate does not appear to have had his mind directed at all to the question whether they were, or whether anybody present on those premises could have been said to be, wagering or betting at a game of chance or on a game of chance. He took what appeared to be a short cut by holding that the decision in the House of Lords in *A.-G. v. Luncheon and Sports Club, Ltd.* (2) justified him in saying that there had been no betting at all on these premises. As my Lord has said, that cannot be justified. It may be that there was betting as it has been described by the persons who were using this totalisator inter se; but, unless we are bound by the decision of *Tollett v. Thomas* (1), it seems to me clear that they were not, although betting among themselves, betting or wagering at a game of chance within the meaning of s. 3 of the Act of 1873.

D Now we are bound by *Tollett v. Thomas* (1)? It is quite clear, and it is admitted by counsel for the appellants, that *Tollett v. Thomas* (1) was decided on the footing that, in that case, there had been betting with the appellants in the case, who were the proprietors of the machine. Although the point was taken for the appellants, and distinctly taken as appears at L.R. 6 Q.B. 519, that the appellants were not themselves playing or betting, the point was really never decided. It was merely assumed against the appellants; and E BLACKBURN, J., in an interlocutory observation, seems to have thought that it was an answer to that contention to say that the appellants were using the machine within the meaning of the Act, overlooking the question whether they were in fact wagering or betting. As the very substratum of that decision has been destroyed, in my view, by the decision in the House of Lords, I am of the opinion that we are no longer bound by it, even to the extent to which it dealt with the question whether F a horse race could properly be described as a game of chance. COCKBURN, C.J., did glance at the question whether wagering on a horse race could be described as wagering on a game of chance, but he abstained from deciding because he proceeded to say (L.R. 6 Q.B. at p. 52):

G “Whether a horse race be in itself a game of chance or not, we can entertain no doubt that, if some additional element of chance be introduced, the wagering on a horse race may be converted into a game of chance.”

That does not appear to me to be a decision at all, or certainly not a satisfactory decision, on the question of whether the wagering in the present case on a dog race is wagering or betting at a game of chance. In the much later decision of *Ridge-way v. Farndale* (3) the essential part of the offence was clearly pointed out by the H court in a case which raised the question in the most appropriate way. It was a case where the conviction omitted the words “at a game or pretended game of chance,” and the court had to determine whether that conviction could stand. WRIGHT, J., in giving the judgment, in which COLLINGS, J., as he then was, concurred, said ([1892] 2 Q.B. at p. 311):

I “the words ‘at any game or pretended game of chance’ remain a part of the essential definition of the offence.”

In my opinion, there was no evidence in the present case that there was any wagering or betting at any game or pretended game of chance and, therefore, although the deputy stipendiary magistrate decided the case on another and a wrong ground, the dismissal of the charge was, in the circumstances, proper and the appeal should be dismissed.

HUMPHREYS, J.—I agree. I think we are bound to say—and, indeed, the matter has not seriously been argued—that the opinion expressed by the deputy

stipendiary magistrate in the Case that no betting had taken place on the premises in question is wrong. It clearly follows from the decision in the House of Lords in *A.-G. v. Luncheon and Sports Club, Ltd.* (2), that betting of a sort did take place on those premises and that was the only ground on which the deputy stipendiary magistrate gave his decision and dismissed the informations. It appears from the Case that a number of other points were raised in argument before him, one of which was that no game of chance was being carried on at this place. The deputy stipendiary magistrate expressed no view about that matter. I confess I have doubted whether we ought not to send the Case back to him in order that he should apply his mind to what is the real question in the Case, but, on the whole, I agree with the other members of the court that, as the facts are fully stated, we are at liberty to say what, in our view, is the law in regard to this question of there being a game of chance carried on on the premises. I concur in the judgments which have been already pronounced that *Tollett v. Thomas* (1) has been virtually overruled by the House of Lords and, therefore, I agree that it is open to us to express our own view as to the proper construction of s. 3 of the Act of 1873 under which the prosecution took place. In my view, the section provides that, before a person is convicted, he must be proved to have been playing or betting by way of wagering or gaming with some instrument or other article or means of wagering or gaming at a game or pretended game of chance. I think it is impossible to say that the game or pretended game of chance is merely the betting by way of wagering or gaming to which reference has been already made. I think that, in order to commit an offence under this section, a person must be found to have been playing or betting by way of wagering or gaming at some game or pretended game which is in itself a game of chance. I do not think that dog racing, any more than horse racing, could be described as a game of chance. For these reasons, I agree that the appeal should be dismissed.

LORD HEWART, C.J.—I should like to add, because the point was discussed, that, in my opinion, it is not necessary to say whether the structure described in this Case was an instrument of gaming within the meaning of s. 3 of the statute.

Appeal dismissed.

Solicitors: *F. Venn & Co.*, for the Town Clerk, Liverpool; *N. E. Stockdale.*

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

A

Re DAVIES' WILL TRUSTS. BEVAN *v.* WILLIAMS

[CHANCERY DIVISION (Maugham, J.), November 4, 5, 1931]

[Reported [1932] 1 Ch. 530; 101 L.J.Ch. 301; 147 L.T. 334]

B

Settlement—Prior to 1926—Share of income of farm and lands to a tenant for life “so long as he shall reside upon and assist in the management of the farm”—Farm and lands after 1925 subject to statutory trusts—No forfeiture of tenant for life’s interest by exercise of statutory trusts—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 106—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 35.

C

A testator, who died in 1922, directed by his will that the income of his farm was to be paid to B., his executrix, and W. equally until his younger daughter should attain twenty-one, and then in equal shares to B. for life or until marriage, W. for life, or so long as he should reside on and assist in the management of the said farm, and his two daughters or the survivor of them for life with gift over, and power was given to B. to exercise the powers of a tenant for life under the then Settled Land Acts. W. lived with the testator at the farm and helped in its management until the testator’s death. Thereafter he continued to live there and to manage it. On the coming into force of the Law of Property Act, 1925, the property vested in B. on the statutory trusts. On a summons taken out by B. in 1931 asking, *inter alia*, whether, on a sale of the farm and lands under the statutory trusts, or on the exercise by B. of any power of leasing conferred on her by statute or by the will, and, in particular, on the exercise of any such power in favour of W., W.’s interest in the income would determine,

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Held: on the true construction of the Law of Property Act, 1925, s. 35, on the exercise by B. of the statutory trusts, W.’s life interest in the income would not be forfeited.

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Notes. As to settled land held on trust for persons in undivided shares, see 29 HALSBURY’S LAWS (2nd Edn.) 547–548, para. 801; and for cases on the subject see 40 DIGEST 782–784, 3134–3151.

For the Settled Land Act, 1925, s. 106, see 23 HALSBURY’S STATUTES (2nd Edn.) 226; and for the Law of Property Act, 1925, s. 35, see 20 HALSBURY’S STATUTES (2nd Edn.) 491.

Cases referred to:

G

(1) *Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276; 98 L.J.Ch. 419; 141 L.T. 295; 45 T.L.R. 504; Digest Supp.

(2) *Re Boyer’s Settled Estates*, [1916] 2 Ch. 404; 85 L.J.Ch. 787; 115 L.T. 473; 60 Sol. Jo. 680; 40 Digest (Repl.) 796, 2772.

Adjourned Summons.

H

By his will dated Feb. 25, 1915, the testator, David John Davies, appointed the plaintiff, H. G. Bevan, executrix and trustee thereof for the purposes of the Settled Lands Acts, 1882 to 1890, and after making various bequests devised his freehold farm and lands adjoining it and his share in the minerals under the farm to the plaintiff on trust to pay the net income thereof equally between herself and his nephew, W. S. Williams, until the testator’s youngest or only daughter should attain the age of twenty-one, subject to the plaintiff’s and the nephew’s educating the testator’s two daughters and the survivor of them during that period, and thereafter on trust to pay the same in equal shares to herself for life or until marriage, the nephew for life or so long as he should reside on or assist in the management of the farm, and the said two daughters and the survivor of them during their lives and the life of the survivor of them. He devised, subject thereto, the farm and lands to the children of his daughters. The nephew lived at the farm and helped in its management up to the time of the testator’s death in 1922. The plaintiff also had lived with him and his daughters there for many years before his death. At his death, the testator was entitled in fee simple to the surface of the farm and

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lands and to one equal fourth part of the minerals thereunder. He left surviving two daughters only—Hilda and Elizabeth—both unmarried and infants. Hilda married in 1924 and had had one child—Gwen Griffiths. Elizabeth attained the age of twenty-one years on Jan. 22, 1926. The nephew married in 1921, and after 1924 lived with his wife at the farm. The plaintiff, her husband and the daughter, Elizabeth, left there in 1925, the nephew continuing to live on the farm and manage it. The following questions, *inter alia*, arose on the summons: Whether, on a sale of the farm and lands under the statutory trusts, or on the exercise by the plaintiff of any power of leasing conferred on her by statute or by the will, and, in particular, on the exercise of any such power in favour of the nephew, the nephew's life interest in the income would determine.

The Law of Property Act, 1925, s. 28, provides:

"(1) Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority . . .

"(2) Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested."

Section 35 provides:

"For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land. . . ."

Section 39 provides:

"For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended), the provisions set out in the First Schedule to the Act shall have effect— . . . (4) for subjecting land held in undivided shares to trusts for sale; . . ."

Sched. I, Part IV, para. 1, provides:

"Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect: (1) If the entirety of the land is vested in trustees or personal representatives (whether subject or not to incumbrances affecting the entirety or an undivided share) in trust for persons entitled in undivided shares, then—(a) If the land is subject to incumbrances affecting undivided shares or to incumbrances affecting the entirety which under this Act or otherwise are not secured by legal terms of years absolute, the entirety of the land shall vest free from such incumbrances in such trustees or personal representatives and be held by them upon the statutory trusts; and (b) in any other case, the land shall be held by such trustees or personal representatives upon the statutory trusts; subject in the case of personal representatives, to their rights and powers for the purposes of administration."

A The Settled Land Act, 1925, s. 106, provides:

"(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted . . . (b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him; that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

C "(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

D "(3) Notwithstanding anything in a settlement, the exercise by the tenant for life or statutory owner of any power under this Act shall not occasion a forfeiture."

L. B. Tillard for the plaintiff.

E *Watmough*, for the nephew and testator's daughters, referred to *Re Patten*, *Westminster Bank v. Carlyon* (1).

D. Buckley for the granddaughter.

MAUGHAM, J., stated the facts, and continued: *Primâ facie*, the result of the will was that, on the younger daughter's attaining the age of twenty-one, the income was to be held on trust for four persons in equal shares, but as regards one of them, the testator's nephew, subject to the qualification, "so long as he shall reside upon and assist in the management of" a certain farm.

F The first point to be decided is what the position of the nephew was before the commencement of the Law of Property Act, 1925. He was, beyond dispute, one of the tenants for life of the freehold farm; and, having regard to ss. 51 and 52 of the Settled Land Act, 1882—which are now replaced by s. 106 of the Settled Land Act, 1925—the provision as to his residing on and assisting in the management of the farm, so far as it tended to prohibit or prevent him from exercising, or to induce him not to exercise, the power of sale or leasing, was to be deemed void: *Re Boyer's Settled Estates* (2). Accordingly, it was open to him before 1926, with the concurrence of the other tenants for life, to sell or lease the farm under the statutory powers without incurring a forfeiture. Under s. 39 of the Law of Property Act, 1925, and under the provisions of Part IV of the First Schedule to that Act, the freehold farm became subject to the statutory trust for sale. By s. 28 of the Act, large powers are conferred on trustees for sale. They are given all the powers of a tenant for life and of trustees of a settlement under the Settled Land Act, 1925, including the power of management conferred on that Act during a minority. [His Lordship read s. 28 (2) and continued] And s. 35 of the Law of Property Act, 1925, provides the manner in which land shall be held on the statutory trusts.

I The question that arises is whether, inasmuch as the land is now held on the statutory trusts for sale, the exercise of those trusts will have the effect of putting an end to the nephew's interest, if and in so far as it will preclude him from residing on, and assisting in, the management of the farm, or whether, on the true construction of s. 35 of the Law of Property Act, 1925, the "powers and provisions" therein mentioned include a provision that the exercise of the statutory trusts shall not occasion a forfeiture. The question has been well argued before me, and I agree that s. 35 of the Law of Property Act, 1925, does not very distinctly point to the latter alternative. But, as has been observed before, it is right in the case of

complicated legislation, such as that of 1925, to place a benevolent construction on the various sections, and in a case of doubt to avoid the result that rights possessed before the coming into force of the Act are seriously affected, or even destroyed, as a consequence of a difference in the legal machinery which the legislature has thought fit to create in an endeavour to simplify the law. Since Jan. 1, 1926, the nephew's rights in the farm have been modified. He is not entitled to prevent the trustee from exercising the statutory trusts, which override his powers, and the right to prevent either a sale or a lease, which he had before 1926, no longer exists. He is apparently left with such protection (if any) as may be afforded by the provisions of s. 26 (3) of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926.

On the whole, I come to the conclusion that, in order to give effect to the rights of the nephew as a person interested in the land before 1926, it is necessary to hold that the "powers and provisions" referred to in s. 35 include, by implication, a provision the effect of which will preclude the possibility of the nephew forfeiting his interest in the farm during his lifetime by reason of the exercise of the statutory trusts. It follows that, if there is a sale or a lease under the statutory trusts—and I cannot distinguish between the case of a lease to the nephew and that of a lease to a third party—the provision putting an end to his interest if he shall cease to reside on the farm must be deemed to be void, and that such an event shall not cause a forfeiture of his interest.

Solicitors: *Tamplin, Joseph Ponsonby, Ryde & Flux*, for *Hanson & Nash*, Swansea.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re CARRINGTON. RALPHS v. SWITHENBANK

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 18, 19, 1931]

[Reported [1932] 1 Ch. 1; 100 L.J.Ch. 299; 145 L.T. 284]

Will—Ademption—Exercise of option to purchase subject-matter of specific bequests.

By his will, dated Aug. 26, 1911, the testator bequeathed specific legacies of certain shares in a company. On Dec. 13, 1927, he gave H. an option to purchase those shares, the option to be exercised within one month of his (the testator's) death. The testator died on Jan. 31, 1930, and H. exercised his option on Feb. 18, 1930.

Held: when the option was exercised there was a conversion of the shares into money and the shares no longer formed part of the testator's estate, with the result that the specific legacies had been adeemed.

Lawes v. Bennett (1) (1785), 1 Cox, Eq. Cas. 167, and *Weeding v. Weeding* (2) (1861), 1 John & H. 424, followed.

Notes. Followed: *Re Rose, Midland Bank Executor and Trustee Co. v. Rose*, [1948] 2 All E.R. 971.

As to ademption of a legacy, see 34 HALSBURY'S LAWS (2nd Edn.) 126-131; and for cases see 44 DIGEST 403-416.

Cases referred to:

(1) *Lawes v. Bennett* (1785), 1 Cox, Eq. Cas. 167; 29 E.R. 1111; 20 Digest 338, 807.

- A (2) *Weeding v. Weeding* (1861), 1 John & H. 424; 30 L.J.Ch. 680; 4 L.T. 616; 7 Jur.N.S. 908; 9 W.R. 431; 70 E.R. 812; 20 Digest 357, 956.
- (3) *Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506; 63 L.J.Ch. 815; 71 L.T. 386; 42 W.R. 685; 38 Sol. Jo. 662; 8 R. 660; 20 Digest 357, 957.
- (4) *Townley v. Bedwell* (1801), 14 Ves. 590; 31 E.R. 1008, L.C.; 8 Digest (Repl.) 371, 570.
- B (5) *Re Marlay, Duke of Rutland v. Bury*, [1915] 2 Ch. 264; 84 L.J.Ch. 706; 113 L.T. 433; 31 T.L.R. 422; 59 Sol. Jo. 494, C.A.; 20 Digest 355, 942.
- (6) *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724; 64 L.J.Ch. 477; 72 L.T. 327; 43 W.R. 420; 39 Sol. Jo. 346; 13 R. 396; 20 Digest 358, 964.
- (7) *Emuss v. Smith* (1848), 2 De G. & Sm. 722; 64 E.R. 323; 20 Digest 358, 963.

Appeal from a decision of MAUGHAM, J.

C The facts appear in the headnote and the judgment of LORD HANWORTH, M.R.

Henry Johnston for the specific legatees.

B. Ormerod for the plaintiff.

Gover, K.C., and *C. E. R. Abbott* for the respondents interested in residuary estate.

B. K. Heyworth for other residuary legatees.

- D **LORD HANWORTH, M.R.**—The testator, William Edward Carrington, made his will on Aug. 26, 1911, and by it he made specific bequests of certain shares in S. R. Carrington & Sons, Ltd., to his sister, to his niece and to a wife of his nephew, and created the ordinary trust for sale and conversion of his property not otherwise disposed of by his will, constituting his residuary estate. On Dec. 13, 1927, he granted an option over shares in the company to be exercised not later than one month after his death. On Jan. 31, 1930, the testator died, and on Feb. 18, 1930, the grantee of the option exercised it.

The question is whether the specific legacies of these shares have been adeemed by the fact that the option has been exercised, with the result that the shares have been turned into money and no longer form part of the testator's estate. MAUGHAM,

- F J., reluctantly came to the conclusion that they had been adeemed, following *Lawes v. Bennett* (1) and *Weeding v. Weeding* (2). He regretted having to do so, as he thought that the doctrine of those cases prevented the testator's intention being carried out and worked an injustice on the legatees, and he said that, therefore, he would be glad to have those cases reviewed by the Court of Appeal. I share MAUGHAM, J.'s reluctance, but the sequence of authority is too prolonged and too strong to permit of any other result.

- G In *Lawes v. Bennett* (1) there was an option given before the will was made, and it was exercised after the death of the testator. The words which have given trouble in that case are in the judgment of LORD KENYON (1 Cox, Eq. Cas. at p. 171):

- H "When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period."

It is said that the meaning of those words was that LORD KENYON was treating the option as relating back to the date on which it was given, but I doubt whether that is the necessary inference from the words used. But in *Weeding v. Weeding* (2) we have a case which is practically on all fours with the present case. In that case it was held that the property was converted from the date of the exercise of the option and passed to the residuary legatees. There is a difference between *Lawes v. Bennett* (1) and *Weeding v. Weeding* (2), as *Weeding v. Weeding* (2) was after the Wills Act, 1837, and under s. 24 of that Act a will now speaks from the death of the testator as if it had been executed immediately before the death of the testator. It would seem that owing to the decision in *Weeding v. Weeding* (2), there was, in the present case, a conversion when the option took effect on Feb. 18, 1930, of these shares into money, and, consequently, that part of the testator's estate is money and the shares no longer form part of his estate. The result is that the specific legacies have been adeemed, and the legatees are deprived of the

shares, just as if the testator had sold the shares in his lifetime. It is too late to upset the reasoning in *Lawes v. Bennett* (1) or to overrule *Weeding v. Weeding* (2). A

In 1894, in *Re Isaacs, Isaacs v. Reginall* (3), CHITTY, J., had to consider whether the adopting of the principle in *Lawes v. Bennett* (1) applied to an intestacy, and after going through the cases he came to the conclusion that the principle must be applied to an intestacy. He said ([1894] 3 Ch. at p. 511):

"I think that the judgment in the case of *Townley v. Bedwell* (4) alone is a decision on the point, that the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law," B

and he also says that he does not adopt the principle that the conversion related back to the contract. Those cases were considered in *Re Marlay, Duke of Rutland v. Bury* (5), and the three judges of the Court of Appeal said that under this doctrine of conversion where the option was exercised at a later date the effect was not to be taken as from the date of giving the original option but from the date when it was exercised. PICKFORD, L.J., said ([1915] 2 Ch. at p. 228): C

"I think it must be taken as settled that if and when the condition is fulfilled there will be a conversion of the real property affected by the contracts into personalty," D

and later on he said:

"I think, therefore, we must hold that the conversion has not yet taken place, and that the Westmeath estates at the testator's death were vested in the defendant, Bury, for an estate in fee defeasible on the fulfilment of the condition, and were not vested in the executors as such." E

WARRINGTON, L.J., said ([1915] 2 Ch. at p. 281):

"There is no question that in ordinary cases such a state of things operates to effect a conversion of the estate: *Lawes v. Bennett* (1). It is contended that it does more, and that it effects a conversion as from the date of the conditional contract, so that in the present case the proceeds of the sale if and when carried out must be treated for all purposes, including the incidence of duty, as if they had formed part of the general personal estate." F

One view appeared attractive, namely, that one might say with regard to personal property, that as the option was not exercised till Feb. 18, 1930, it was possible to hold that the shares were still part of the estate of the testator, and that the specific bequests were effective even if subsequently to the testator's death they became money. I put the case of a dividend on the shares arising before Feb. 18, and suggested that the specific legatees might have been entitled to a portion of the dividend, but that view is not tenable having regard to what WARRINGTON, L.J., said in *Re Marlay* (5) ([1915] 2 Ch. at p. 281): G

"It is well settled that in such cases the rents and profits are payable to the heir or devisee, his heirs or assigns, until the happening of the event in question; and this, I think, can only be justified on the footing that the land vests in him as land, and remains so vested until it shifts by the happening of the event." H

It is plain, then, that the doctrine is that conversion does not take place at the date of the contract, but at the date when the condition is fulfilled which makes the contract effective, then the interest shifts on the happening of that fulfilment. In *Re Pyle, Pyle v. Pyle* (6) STIRLING, J., held that there had not been any conversion, but was able to distinguish that case on the facts from *Lawes v. Bennett* (1) and *Weeding v. Weeding* (2) by saying that *Emuss v. Smith* (7), which, he said, was extremely close to the case he had before him, was founded on three things, I

"the specific devise in the will, the optional nature of the contract, and the re-publication of the will by the codicil."

A Then he continued :

“Now it seems to me that these elements exist in the present case, and one of them is even more forcible than in *Emuss v. Smith* (7); for, as I have said, in this case the testator expressly confirms his will by the codicil. There is one point of difference, namely, that in this case the lease and codicil were executed on the same day. There is a measure of uncertainty as to whether the lease preceded the codicil, or the codicil the lease, but it seems to me that the inference is, that if the lease conferring the option to purchase had not been actually executed when the testator made his codicil, it must have been on the eve of execution, and must have been present to the mind of the testator when he confirmed his will. Under these circumstances, I think there is a sufficient indication of intention to take the case out of the rule established by *Lawes v. Bennett* (1), and I so hold.”

We have no such facts here, and that case shows that, unless there are such facts as were there found to exist, the principle of *Lawes v. Bennett* (1) and *Weeding v. Weeding* (2) must be followed.

Therefore, after searching for means to carry out the intention of the testator it appears that it is not possible to do so for the reason that at the date of the exercise of this option there has been a conversion, and there is necessarily an ademption of the shares. Therefore, the shares, the subject of the specific legacy, have been taken away and adeemed by being changed into money. There is one further point, namely, whether the residuary estate has been specifically dealt with by the will or left so that there was an intestacy in respect of it. *Re Isaacs, Isaacs v. Reginall* (3) makes it plain that the principle of *Lawes v. Bennett* (1) would still apply to an intestacy. *Re Marlay, Duke of Rutland v. Bury* (5) approves and follows that decision. I am, therefore, in the same position as MAUGHAM, J., was, and the appeal must be dismissed.

LAWRENCE, L.J.—I agree. MAUGHAM, J., felt himself unable to distinguish this case from *Weeding v. Weeding* (2). I also am unable to make any distinction between the two cases. It is true that *Weeding v. Weeding* (2) was a decision of a court of first instance and technically is not binding on this court, but it was decided over seventy years ago and has been followed in many other cases; it would not be right, therefore, for this court to overrule it now. The rule in *Lawes v. Bennett* (1) which WOOD, V.-C., followed in *Weeding v. Weeding* (2), although said to be anomalous, is too well established to be upset. In *Lawes v. Bennett* (1) the option was granted before the will, and the contention is that the real question was whether the testator had expressed an intention in his will that, subject to the option, the specific legacy was to go to the legatee, and, consequently, that the decision in that case could be explained on the ground that it turned merely on the construction of the particular will, but that explanation of *Lawes v. Bennett* (1) is swept away by the decision in *Weeding v. Weeding* (2), in which case the option was granted after the date of the will yet the rule in *Lawes v. Bennett* (1) was applied. CHITTY, J., in *Re Isaacs, Isaacs v. Reginall* (3), explained that in view of the decision in *Weeding v. Weeding* (2) the rule could not be treated as having been founded merely on the intention expressed by the testator in his will and applied the rule to the case of an intestacy. In these circumstances I think that the appeal fails and ought to be dismissed.

ROMER, L.J.—I am most reluctantly compelled to come to the same conclusion. In *Lawes v. Bennett* (1), decided in 1785, it was held that, where an option was given and then a will was subsequently made dealing with the property the subject of the option, the property must be treated as personal estate and not as forming part of a general devise of the real estate when the option was exercised. In that case the testator had in effect given to the lessee by reason of the option to him power to elect whether he should convert the property or leave it as real estate, and, therefore, I can well understand that the parties interested under the will

desired to know whether the testator intended to include the proceeds of sale in the devise or in the general residuary bequest. That being so, *Lawes v. Bennett* (1) would not apply to a case where the testator had not made a general devise of his real estate or had specifically devised the property. If that case had never been treated as laying down a general principle I should not have been embarrassed with it in the present case. But about eighty years afterwards in *Weeding v. Weeding* (2) it was held that that decision would apply as well to a case where the option was created after the date of the will as to a case in which it was created before the will. In *Weeding v. Weeding* (2) the devise was not property the subject-matter of devise *eo nomine*, but of all the testator's Kentish Town estate. The Vice-Chancellor came to the conclusion that by the Kentish Town estate the testator did not intend to include that part of it which had been made subject to the option. Section 24 of the Wills Act applied, and, therefore, the will was to be deemed to speak from the date of the testator's death, and the Vice-Chancellor said (1 John & H. at p. 431):

"The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known, when he had entered into the contract, that what would ultimately be Kentish Town estate would depend on the option of the lease; and the inference is that he meant his property to go according to the state to which it would be reduced by the exercise of that option."

That was dealing with the devise by general words and it must be treated as being a case where an express intention of the testator was shown. But in opening his judgment he said (1 John & H. at p. 429):

"I do not see how I can give any weight to the argument of the defendants, unless I can distinguish the present case from *Lawes v. Bennett* (1) and *Townley v. Bedwell* (4)."

Therefore, he treated *Lawes v. Bennett* (1) as applicable where the option came into being after the date of the testator's will.

It is equally impossible at the present time to hold that *Lawes v. Bennett* (1) only applied when real estate was devised as forming part of a general devise, because CHITTY, J., in 1894, in *Re Isaacs, Isaacs v. Reginall* (3) decided that the rule applied in the case of an intestacy, and in other cases it was held that *Lawes v. Bennett* (1) laid down a general principle. In *Re Marlay, Duke of Rutland v. Bury* (5) LORD COZENS-HARDY, M.R., said ([1915] 2 Ch. at p. 275):

"It was decided as long ago as 1785 by SIR LLOYD KENYON, M.R., in *Lawes v. Bennett* (1) that where a lease contains an option to the lessee to purchase the demised property for an agreed sum, and the option is not exercised until after the death of the lessor, the effect is that as between the real and personal estate of the lessor, the purchase-money goes as personal estate and not as real estate to the devisee."

As the cases stated, where an option has been given by a testator over part of his real estate, then, whether given before or after the date of the will, that real estate is to be treated for purposes of devolution on death as devolving from the date of the exercise of the option as proceeds of sale and not as real estate. My respect for LORD KENYON would have deterred me from putting such a construction on his judgment. Conversion, however, it is now agreed, takes effect from the exercise of the option only, and in the hands of a devisee of real estate as, from the exercise of the option the property is personal estate, not real, his heir would not take but his next-of-kin. But why the exercise of the option should have the effect of taking away the land from the devisee I have never been able to understand. But there it is, and as things are the moment of the option being exercised as from that time the shares no longer belong to the legatee but the proceeds of sale of the shares

A pass to the residuary legatees. It is impossible for us to escape from the effect of those decisions, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Coppock, Helm, & Walmsley*, Stockport; *Gregory, Rowcliffe & Co.*, for *Addleshaw, Sons, & Latham*, Manchester.

B [Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

C

Re COLE. TRUSTEE IN BANKRUPTCY v. PUBLIC TRUSTEE

[CHANCERY DIVISION (Farwell, J.), March 30, 31, 1931]

D [Reported [1931] 2 Ch. 174; 100 L.J.Ch. 316; 145 L.T. 484;
[1931] B. & C.R. 7]

Bankruptcy—Avoidance of settlement—Settlement made in favour of purchaser for valuable consideration—Settlement made as result of compromise of action—"Purchaser"—Unborn issue—Relinquishment of possible larger interest for interest under settlement—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 42 (1).

E

M., the daughter of G., being under age, married abroad by a false declaration. The Attorney-General, at the relation of G., brought an action under the provisions of the Marriage Act, 1823, and the Foreign Marriage Act, 1892, claiming that M. had forfeited her interest in certain property to which she would become entitled on attaining twenty-one, and asking that any property she might have or acquire during her marriage should be secured for the benefit of herself and her issue by a settlement to be approved by the court, and that the husband should be excluded from any interest in her property. After M. came of age the action was compromised and she agreed to settle her property so that she took a life interest with power to appoint among her issue, with a trust for the issue in default of appointment. In default of issue the property was to go to her next-of-kin. Both M. and her husband became bankrupt within two years of the settlement, and the trustee in bankruptcy claimed that the settlement was void against him.

G

Held: the settlement was made as the direct result of the compromise of an action brought in good faith and so was made for valuable consideration; by it the husband gave up any claim he might have to the property and agreed to pay the costs of the action, the wife gave up her property in exchange for a life interest, and the unborn issue gave up an interest which might have been a larger interest for the interest they took under the settlement; and, therefore, the settlement had been made in favour of a purchaser—the unborn issue—in good faith and for valuable consideration within s. 42 (1) of the Bankruptcy Act, 1914, and so was good against the trustee in bankruptcy.

II

I

Notes. As to avoidance of settlements in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 548 et seq.; and for cases see 5 DIGEST 837 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Motion in Bankruptcy.

In January, 1928, Captain Awdry Valentine Cole and Miss Marguerite Eleanor Mary Agnes Gooch were married at Lyons, in France. Miss Gooch was then under the age of twenty-one, and her father had objected to her friendship with Captain Cole, and had forbidden them to meet. Upon attaining twenty-one, Miss Gooch

would become entitled to certain property. The marriage took place without the knowledge or consent of Miss Gooch's father. By French law it was necessary for the due solemnisation of the marriage that both parties should make a declaration as to the age of the woman and whether there was anyone whose consent was required to the marriage. Both Captain Cole and Miss Gooch made a declaration, false to their knowledge, that Miss Gooch was twenty-two years of age, and that the consent of no one was required. On April 16, 1928, an action was brought by the Attorney-General at the relation of the father for a declaration under the Marriage Act, 1823, and the Foreign Marriage Act, 1892, that the wife had forfeited all estate, right, title, and interest in any property that had accrued or should accrue to her by force of the marriage, and the writ asked that all such property or future property as she should acquire during the marriage should be secured for the benefit of herself or her issue, and that a proper settlement should be approved by the court so as to exclude the husband from any interest in the property of the wife. A statement of claim was delivered asking for the same relief as the writ. The husband and wife, by their defence, did not admit that they had made any false statement, but said that they were, and always had been, willing that a proper settlement should be made of the property of the wife, that they would concur therein, and that the husband did not desire, and never had desired, to derive any interest or pecuniary benefit from the property of the wife. The wife attained the age of twenty-one on July 22, 1928, and became entitled to a sum of £8,000. The parties then came to terms, and a compromise of the action was arranged, for which the sanction of the court was not necessary. On Nov. 5, 1928, an order was made in the action whereby, the Attorney-General not objecting and the defendants consenting to the order, the husband was to pay the costs of all parties to the action, and the action was dismissed on the terms of the settlement set out in the schedule to the order. By that settlement the Public Trustee was appointed trustee, and the trusts were that the wife was to take a life interest in her property with a power to appoint among the issue of the marriage, and that in default of appointment the children should take on attaining twenty-one, or in the case of females on marriage, and that in default of such children and subject to any such appointment as aforesaid, the property should be held both as to capital and income in trust for the persons who would be entitled thereto under the Administration of Estates Act, 1925, if the wife had died absolutely possessed thereof intestate and without having been married. By this settlement, which was duly executed on April 24, 1929, the wife had no general power of appointment in default of children, and the husband was absolutely excluded from any benefit from the wife's property. On Oct. 17, 1930, a receiving order was made against Captain and Mrs. Cole, and on Jan. 13, 1931, they were adjudicated bankrupt. The settlement having been made within two years of the bankruptcy and being a post-nuptial settlement, it was, under s. 42 of the Bankruptcy Act, 1914, *prima facie* void against the trustee in bankruptcy, unless the wife could satisfy the court that the settlement was made in favour of a purchaser in good faith and for valuable consideration, so as to bring it within the exception in the section. The trustee in bankruptcy now moved against the Public Trustee, as trustee of the settlement, for a declaration that the settlement was void against him (the trustee) so far as was necessary for the purpose of paying the wife's debts in full.

W. N. Stable and A. Melford Stevenson for the trustee in bankruptcy.
Grant, K.C., and *R. H. Hodge* for the Public Trustee.

FARWELL, J. [after stating the facts, continued:] In my judgment, it is now established that, once the court is satisfied that there has been a compromise of legal proceedings, and that the legal proceedings were brought in good faith, such a compromise does, at any rate for the purpose of supporting a contract or anything of that kind, represent valuable consideration. It is not for the court to determine whether or not the action was one that could have succeeded, or would have succeeded, if it had been prosecuted to the end. But this, at any rate, is clear,

A and it is admitted on both sides, the action was an action brought in good faith, and it would be impossible, I think, for any other admission to be made, when one has in mind that the plaintiff in the action was His Majesty's Attorney-General. The claim might have resulted, not only in the husband being completely excluded from any benefit or right in the wife's property, but, assuming the action to have succeeded, in the wife being excluded from all benefit, because, if the action had
B succeeded, the court might have said that the settlement was to be a settlement for the benefit of the issue to the exclusion of the wife, whereas, if the action had failed, the issue of the marriage would have taken no benefit, and it was in order to compromise these claims that the settlement was made. Therefore, I begin with this, at any rate, that the settlement was made as the direct result of this com-
C promise, which was sanctioned by the court, and, therefore, the settlement is made for valuable consideration.

But then it has been argued by counsel for the trustee in bankruptcy with great force that there is here no purchase for valuable consideration, and he says that, even if the settlement were made for valuable consideration, there is no purchaser, and authorities have been cited to me which, I think, do show that there must be a quid pro quo for the agreement. I think that the authorities also show that the
D quid pro quo need not necessarily be something which will benefit the vendor or purchaser as the case may be; there must be a quid pro quo, but it need not necessarily be one for the benefit of the parties. In the present case it seems to me that, on the one side, there is His Majesty's Attorney-General on behalf of the unborn issue of the marriage because, if I understand what the action was intended to do, the action was intended primarily to protect possible issue of the marriage.
E The Attorney-General, as the result of the compromise, was giving up the claim, which may or may not have been a good one, to have the property of the wife settled in a way that might have given the whole of the interest in the property to the issue. It is quite true that by the statement of claim the settlement as asked for is for the benefit of the lady and her issue, but I feel no doubt that, if the court had thought it right to direct a settlement, it was within the power of the court to
F direct a settlement which might have excluded the wife from even a life interest, or given her only a very limited interest, such as a protected life interest, or some interest of that kind. The full benefit which the unborn issue might have acquired by virtue of this action was being given up on their behalf by the Attorney-General. The unborn issue were getting a settlement in their favour, but subject to the life interest of the wife, and, therefore, something was being surrendered on their behalf.
G On the other hand, the lady and her husband were in the position that, if the action had failed, she would have remained owner of her property, and her husband would possibly not only have escaped liability for the costs of the action, but would have remained entitled, unless the lady made a will, to the interest he would take in her property as her husband if she died intestate. What they were giving up was something very substantial; the husband was giving up any claim he might have to the
H property, and was agreeing to pay the costs of the action, and the wife was giving up her property in exchange for a life interest and nothing more, without even the right to dispose of it as she thought right in the event of there being no child of the marriage. It seems to me that in these circumstances there was a settlement made within the meaning of this section in favour of a purchaser for valuable consideration. I think that the purchaser in this case was the unborn issue. It was a
I settlement made in their favour and for their benefit; it was a settlement bought by them, to use that phrase, by the giving up of an interest that might have been a larger interest for the interest that they take under the settlement. The matter is one of considerable difficulty; there is no authority that exactly covers it, but I have come to the conclusion after looking at the authorities that this motion fails, and the application must be dismissed with costs.

Solicitors: for the trustee, *Ramsden & Co.; Child & Prescott.*

[*Reported by E. K. CORRIE, Esq., Barrister-at-Law.*]

STAG LINE, LTD. v. FOSCOLO MANGO & CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Atkin, Lord Russell and Lord Macmillan), October 30, November 2, December 10, 1931]

[Reported [1932] A.C. 328; 146 L.T. 305; 101 L.J.K.B. 165;
48 T.L.R. 127; 75 Sol. Jo. 884; 37 Com. Cas. 54;
18 Asp.M.L.C. 266]

Shipping—Deviation—“Reasonable” deviation—Test—Effect of unreasonable deviation on exceptions protecting shipowner—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22), Schedule, Rules Relating to Bills of Lading, art. IV, r. 2 (a), (c), r. 4.

The respondents were the owners of a cargo of coal shipped on the appellants' steamship *Ixia* for delivery from Swansea to Constantinople. By the bill of lading the coal was to be carried from Swansea to Constantinople (by cl. 6) "with liberty . . . to call at any ports in any order for bunkering or other purposes or to make trial trips after notice . . ." By the bill of lading all the provisions of the Carriage of Goods by Sea Act, 1924, were to apply to the contract, and by art. IV, r. 2, in the schedule to that Act: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (inter alia) perils of the sea." By r. 4 of the same article: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." The ship was fitted with a heating system, and engineers joined the ship at Swansea to test the system on the voyage. In the ordinary course the test would have been completed by the time the ship reached Lundy, and the two engineers could then have left the ship with the pilot. In fact, some of the firemen were drunk when the ship left Swansea and so no such proper head of steam could be obtained as was required for the test. The captain, therefore, arranged to carry on the engineers to conclude the test and to put them ashore at St. Ives. On leaving St. Ives the ship made a course nearer the coast than it would have made but for this arrangement, with the result that she ran into the Vyneck Rock, and became a total loss. In an action by the cargo-owners against the shipowners in respect of the loss of the cargo,

Held: (i) whether "other purposes" in cl. 6 of the charterparty was to be construed as purposes kindred to bunkering (LORD BUCKMASTER), or as limited by reference to the nature and purpose of the contract voyage (LORD WARRINGTON), or as business purposes contemplated by the parties as arising in carrying out the voyage, e.g., to call at a port or ports to load or discharge cargo for other shippers (LORD ATKIN), or as purposes of the contract venture (LORD RUSSELL), or as purposes similar to bunkering (LORD MACMILLAN), the deviation in the present case was not authorised by that clause;

(ii) a "reasonable" deviation within art. IV (4) of the schedule to the Carriage of Goods by Sea Act, 1924, was a deviation which commended itself to the common sense and sound understanding of prudent, sensible men when every material circumstance had been weighed, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive, and, applying that test, this deviation was not reasonable;

(iii) the exceptions of responsibility for default in the navigation of the ship and the perils, dangers, and accidents of the sea in art. IV (2) (a) and (c) of the schedule to the Act of 1924 did not operate to protect the shipowners where there had been an unauthorised deviation; and, therefore, the cargo-owners were entitled to succeed in the action.

A Per LORD ATKIN: (i) I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Carriage of Goods by Sea Act, 1924, and I can find in the Act nothing which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies. . . . The Act is not intended to codify the English law, but is the result of an international conference intended to unify certain rules relating to bills of lading which will often have to be interpreted in the courts of foreign consignees. For the purpose of uniformity it is, therefore, important that the [English] courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

C (ii) A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract, and may be reasonable though it is made solely in the interests of the ship, or solely in the interests of the cargo, or, indeed, in the direct interest of neither, as, for instance, where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance, or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance.

D **Notes.** Considered: *Lazard Bros. & Co. v. Brooks* (1932), 57 Com. Cas. 224. Referred to: *Tate and Lyle, Ltd. v. Hain Steamship Co.* (1934), 151 L.T. 249.

As to deviation, see 30 HALSBURY'S LAWS (2nd Edn.) 288; and for cases see 41 DIGEST 480 et seq. For Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to:

- F** (1) *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193, H.L.; 17 Digest (Repl.) 357, 1632.
- (2) *Hick v. Raymond and Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 41 W.R. 384; 37 Sol. Jo. 145; 7 Asp.M.L.C. 233; 1 R. 125; sub nom. *Hicks v. Rodocanachi*, 9 T.L.R. 141, H.L.; 12 Digest (Repl.) 344, 2672.
- G** (3) *The Teutonia* (1872), L.R. 4 P.C. 171; 8 Moo.P.C.C.N.S. 411; 41 L.J.Adm. 57; 26 L.T. 48; 20 W.R. 421; 1 Asp.M.L.C. 214; 17 E.R. 366, P.C.; 12 Digest (Repl.) 459, 3428.
- (4) *Bank of England v. Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; sub nom. *Vagliano v. Bank of England*, 55 J.P. 676, H.L.; 42 Digest 779, 2094.
- H** (5) *Foreman and Ellams, Ltd. v. Federal Steam Navigation Co., Ltd.*, [1928] 2 K.B. 424; 97 L.J.K.B. 525; 138 L.T. 582; 44 T.L.R. 250; 72 Sol. Jo. 103; 17 Asp.M.L.C. 447; 33 Com. Cas. 168; 41 Digest 434, 2725.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.).

I The Court of Appeal held that the deviation to St. Ives and the subsequent change of course was not authorised; that the rule of law that a deviating ship lost the benefit of the exceptions in the contract of carriage had not been abrogated by the Carriage of Goods by Sea Act, 1924; and that, therefore, the shipowners were not entitled to the exception from their responsibility contained in art. IV, 2 (c), of the schedule to that Act. The shipowners appealed.

Dunlop, K.C., and *Sir Robert Aske* for the appellants.

A. T. Miller, K.C., *Le Quesne, K.C.*, and *R. F. Hayward* for the respondents.

Dec. 10. The following opinions were read.

LORD BUCKMASTER.—The appellants are the owners of the steamship *Ixia*, of 4,800 tons dead weight exclusive of bunkers, which they chartered to the respondents, Foscolo Mango & Co., Ltd., under a charterparty dated June 14, 1929, made between the appellants and the second respondents, who acted as agents for the charterers. The vessel was chartered to carry a cargo of coal, sold by the second respondents to the first, not exceeding 4,350 tons nor less than 4,100 tons, and to proceed from Swansea, where the coal was to be loaded, with all possible despatch to Constantinople. The terms of the charterparty were incorporated in the bill of lading. The charterparty contained a clause (cl. 6) giving the vessel liberty "to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice." The usual and customary route for the voyage was from Swansea, south of Lundy, thence in a straight line to a point about five miles off Pendeen, on the north coast of Cornwall, and then with a slight alteration to the east to Finistère, and so on. The ship had been fitted with a heating apparatus designed to make use of the heat which might otherwise be wasted as steam, and so to diminish the bill for fuel. This apparatus had not been working satisfactorily, and the owners, therefore, arranged to send representatives of the engineers to make a test when the vessel started on her next voyage. Two engineers accordingly joined the ship, the intention being that they should leave the ship with the pilot somewhere off Lundy. The firemen on board the ship were not in possession of their full energies when the ship started at 1.45 in the morning on June 31, 1929, owing to excessive drinking before they joined the ship. The result was that a proper head of steam necessary for making the test was not got up in time to enable the test to be made before the pilot was discharged. Accordingly, the engineers proceeded on the voyage until the ship was off St. Ives, when the ship was turned about five miles out of its course to enter the St. Ives Harbour in order that the engineers might be landed. After landing them the ship did not go straight back to the recognised route that she ought to have pursued, but hugged too closely the dangerous coast of Cornwall, and ran on a rock called the Vyneck Rock, with the result that the vessel and cargo were totally lost, though fortunately there was no loss of life. The accident took place at about 3.20 p.m., there was a moderate wind from E.N.E., the weather was cloudy, but visibility was moderately good up to six miles.

The respondents sought to recover damages for loss of their cargo upon the ground that there had been an unlawful deviation from the contracted course. The appellants made three answers to this claim. First, they set up the clause of the charterparty to which reference has been made, and, secondly, they said by the Carriage of Goods by Sea Act, 1924, the rules in the schedule must be regarded as incorporated in the contract, and, by those rules, they were entitled to make the deviation which led to the disaster. As is well known, the statute provides that the rules are to have effect in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port, whether in or outside Great Britain or Northern Ireland. The rules that are relevant are to be found in art. IV of the schedule, cl. 2, which provides:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship: . . . (c) Perils, dangers and accidents of the sea or other navigable waters."

Clause 4 of the same article is in these terms:

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

A The appellants' argument upon the statute is, first, that the accident was a peril of the sea, and, secondly, that the deviation in question was a reasonable deviation and consequently was not an infringement of the contract of carriage.

It is well to consider these arguments in the order in which I have stated them. With regard to the clause of the charterparty, the contention is that to land the two engineers at St. Ives was an "other purpose" within the meaning of cl. 6 of the charterparty, and, consequently, permitted by the charterparty itself. This argument depends upon the view that it is impossible to get a specified category in which the words "other purposes" may be confined when the illustrative word at the beginning of the sentence consists only of one description. I find it difficult, and I think it is undesirable, to attempt to specify in exact language what are the limitations imposed by the use of such a word prefacing others of general import. C To my mind, it is impossible to frame a rule applicable to all the various documents in which such phrases are to be found. General words in a will following a specific instance may require different interpretation from that demanded by similar words in an Act of Parliament or a charterparty. To attempt in these circumstances to say that two or more words are essential before you can define a class does not assist in the present case. The word "bunkering" must have some demonstrative and limiting effect, and the phrase "or other purposes" following it cannot be so construed as to disregard the effect of the first example, and to assume that any purpose is thereby permitted. If that were so, the word "bunkering" might be left out. Nor am I prepared to define what are the limitations within which the phrase "other purposes" must be confined, but I can find nothing kindred to bunkering or associated with the operation that is involved in landing two men at a port that is not on any part of the specified route. The passage from the judgment of LORD HERSCHELL in *Glynn v. Margetson & Co.* (1) ([1893] A.C. at p. 355) is in exact accordance with the view which I have expressed. I agree with SCRUTTON, L.J.'s judgment upon this point, and I do not think that it demands further discussion.

F To turn from the words of the contract itself to the implied clauses introduced by the statute, the first point can, I think, be disregarded. It involves the view that perils and accidents of the sea are not qualified by the provisions as to deviations and that such perils exempt the shipowner from responsibility for damage if they arise from or in the course of deviation, whether such deviation be reasonable or not. In my opinion, cl. 4 must be given its full effect without rendering it to a large extent unnecessary by such an interpretation, for it would follow from the arguments that a peril encountered by deviation, wholly unreasonable and wholly unauthorised, would be one for which the shipowner would be exempted from loss. G In other words, reasonable deviation would then apply only to questions of demurrage, whatever the deviation might be.

H The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. It hardly needed the great authority of LORD HERSCHELL in *Hick v. Raymond and Reid* (2) to decide that in construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one. But if, when full consideration has been given to this fact, two courts have decided that a set of circumstances is reasonable unless it can be shown that the learned judges have misdirected themselves in reaching their conclusion, or have overlooked any important consideration or introduced considerations that did not deserve notice, it would not, I think, be in accordance either with good sense or the comity of the courts to decide that what they thought was reasonable other people did not. In this case three judges have decided that the deviation here could not be so regarded—and GREER, L.J., has agreed for a slightly different reason, because he thought the original deviation was permissible to St. Ives but not afterwards—but I think that

all of them have really considered the facts that were necessary for the purpose, and I am not prepared to differ from the conclusions that they have reached. I do not think elaborate definitions, whether contained in dictionaries or in judgments, are of much use in determining the value of a word in common use which means no more in this context than a deviation which, where every circumstance has been duly weighed, commends itself to the common sense and sound understanding of sensible men. A

I notice that SCRUTTON, L.J., also supports his judgment upon the view that the rules in the schedule did no more than incorporate in a codified form the permissible limits of deviation which had previously been stated in *The Teutonia* (3) (L.R. 4 P.C. at p. 179). Upon the view that I take it is unnecessary to consider the soundness of this conclusion, and I express no opinion upon it. Nor again is it necessary to determine whether GREER, L.J., was right in assuming that the deviation became unreasonable after St. Ives, but I think there is much to be said in support of his reasoning. The deviation had not ended at the port. It continued until the contracted line of route was resumed, and to deviate by going along the coast, though it may be regarded as bad seamanship, might none the less be an unreasonable deviation. For these reasons I think the appeal should be dismissed. B C

LORD WARRINGTON (read by LORD TOMLIN).—The respondents were the owners of a cargo of coal shipped on board the appellants' steamer *Ixia* for carriage from Swansea to Constantinople. The cargo was lost off the coast of Cornwall as the result of the stranding of the vessel—namely, a peril of the sea—incurred owing to negligence on the part of the persons in charge. The action was brought by the owners of the cargo for damages occasioned by the loss. The shipowners pleaded that under the contract of carriage perils of the sea and loss through negligence of their servants were excluded, and, therefore, they were not liable. The cargo-owners replied that the shipowners had without justification departed from the contract route, and were, therefore, disentitled to rely on the exceptions in question. MACKINNON, J., before whom the action was tried, gave judgment for the respondents, and his judgment has been affirmed by the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.). Hence the present appeal. D E F

The contract of carriage was contained in a bill of lading dated June 29, 1929, which incorporated the terms of a charterparty dated June 14, 1929, and also contained a stipulation that all the terms, provisions, and conditions of the Carriage of Goods by Sea Act, 1924, and the schedule thereto, were to apply to the contract contained in the bill of lading, and the owners and the charterers were to be entitled to the benefit of all privileges, rights, and immunities contained in the said Act and the schedule thereto as if the same were therein (namely, in the bill of lading) specifically set out. There is no dispute that the contract route was from Swansea to Constantinople, and that the accident happened at a time when the ship was not on that route, and the question is whether the deviation was justified by the contract. The deviation resulted from the decision of the master to call at St. Ives for the purpose of dropping there two engineers who had been taken on board at Swansea for the purpose of testing and adjusting certain steam and fuel-saving apparatus, a process which could be affected only under sea-going conditions and with a full head of steam. The shipowners attempted to justify the deviation in two ways: First, they said that the contract allowed the ship to call at any ports in any order for bunkering or other purposes, and that under this they were entitled to call at St. Ives for the purpose above mentioned; and, secondly, they relied on art. IV, r. 4, of the schedule to the Act of 1924, which is in the following terms: G H I

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

MACKINNON, J., and the members of the Court of Appeal have decided against the appellants on both points.

A As to the first point, as a matter of construction the words "or other purposes" cannot, in my opinion, receive the same wide construction as they might have received had bunkering not been specifically mentioned. They must at all events be limited by reference to the nature and purpose of the contract voyage, and I agree with the learned judges in the courts below that the purpose of landing the two engineers was not a purpose which could be brought within the liberty relied upon. I may add, however, that I do not base my conclusion upon the particular circumstances—namely, the drunkenness of the stokers and the consequent delay in raising a full head of steam—which induced the master to decide to land the two engineers at St. Ives rather than at Lundy as originally proposed. I think the calling at St. Ives would not have been justified, whatever had been the cause of the delay in concluding the work of the engineers.

C There remains the further question whether the deviation to St. Ives and thence to the contract route was a reasonable deviation, and, therefore, justified by the provisions mentioned above contained in the schedule to the Act of 1924. I confess I do not feel the difficulty experienced in the courts below, and, particularly, by MACKINNON, J., in giving a meaning to the word "reasonable." It is quite usual for a tribunal—it may be a jury or it may be a judge sitting alone—to decide whether or not a course of action or a particular transaction is reasonable. This is a question of fact and has to be answered after giving due consideration to all the relevant circumstances and not on any dictionary meaning of the word. In the present case we find a contract under which the ship is *prima facie* bound to pursue a certain course. It did not in fact do so, but pursued a course which brought it into a much closer proximity to the Cornish coast. This deviation was in the interest of the ship alone. In my opinion, this fact did not by itself make it unreasonable. It may well be that the interests of the cargo-owners were affected in so slight a degree that the master, acting as a reasonable man and responsible for both ship and cargo, was entitled to regard the proposed course as one that he was free to take. If he had decided, after leaving St. Ives, to stand away from the coast and thus regain the contract course, I should have felt some difficulty in saying that the deviation was not reasonable and should have preferred the view of GREER, L.J., but, even so, it would not follow that we should be justified in saying that the conclusions of the other judges in the courts below were wrong, and unless we could say so we ought not to reverse their decision, which, as I have said, is a finding of fact. But, in my judgment, all difficulty in the way of agreeing with their view is removed by one element in the course selected by the master, namely, his decision that after leaving St. Ives the course should be at one-and-a-half to two miles from the coast. I think it is clear that this course placed the ship and cargo in a position of peril to which they would not have been exposed if after leaving St. Ives the master had at once made for the open sea on his way to re-join the contract route, and I fail to see any good reason for his not doing so. Nor can I agree that his decision amounted to mere negligent navigation. I think the course pursued from St. Ives southwards was as much a part of the deviation as that from Lundy to St. Ives, and the deviation would be justified only if the whole of it could be said to be reasonable. On the whole, I come to the conclusion that on this point also the appeal fails, and that it should be dismissed, with costs.

I **LORD ATKIN.**—This case assumes importance because it involves a question of the construction of the Carriage of Goods by Sea Act, 1924, and has evoked a construction of that Act from at least one judge of great authority on such matters which I venture to think is based on a wrong method of approach to that Act.

The *Ixia*, a ship of 1,828 tons net register, sailed from Swansea to Constantinople with a full and complete cargo of coal under a charterparty in the terms of the Chamber of Shipping Welsh Coal Charter, 1896, as amended on various dates, the last of which was Dec. 21, 1924. A bill of lading was taken by the charterers, making the cargo deliverable to named consignees, Messrs. Foscolo Mango & Co., Ltd.,

"with liberty to call at any ports in any order for bunkering or other purposes . . . all as part of the contract voyage; all the terms, conditions, and exceptions contained in the charterparty are herewith incorporated."

The liberties given in the bill of lading are the same liberties as those given in the charterparty, and it appears to me with respect that whether the plaintiff be the charterer or the consignee the document to be construed is the charterparty.

I propose, not to set out the facts, but to discuss the points of law raised. The position in law seems to be that the plaintiffs are *prima facie* entitled to say that the goods were not carried safely; the defendants are then *prima facie* entitled to rely on the exception of loss by perils of the sea; and the plaintiffs are *prima facie* entitled in reply to rely upon a deviation. For unless authorised by the charterparty or the Act the departure to St. Ives from the direct course to Constantinople was admittedly a deviation. I pause here to say that I find no substance in the contention faintly made by the appellants that an unauthorised deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act, 1924. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find in the Act nothing which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies.

It remains, therefore, for the shipowners to show that the suggested deviation was authorised by the contract including the terms incorporated by the Act. They first rely upon the express liberty given by the charterparty

"to call at any ports in any order for bunkering or other purposes . . . all as part of the contract voyage."

What exactly the Chamber of Shipping and the Documentary Council of the Baltic and White Sea Conference (who we are told in the document adopted this form of charterparty) meant by these words I wish they could be asked. We have to struggle to find a meaning. The words cannot be unlimited in scope, or they would authorise the shipowner to direct the ship to any part of the globe for any purpose that he thought fit. Even if limited to any port or ports on the geographical course of the voyage, as I think on authority they clearly must be, the purpose of the call must receive some limitation. The liberty could not reasonably be intended to give the right to call at an intermediate port to land or take on board friends of the shipowner for the purposes of a pleasure trip. On the other hand, I find it very difficult to adopt the view which has found favour with one of your Lordships that they involve some limitation which is kindred to or associated with bunkering. Even if the purpose be extended beyond taking in motor fuel or supplies, necessary for the navigation of the ship, to supplies for the maintenance or comfort of passengers, I find it difficult to put such a restricted meaning on the words in view of the collocation "any ports in any order" which seems to point to some purposes other than the restricted ones suggested. Logically I find a difficulty in excluding a suggested purpose from a class until I have formed some more or less definite conception of the nature of the class. I think myself that the purposes intended are business purposes which would be contemplated by the parties as arising in carrying out the contemplated voyage of the ship. This might include in a contract other than a contract to carry a full and complete cargo a right to call at a port or ports on the geographical course to load and discharge cargo for other shippers. It would probably include a right to call for orders. But I cannot think that it would include a right such as was sought to be exercised in the present case to land servants of the shipowners or others who were on board at the start to adjust machinery and were landed for their own and the owners' convenience because they could not be transferred to any ingoing vessel. I think, therefore, the shipowners are not excused by this clause.

There remains the provision of art. IV, r. 4, of the schedule to the Carriage of

A Goods by Sea Act, 1924, which with the other rules in the schedule is incorporated expressly in the bill of lading pursuant to s. 3 of the Act :

"Any deviation in saving or attempting to save life at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

B In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well-known words of LORD HERSCHELL in *Bank of England v. Vagliano Bros.* (4) ([1891] A.C. at p. 144).

C Dealing with the Bills of Exchange Act as a code he says :

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was."

D He then proceeds to say that, of course, it would be legitimate to refer to the previous law where the provision of the code was of doubtful import or where words had previously acquired a technical meaning or been used in a sense other than their ordinary one. If this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present, which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act applies only to contracts of carriage of goods outwards from ports of the United Kingdom, and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

G Having regard to the method of construction suggested above, I cannot think that it is correct to conclude, as SCRUTTON, L.J., does, that r. 4 was not intended to extend the permissible limits of deviation as stated in *The Teutonia* (3). This would have the effect of confining reasonable deviation to deviation to avoid imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo-owner and ship as MACKINNON, J., appears to hold, or even to such a deviation as would be contemplated reasonably by both cargo-owner and shipowner as has been suggested by WRIGHT, J., in *Foreman and Ellams, Ltd. v. Federal Steam Navigation Co., Ltd.* (5) ([1928] 2 K.B. at p. 431), approved by SLESSER, L.J., in the present case. A deviation may, and often will,

I be caused by fortuitous circumstances never contemplated by the original parties to the contract, and may be reasonable though it is made solely in the interests of the ship, or solely in the interests of the cargo, or, indeed, in the direct interest of neither, as, for instance, where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance, or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circum-

stances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive. I think this view conforms to that of GREER, L.J., the only criticism of whose test I would make is that it appears unnecessary to introduce the reasonable cargo-owner into the discussion. The decision has to be that of the master or occasionally of the shipowner; and I conceive that a cargo-owner might well be deemed not to be unreasonable if he attached much more weight to his own interests than a prudent master, having regard to all the circumstances, might think it wise to do.

On applying, then, this test, was this deviation reasonable? I do not discuss the facts except to say that I see no ground for suggesting that the deviation was due to some default of the shipowners in respect of the firemen. In the absence of evidence directed to that issue it does not seem right to impute blame to the owners in that respect. I desire to refrain from expressing an opinion on whether the question whether a deviation is reasonable is a question of law or of fact. In the present case we are judges both of law and of fact; and if the question is of fact the concurrence of the learned judges below seems to me to lose some of its value when regard is had to the meaning which they attributed to the issue that they were determining. I think that GREER, L.J., is plainly right in applying the test of reasonableness to the deviation as a whole. It could not, however, be laid down that as soon as the place was reached to which deviation was justified there was an obligation to join the original course as directly as possible. A justified deviation to a port of refuge might involve thereafter a shorter and more direct route to the port of destination compared with a route which took the shortest cut to the original course. On the other hand, though the port of refuge was justifiably reached, the subsequent voyage might be so conducted as to amount to an unreasonable deviation.

Taking all the facts into account, I am pressed with the evidence which the learned judge accepted, that after St. Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by deviation to St. Ives was vastly increased by the subsequent course. It seems to me not a mere error of navigation, but a failure to pursue the true course from St. Ives to Constantinople which in itself made the deviation cease to be reasonable. For these reasons I agree that this appeal should be dismissed.

LORD RUSSELL (read by LORD THANKERTON).—The provisions of the contract in the present case which are relevant to the decision of this appeal are three in number. (i) There was an exception of perils of the seas. (ii) There was liberty "to call at any ports in any order for bunkering or other purposes . . . as part of the contract voyage." (iii) The appellants in all matters arising under the contract were to be entitled to the rights and immunities contained in art. IV of the schedule to the Carriage of Goods by Sea Act, 1924. That there was a departure from the direct route between Swansea and Constantinople is conceded, but it was said that the exception of perils of the seas still operated in favour of the appellants because the call at St. Ives fell within the liberty above mentioned, and was, accordingly, either part of the contract voyage or a permitted deviation therefrom.

While I appreciate the difficulty of applying what is called the *ejusdem generis* rule where only one species is available out of which to construct the genus, nevertheless it seems clear that some limitation must be placed upon the words "other purposes." If they are to be read as free from any limitation, then it was unnecessary to specify the bunkering purpose. Some restriction must, therefore, exist; and for myself I am in agreement with the view that the *Ixia's* call at St. Ives, not being a call for the purposes of the contract venture, was not a call for other purposes within the meaning of the liberty.

The appellants next prayed in aid the provisions of para. 4 of art. IV in the schedule to the Act of 1924. The schedule is a schedule of rules relating to bills

A of lading which (by s. 1 of the Act) are to have effect in relation to and in connection with the carriage of goods by sea in ships from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland. Paragraph 4 of art. IV provides that

B “any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

It was said that the call at St. Ives was a reasonable deviation within this rule, with the result that the exception of perils of the seas still operated in exoneration of the appellants. Whether the deviation was or was not reasonable appears to me to be a question of fact to be determined in each case upon the facts of each case. **C** The trial judge here came to the conclusion that the reasonableness of the deviation had not been established; in other words, he held that upon the facts proved the deviation was not a reasonable deviation. With this view, SCRUTTON, L.J., agreed, and, as I read his judgment, SLESSER, L.J., also. GREER, L.J., took a somewhat different view. He thought that the whole deviation was unreasonable, by reason **D** of the course which was set after leaving St. Ives. For myself I am not prepared to differ from the view upon this question of fact, which was adopted by the trial judge and concurred in by the majority of the lords justices, namely, that upon the facts of the present case the deviation here was not a reasonable deviation. It follows, accordingly, that the appellants get no protection from para. 4 of art. IV.

The appellants advanced one further argument which in no way depended for **E** its decision upon fact, and which, if successful, would have far-reaching consequences. They contended that the Act of 1924 freed them from responsibility for loss arising from perils of the sea, notwithstanding any deviation, reasonable or unreasonable—in other words, that the Act had effected an alteration in the law which had hitherto prevailed. It was said that the obligation not to deviate only arose under para. 2 of art. III, under which the carrier must “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried,” and **F** that inasmuch as that paragraph was expressed to be subject to the provisions of art. IV, the obligations imposed by para. 2 of art. III (including the obligation not to deviate) were expressly made subject to the provisions of para. 2 of art. IV, which provided that neither the carrier nor the ship should be responsible for loss or damage arising or resulting from (amongst other things) “perils, dangers, and **G** accidents of the sea or other navigable waters.” That was, as I understand it, the line of reasoning. In my opinion, the argument is unsound. It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear **H** terms. For these reasons I agree that the appeal should be dismissed.

LORD MACMILLAN.—On June 30, 1929, the steamship *Ixia* ran on a rock off the coast of Cornwall and the ship and her cargo of coal were totally lost. The owners of the cargo now seek to recover from the shipowners a sum representing the damage which they have sustained by reason of the casualty. The shipowners **I** reply that the cargo was lost by a peril of the sea, as it undoubtedly was, and that consequently they are relieved from liability by virtue of the exception of such perils contained in the charterparty and incorporated in the bills of lading and also under art. IV, 2 (c), of the schedule to the Carriage of Goods by Sea Act, 1924, which provides that

“neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . perils, dangers, and accidents of the sea. . . .”

The bills of lading, as required by s. 3 of the Act of 1924, contain an express statement that the shipowners are to be entitled to the privileges, rights, and immunities

contained in (inter alia) art. IV of the schedule to the Act. To this plea the cargo-owners rejoin that the shipowners have forfeited the benefit of the immunity because of their having acted in breach of the contract of affreightment by deviating from the contractual course of the voyage. This, in turn, is countered by the shipowners, who maintain (i) that the immunity from liability conferred by art. IV, 2 (c), of the schedule to the Act of 1924 is absolute and is not affected by any breach of contract on their part; (ii) that they committed no breach of contract because under the charterparty and bills of lading they had liberty "to call at any ports in any order for bunkering or other purposes," and their alleged deviation in calling at St. Ives was in the exercise of that liberty; (iii) that, if there was a deviation, it was a reasonable deviation within art. IV, para. 4, of the schedule to the Act of 1924, which provides that

"any reasonable deviation shall not be deemed to be an infringement or breach . . . of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

There was also a suggestion that the vessel was making a trial trip within the permission to make such trips contained in the contract documents, but this is so clearly untenable that I need do no more than mention and reject it.

Turning, then, to the three contentions of the shipowners which I have set out above, I have no hesitation in negating the first, which is so extravagant that, if it were upheld, the shipowners would be exempt from liability for loss resulting from a peril of the sea even if that peril was encountered when the vessel was on a deviation from her contract voyage which was not reasonable under para. 4 of the same article. As to the second contention, the liberty to call at any ports "for bunkering or other purposes" cannot be read as meaning that the ship was to be at liberty to call at any ports for bunkering purposes or any purposes other than bunkering, for that would be tantamount to saying that she might call at any port for any purpose. I read the words as meaning "for the purpose of bunkering or for any similar purpose." What purposes are similar to the purpose of bunkering I shall not attempt to define. It suffices to say that, in my opinion, the purpose for which the *Ixia* called at St. Ives was not a purpose in any way resembling so ordinary a maritime incident as bunkering.

There remains the shipowners' third contention, which is the real crux of the case. Was the deviation to St. Ives a "reasonable" one? The statute does not supply any criterion of reasonableness, and I doubt if it would have been possible to formulate a criterion of universal applicability, for the contingencies and emergencies which arise in maritime transport are as infinite in their variety as the vagaries of the sea itself. An undefined standard of reasonableness may sometimes be difficult to apply, but the task is one which judges and juries have had daily to perform from time immemorial. To give a single instance, the Sale of Goods Act, 1893, uses the expression "reasonable time" in six of its sections without any definition, though it prescribes in s. 56 that the question of what is a reasonable time is to be treated as a question of fact, and I am not aware that any serious difficulty has in consequence arisen in the administration of the statute. This at least has been laid down for our guidance that the reasonableness of an act must be judged in relation to the circumstances existing at the time of its commission and not by any abstract standard. The act, too, must be considered as a whole, in the light of all the attendant circumstances. A conclusion so reached that a particular act was reasonable or unreasonable is in general a conclusion of fact; it is an inference of fact from a given set of facts.

Now, in the present case there are concurrent judgments of the judge of first instance and the Court of Appeal finding unanimously that the deviation in question was not reasonable. Even if I were disposed to think otherwise—I do not for a moment say that I am—I should be slow indeed to disturb such a finding unless I were satisfied that those who had reached it had in so doing infringed some principle of law. It is no doubt obvious that the learned judges have considered

- A the episode from varying points of view and have, as was natural, each been influenced by the aspect of it which appeared to him most conspicuous. But it cannot be inferred from this difference of emphasis that they have disregarded any circumstance which they ought to have considered or have taken into account any circumstance which they ought not to have considered. Thus I do not think that MacKINNON, J., in giving weight to the circumstance that, in his view, the deviation
- B was not in the joint interest of cargo and ship, intended to lay down or to apply any absolute rule that no deviation could be reasonable which was not in the joint interest of cargo and ship. The absence of the element of joint interest may well be an important indication of unreasonableness without being conclusive. Nor do I think that SCRUTTON, L.J., intended to lay down or apply any absolute rule that only a deviation to avoid imminent peril could be regarded as reasonable. It is
- C important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance. As I have heard
- D nothing to satisfy me that the judges below have reached their conclusion on wrong principles, I concur in the motion that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Charles Lightbound, Jones & Lightbound, for Ingledew & Co., Newcastle-upon-Tyne.*

E [Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

F

Re CATLING. PUBLIC TRUSTEE v. CATLING

[CHANCERY DIVISION (Bennett, J.), June 25, 26, 1931]

[Reported [1931] 2 Ch. 359; 100 L.J.Ch. 390; 145 L.T. 613]

- G *Settled Land—Tenant for life—Person having powers thereof—Tenant at nominal rent—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 20, sub-s. (1) (iv) and (vi).*

A person who is a tenant of settled land under a lease at a nominal rent, the tenancy not to be determined during that person's life except by that person provided that he fulfils certain conditions, is not a person having the powers of a tenant for life within s. 20 (1) of the Settled Land Act, 1925, since, as a matter of necessary implication in view of the terms of para. (iv) of that subsection, he is excluded from the class of persons upon whom the subsection confers the powers of a tenant for life.

H **Notes.** As to persons having powers of a tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 674 et seq.; and for cases see 40 DIGEST 731 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

I Cases referred to:

- (1) *Re Gibbons, Gibbons v. Gibbons*, [1920] 1 Ch. 372; 89 L.J.Ch. 148; 122 L.T. 710; 36 T.L.R. 203; 64 Sol. Jo. 274, C.A.; 40 Digest (Repl.) 800, 2807.
- (2) *Re Boyer's Settled Estates*, [1916] 2 Ch. 404; 85 L.J.Ch. 787; 115 L.T. 413; 60 Sol. Jo. 680; 40 Digest (Repl.) 796, 2772.
- (3) *Re Drew, Settled Estates* (1911), unreported.
- (4) *Re Jobson, Jobson v. Richardson* (1889), 44 Ch.D. 154; 59 L.J.Ch. 245; 62 L.T. 148; 44 Digest 1040, 8967.

Adjourned Summons.

The testator, by his will dated Sept. 29, 1921, devised a freehold house and grounds, known as Brookland, together with certain adjoining premises, to the Public Trustee upon trust that the trustee should, if the testator's wife should so desire, let the property to her on a yearly tenancy at a rent of £1 per annum without power for her to assign, sublet, or part with possession of the freehold house or assign the tenancy, upon the terms that she should make the freehold house her principal residence, provided that as long as she should be living, and should duly observe the above conditions, a notice to determine such tenancy should not be effectual unless given by the wife to the trustee. On default, however, on her part in observing the conditions, such notice might forthwith be given by the trustee, and such tenancy should in any case cease on her death. It was also provided that during the continuance of her tenancy the wife should be entitled to receive the rents payable under any leases affecting the property. There were also provisions that in the event of the tenancy being determined the property should be dealt with in the manner mentioned. The testator died on Feb. 18, 1929, and this summons was taken out by the Public Trustee for the determination of the question (inter alia) whether the testator's widow was a tenant for life or a person having the powers of a tenant for life within the meaning of the Settled Land Act, 1925.

C. A. J. Bonner for the applicant.

C. C. Rawlence, for the testator's widow, referred to *WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES* (11th Edn.), vol. 2, pp. 84, 91, and 279; *Re Gibbons, Gibbons v. Gibbons* (1); and *Re Boyer's Settled Estates* (2).

F. R. Evershed for the Lock Hospital.

Cyril Radcliffe, Henry Johnston, Stafford Crossman, H. Watt Dollar; J. W. M. Holmes and Bebee for other parties.

Re Drew, Settled Estates (3) and *Re Jobson, Jobson v. Richardson* (4) were also referred to.

BENNETT, J. (after reading the relevant clause of the will, continued:) The first question which is raised by this summons is whether, under this will, the defendant, Emily Catling, the testator's wife, is the tenant for life, or a person having the powers of a tenant for life, within the meaning and for the purposes of the Settled Land Act, 1925, of the property comprised in the specified devise. This question has to be determined by reference to the provisions of the Settled Land Act, 1925.

It is argued on behalf of the testator's wife that she is a person who has the powers of a tenant for life under s. 20 of the Settled Land Act, 1925, the contention being that she falls within para. (vi) of sub-s. (1) of that section, or, possibly, within para. (viii) of sub-s. 1 of that section. Paragraph (vi) is in these terms:

"A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for any purpose."

The contention is that, if you look at the substance, or what is said to be the substance, of the devise, in substance it is a gift by the testator to his wife with an executory gift over in case she should cease to make Brookland her principal residence. It is said that that is the substance of the gift, because the rent of £1 per annum, which, if she exercises her option of taking a tenancy, she is to pay for the property the subject of the devise, is merely a nominal rent, and that fact, coupled with the provision that during the continuance of the tenancy, if she exercises her option, she is to be entitled to receive the rents receivable under any lease affecting the devised hereditaments, shows that in substance the testator intended his wife to be a tenant for life, and that this conditional limitation or

A executory limitation over was to come into operation in case she ceased to make Brookland her principal residence. The answer to that contention is founded upon s. 20 (1), para. (iv), and it is said that by necessary implication there is excluded from the persons to whom the section gives the powers of a tenant for life any person who holds under a lease at a rent, and the contention is that Mrs. Catling, if she exercises her option, will be nothing more than a tenant holding under a lease at a rent.

B In my judgment, as a matter of necessary implication from the language of sub-s. 1, para. (iv), a person who is a tenant under a lease at a rent is excluded from the class of persons upon whom the section confers the powers of a tenant for life, and, as a matter of construction, what the testator has done is to give to his wife the option of becoming a tenant under a lease at a rent. Therefore, in my view, she is not a person who has under s. 20 the powers of a tenant for life, and the answer to the question should be in the negative.

Solicitors: *Landons, Dimond & Son; Hyde, Mahon & Pascall; Andrew, Purves, Sutton & Creery; Treasury Solicitor; Francis & Crookenden.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

D

E

FORTH CONSERVANCY BOARD *v.* INLAND REVENUE COMMISSIONERS

F [HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Thankerton and Lord Russell), March 16, 17, May 11, 1931]

[Reported [1931] A.C. 540; 100 L.J.P.C. 193; 145 L.T. 121;
95 J.P. 160; 47 T.L.R. 429; 75 Sol. Jo. 359; 29 L.G.R. 541;
16 Tax Cas. 103]

G *Income Tax—Profits—Trade surplus of dues charged over expenses of river board—Liability of surplus to income tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Case I, Case VI.*

H The Forth Conservancy Board was constituted by the Forth Conservancy Order, 1920, as confirmed by the Forth Conservancy Order Confirmation Act, 1921, for the preservation, maintenance, and improvement of the River and Firth of Forth. The board consisted of thirty-one members, nine of whom were elected by shipowners and persons paying dues to the board. The board was empowered to do everything necessary for the purpose of maintaining the river as a navigable river, and to levy dues in respect of vessels entering or using the river and in respect of goods and passengers conveyed on or shipped or unshipped in the river. In the relevant years of assessment, the board had a balance or surplus after providing for all expenses payable out of the dues collected. Income tax was claimed on that balance under Case I or Case VI of Sched. D to the Income Tax Act, 1918.

I **Held:** although an assessment under Case I could not be supported, because the activities of the board were not a trade or a concern in the nature of a trade, the balance of the money received was annual profits or gains within Case VI and so liable to income tax, the purpose to which the annual profits or gains were put being irrelevant.

Mersey Docks and Harbour Board v. Lucas (1) (1883) (8 App. Cas. 891), applied.

Severn Fishery Board v. O'May (2) ([1919] 2 K.B. 484), distinguished by LORD BUCKMASTER and LORD WARRINGTON, disapproved by LORD THANKERTON and LORD RUSSELL.

Decision of the First Division of the Court of Session (1930 S.C. 850) affirmed.

Notes. The Income Tax Act, 1918, Sched. D, was replaced by s. 123 of the Income Tax Act, 1952.

Considered: *Elliot v. Burn*, [1934] All E.R. Rep. 665; *Pontypridd and Rhondda Joint Water Board v. Ostime*, [1946] 1 All E.R. 668. Referred to: *Nicoll v. Austin* (1935), 19 Tax Cas. 531; *I.R. Comrs. v. City of London Corpn.*, [1952] W.N. 326; *I.R. Comrs. v. City of London Corpn. (as Epping Forest Conservators)*, [1953] 1 All E.R. 1075.

For undertakings analogous to trade, see 20 HALSBURY'S LAWS (3rd Edn.) 287, 288, para. 526; and for cases on the subject, see 28 DIGEST 81, 82, 451-462. For the Income Tax Act, 1952, s. 123, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.

Cases referred to:

- (1) *Mersey Docks and Harbour Board v. Lucas* (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest 21, 104.
- (2) *Severn Fishery Board v. O'May*, [1919] 2 K.B. 484; 89 L.J.K.B. 9; 121 L.T. 371; 7 Tax Cas. 194; 28 Digest 22, 112.
- (3) *I.R. Comrs. v. Forth Conservancy Board*, [1929] A.C. 213; 98 L.J.P.C. 34; 140 L.T. 251; 93 J.P. 97; 45 T.L.R. 83; 27 L.G.R. 167; 14 Tax Cas. 709, H.L.; Digest Supp.
- (4) *Pearn v. Miller* (1927), 11 Tax Cas. 610; Digest Supp.
- (5) *Leeming v. Jones*, [1930] 1 K.B. 279; 141 L.T. 472; 99 L.J.K.B. 17; 15 Tax Cas. 333, C.A., affirmed sub nom. *Jones v. Leeming*, [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; 46 T.L.R. 296; 74 Sol. Jo. 247; 15 Tax Cas. 333, H.L.; Digest Supp.
- (6) *Coman v. Governors of Rotunda Hospital, Dublin*, [1921] 1 A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; 36 T.L.R. 646; 64 Sol. Jo. 548; sub nom. *Governors of Rotunda Hospital, Dublin v. Coman*, 7 Tax Cas. 517, H.L.; 28 Digest 82, 462.
- (7) *Eglinton Silica Brick Co., Ltd. v. Inland Revenue*, 1924 S.C. 946; 61 Sc.L.R. 601; 1924 S.L.T. 676; 28 Digest 20, k.
- (8) *Kirke's Trustees v. I.R. Comrs.* (1926), 136 L.T. 582; 11 Tax Cas. 323; 1927 S.C. (H.L.) 56; Digest Supp.
- (9) *Glasgow Corpn. Water Comrs. v. Miller (Surveyor of Taxes)* (1886), 2 Tax Cas. 131; 13 R. (Ct. of Sess.) 489; 23 Sc.L.R. 285; 28 Digest 21, m.
- (10) *Glasgow Water Comrs. v. Inland Revenue* (1875), 12 Sc.L.R. 466; 2 R. (Ct. of Sess.) 708; 28 Digest 8, p.
- (11) *A.-G. v. Black* (1871), L.R. 6 Exch. 308; 40 L.J.Ex. 194; 25 L.T. 207; 19 W.R. 1114; 1 Tax Cas. 54, Ex.Ch.; 28 Digest 20, 100.
- (12) *Cooper v. Stubbs*, [1925] 2 K.B. 753; 94 L.J.K.B. 903; 133 L.T. 582; 41 T.L.R. 614; 69 Sol. Jo. 743, C.A.; 28 Digest 22, 113.

Appeal against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland, dated June 27, 1930, in a case for the Commissioners of Inland Revenue on appeal by them under the Income Tax Act, 1918, from a determination of the Commissioners for the General Purposes of the Income Tax for the District of Stirling, in the County of Stirling, relative to assessments to income tax for the five years ended April 5, 1926, made upon the respondents, the Forth Conservancy Board, under Sched. D, Case VI, of the Income Tax Act, 1918.

The Case Stated was as follows:

At meetings of the Commissioners for the General Purposes of the Income Tax for the District of Stirling in the County of Stirling, held at Stirling on Jan. 25

A and 28, Feb. 8, and March 4, 1929, the Forth Conservancy Board (hereinafter referred to as "the board") appealed against the undernoted assessments made upon it under the Income Tax Act, 1918, Sched. D, Case VI.

	Year.				Assessment
	1921-2	...	...	...	£2,841
B	1922-3	...	...	...	4,083
	1923-4	...	...	...	4,083
	1924-5	...	...	...	7,624
	1925-6	...	...	...	5,294

The following facts were admitted or proved:

C (i) Following upon negotiations initiated by the Board of Agriculture for Scotland, with the local authorities interested in the development of the River and Firth of Forth, the board was constituted under the Forth Conservancy Order, 1920, as confirmed by the Forth Conservancy Order Confirmation Act, 1921. The board exercises jurisdiction over that part of the River and Firth of Forth between Stirling and an imaginary line drawn across the Forth approximately a mile east of the Forth Bridge.

D (ii) The objects of the board are the preservation, maintenance, and improvement of the River and Firth of Forth.

(iii) Under s. 8 of the order it is provided that the board shall consist of thirty-one members, who are required to be appointed and elected as follows: (a) Appointed by local authorities, thirteen; appointed by Government departments, five; appointed by railway companies, four; (b) elected by shipowners and persons paying dues to the board, nine.

E (iv) Under s. 27 of the order there was transferred to the board the undertaking of the Commissioners of the Forth Navigation, which body had been previously constituted for the purpose of improving and regulating the navigation of the river from Alloa to Stirling, under the Forth Navigation Act, 1843.

F (v) With the exception of Stirling Harbour, which is practically derelict, the board up to April 5, 1926, did not own any heritable subjects other than a portion of foreshore which was purchased by the board in 1925. The foreshore in question was acquired with the view to its possible reclamation at some future date.

(vi) Part IV of the order gives to the board the powers necessary to carry out its obligations. These powers, as enacted in s. 36, are as follows:

G "Subject to the provisions of this order the board may from time to time do all or any of the things following (namely): (a) Dredge, cleanse, and scour the river; (b) alter, deepen, restrict, enlarge, widen, diminish, lengthen, shorten, straighten, and improve the bed and channel of the river; (c) reduce or remove any shoals, shelves, banks, or other accumulations in the river; (d) shorten any bend or remove any angle in the course of the river and for such purpose enter into agreements with the owners of land adjoining or in or near to the river for the purchase of land or otherwise to enable them to effect the same; (e) abate or remove or cause to be abated or removed all impediments or obstructions in the river; (f) dredge and raise from the river, gravel, sand, and other substances for the purposes of making, altering, repairing, and maintaining the banks, and straightening and improving the course of parts of the river and constructing, altering, repairing, and maintaining works executed or to be executed by or for them or belonging to them; (g) carry away or deposit on the banks of the river or on lands adjoining the same by agreement with the owner thereof any materials obtained in dredging or otherwise deepening and improving the bed and channel of the river or sell or dispose of the same as they think fit."

Section 37 gives power to make and maintain sea walls and embankments and such landing places, workshops, cranes, and similar works as may be necessary for enabling the board to exercise the powers conferred on it; to undertake reclamation works and to encourage industry or agriculture on any reclaimed land, it being

provided that the board shall not itself have authority to carry on such industry, or the business of agriculture on such lands. Section 41 gives power to the board to require the proprietors of wharves, piers, jetties, &c., to keep the said properties in repair, and, in default thereof, itself to execute the repairs which are necessary at the expense of such proprietors. Section 42 provides that the board shall provide for, manage, and maintain the lighting and buoying of the river, and for this purpose may enter into agreements with the Commissioners of Northern Light-houses; and s. 43 provides that for the purpose of adjusting compasses of vessels, the board may place and maintain buoys in the river in such places as it may determine. Under s. 44 the board has power to remove stranded or sunk vessels from the river; under s. 45 to acquire or provide ferries across the river; and under s. 46 to furnish vessels with a supply of pure and wholesome water. Under s. 47 the board may make byelaws for the general regulation of traffic on the river. Under ss. 49 and 50 the board may build, purchase, hire, or otherwise employ vessels or machinery for dredging and for the towing of vessels in and out of the river. Under ss. 51, 52, and 53 the board may, for the purposes of the Act, acquire quarries for use in connection with any works which the board is authorised to construct, and may purchase any lands by agreement and sell or otherwise dispose of such lands.

(vii) Part V of the order empowers the board to levy dues, rates and charges as specified in Sched. 3 in respect of vessels entering or using that part of the River and Firth of Forth which is within the board's jurisdiction, and in respect of goods and passengers conveyed upon or shipped or unshipped in the river. Section 55 empowers the board to recover rates for the use of any landing places, workshops, cranes, power stations, &c., and for mooring posts, buoys, &c., belonging to or provided by the board, or in respect of any services rendered by it in connection with the river where no rates are specially fixed.

(viii) Section 74 gives the board power to set aside annually a sum not exceeding £2 10s. per centum of its revenue as a reserve fund, to be accumulated for the purpose of meeting any extraordinary demand. It is provided that the reserve fund shall not exceed the sum of £20,000.

(ix) Section 75 provides that all the revenues of the board shall be applied to the purposes of payment of the expenses incidental to the order, the working and establishment expenses and the cost of maintenance, repair, and renewal of the board's undertaking, the payment of interest on borrowed moneys, the provision for instalments and sinking fund payments, and to the establishment and maintenance of the above-mentioned reserve fund. It is provided that the balance (if any) shall be applicable to such purposes and in such manner for the purposes of the undertaking of the board as the board may determine.

(x) The sole revenues of the board, apart from interest on temporary investments in regard to which no question arises, have been derived from the shipping dues above mentioned, which dues have been fixed by resolution of the board at one halfpenny per registered ton, and have been levied and collected by the board since October, 1921.

(xi) Assessments for the same years as those at present under review were made upon the board under Sched. A of the Income Tax Act, 1918, No. III, r. 3. On July 23, 1926, the board appealed against the said assessments under Sched. A, and the board's appeal was sustained by the General Commissioners of Income Tax, and the assessments were discharged. In terms of s. 149 of the Income Tax Act, 1918, the Commissioners of Inland Revenue appealed against the said decision of the General Commissioners of Income Tax to the First Division of the Court of Session as the Court of Exchequer in Scotland, which court dismissed the appeal (1928 S.C. 286). The Commissioners of Inland Revenue thereafter appealed to the House of Lords, who refused their appeal, and adhered to the decision of the General Commissioners: *I.R. Comrs. v. Forth Conservancy Board* (3).

(xii) The operations of the board in carrying out its conservancy duties have related entirely to matters connected with the navigation of the River and Firth of

- A** Forth such as the maintenance, improvement of the lighting and buoyage of the river; the removal of wrecks and other obstructions; the enforcement of byelaws passed by the board for vessels navigating the river, and also the survey and charting of the river. A number of the powers conferred upon the board under the order, such as the provision of ferries (s. 45), the furnishing of vessels with supplies of water (s. 46), and the acquisition of quarries (s. 51) have not been exercised by the board.

It was contended on behalf of the board:

- (i) That the surplus revenues arising to the board in connection with the fulfilment of its statutory obligations were not "profits or gains" either in the popular sense or within the meaning of Case VI of Sched. D.
- C** (ii) That while there was authority for the assessment under Case VI of profits of a casual nature, analogous to but not falling under any of the other cases of Sched. D, there was no authority for the assessment under that case of the annual surplus revenues resulting from the whole operations of an undertaking such as that of the Forth Conservancy Board, which was constituted under an Act of Parliament for the purpose of carrying out in perpetuity a public duty.
- D** (iii) That the true scope and intent of Case VI of Sched. D were explained and illustrated by the provisions of s. 27 of the Finance Act, 1927, and by the judgments of ROWLATT, J., in the cases of *Pearn v. Miller* (4) and *Leeming v. Jones* (5), and that the profits properly assessable under that case were not the profits of a continuing trade, nor the general revenues of a statutory body, but profits or gains resulting from a transaction or series of distinct transactions.
- E** (iv) That the position of the board for the purposes of taxation was indistinguishable in principle from that of the Severn Fishery Conservators: *Severn Fishery Board v. O'May* (2); and (v) alternatively, that the board did not carry on any trade, manufacture, adventure, or concern of the nature of trade.

On behalf of the Inland Revenue Commissioners, it was contended:

- (i) That the surplus revenues of the board were profits or gains within the meaning of Sched. D of the Income Tax Act, 1918, and were assessable either under Case I or under Case VI of that schedule: *Coman v. Governors of Rotunda Hospital, Dublin* (6); *Eglinton Silica Brick Co., Ltd. v. Inland Revenue* (7); *Kirke's Trustees v. I.R. Comrs.* (8).
- (ii) That the board's operations were part and parcel of the general mercantile operations carried on in connection with the River Forth, for the benefit of a limited class.
- G** (iii) That there was no statutory exemption in favour of the board; and (iv) That the assessments were correct and should be confirmed.

- Having considered the whole facts and arguments, the commissioners found that there were surplus revenues; that the whole operations of the board were covered by the assessments made upon it; and that the board was not assessable to income tax under Sched. D, Case VI, in respect of its income from shipping dues for the years in question, sustained the appeal and discharged the assessments.

- H** The question of law for the opinion of the court was whether the surplus revenues of the appellant board are profits or gains within the meaning of the Income Tax Act, 1918, Case VI of Sched. D, and assessable to income tax under that case.

- The First Division (the Lord President, LORDS SANDS, BLACKBURN and MORISON) held that the board was assessable on the surplus arising from the dues under Case VI of Sched. D in that such revenue constituted profits or gains, not charged under any other schedule or case, derived from its statutory power to charge dues in return for the public services which it provided.

The Board appealed.

Latter, K.C., T. M. Cooper, K.C., and G. A. Montgomery (both of the Scottish Bar) for the appellants.

The Lord Advocate (*Craigie Aitchison, K.C.*), *Reginald Hills* and *A. N. Skelton* (of the Scottish Bar) for the respondents.

The House took time for consideration.

May 11. The following opinions were read.

LORD BUCKMASTER.—The Forth Conservancy Board are the appellants on this appeal, brought from an interlocutor of the First Division of the Court of Session, which decreed that the appellants had been properly assessed under the Income Tax Act of 1918, Sched. D, Case VI, for the years 1921 to 1926 inclusive, and reversed the decision of the commissioners for the general purposes of income tax, which had held that the board were not so assessable. B

The figures of the assessments are immaterial for the present purpose. The income in question arises from shipping dues, which the appellants are entitled to charge on ships using the River Forth in the following circumstances. By statute known as the Forth Conservancy Order Confirmation Act, 1921, confirming an order of the Secretary for Scotland, the appellant board was constituted for the purpose of the preservation, maintenance, and improvement of the River and Firth of Forth. By this it was declared that the board should consist of thirty-one members, nine of whom should be elected by shipowners and persons paying dues to the board. The circumstances which led to the passing of this Act and a full examination of the powers that it conferred are to be found in the former *Forth Conservancy Case* (3). For the purposes of this appeal it is sufficient to say that the board were empowered to do everything necessary for the purpose of maintaining the river as a navigable river, and to levy dues as specified in Sched. 3 in respect of vessels entering or using that part of the river within the board's jurisdiction and in respect of goods and passengers conveyed upon or shipped or unshipped in the river. These dues had been fixed by the board at halfpenny a ton, and it is the balance of such moneys, after providing for all expenses, which is the subject of the present assessment. Such balance is subject to the express provision that it shall be applicable to such purposes and in such manner for the purpose of the undertaking as the board may determine. C D E

The Inland Revenue Commissioners charge the matter as alternatively arising under Case I or Case VI, Sched. D. The interlocutor appealed from declared that the assessment was properly made under Case VI. The two cases as is well known respectively provide that tax under the schedule should be charged as to Case I in respect of any trade not contained in any other schedule, and under Case VI in respect of any annual profits or gains not coming under any of the foregoing cases, and not charged by virtue of any other schedule, and the rule applicable provides that the trade under Case I should be a trade, manufacture, adventure, or concern in the nature of trade. F G

In my opinion the judges of the First Division were right in holding that the assessment could not be supported under Case I. To manage the navigation of a river, and to charge dues for the ships, is not a trade, nor a concern in the nature of a trade. For trade involves something in the nature of a commercial undertaking, of which the buying and selling are the most obvious characteristics. At the same time, I am clearly of opinion that the moneys received are annual profits, or gains, and in *Mersey Docks and Harbour Board v. Lucas* (1) it was clearly decided that the purpose to which annual profits or gains are applied could not affect the liability to tax. It is quite true that in that case the assessment was made under Sched. A, and the Mersey Docks Authority in fact owned a large quantity of real estate in the nature of docks and quays, but this fact did not affect the principle of the decision, and indeed, LORD BLACKBURN pointed out that it really did not matter in that case under which head the assessment fell. The fact that the appellants could not be held to hold property similar to that in the *Mersey Docks Case* (1) enabled them in the former case to escape the assessment which for some reason was expressly limited to that head, but it left unaffected the question as to liability under Sched. D. Apart even from the statement of LORD BLACKBURN, to which I have referred, the principle of the *Mersey Docks Case* (1) appears to me completely to cover the present, but it is argued that it was not an express decision H I

A on the point, and that by analogy to the principle that exempts public rating authorities the appellants ought also to be exempted here.

The principle of exemption for the surplus of rates is, I think, to be found in this, that the rating authority collects money from the inhabitants of the district for the purpose of application to the expenses incurred on behalf of the inhabitants, and that any surplus rightly belongs to the inhabitants themselves, who receive its benefits in case of any surplus because it is carried forward towards the expenses of the ensuing year. It was contended by the appellants that the shipping community as a whole occupied a similar position to that of the ratepayers, but I find the analogy too far drawn to be acceptable. The people who have paid the dues may or may not use the river again, and those who have never contributed to them may get the benefit of the expenditure. A class of persons, connected only by the fact that they own shipping, cannot possess the same characteristics as a body of people like ratepayers, each one of whom receives in some form direct benefit from the money he has provided.

Different considerations arise where the local authority does carry on an undertaking like a tramway or even a waterworks, and *Glasgow Corpn. Water Comrs. v. Miller (Surveyor of Taxes)* (9) shows that, at any rate, where the area of their activities extends beyond the rateable area, the liability to tax at once arises, in respect of profits, and this has been accepted in numerous cases. If a local authority carries on an industrial undertaking it stands in the same position for income tax as a company or an individual. The earlier decision in 2 R. (Ct. of Sess.) 708 held them exempt where the water was only supplied to their own ratepayers. It is unnecessary for the purpose of this decision to examine the soundness of that case, but it was determined before the case of the *Mersey Docks and Harbour Board v. Lucas* (1) and the two cases appear difficult of reconciliation.

The nearest case to the present is that of the *Severn Fishery Board v. O'May* (2). There power had been given to conserve a river, to make byelaws and fine people for the breach, as well as to issue licences for fishing. It might be urged that the annual profits and gains arising from the fines correspond to the money arising from fines in the courts of summary jurisdiction, and that the levying of fines does not constitute annual profit or gain. It is at least a distinction from the present case, and I do not think, in order to support the interlocutor appealed from that it is necessary that it should be overruled. I therefore express no opinion as to its validity. I think the interlocutor appealed from was correct and that this appeal should be dismissed.

LORD DUNEDIN.—It is with the greatest reluctance that I find myself compelled to concur with your Lordship in the judgment proposed. I say this, not only because were it not for authority I should wish to decide the case otherwise, but still more because I think that the effect of the judgment will be disastrous to the proper efficiency of the statutory body concerned, and will, to a great extent, defeat the object for which the Act of Parliament under which they exist was passed. What was the object of the Act? It was to improve the navigation of the Forth and encourage trade, by way of shipping, in that river. In order to effect that object the statutory body is brought into existence to dredge the river and, from time to time, to improve the navigation by means of cuts in the channel, by deepening the water, and by abrasion of the banks.

In order to do these things the body are entitled to levy dues upon vessels using the river. Not a penny of the dues so levied can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the moneys received. But, after this judgment, more than one-fifth of the money which may, at the end of the year, have stood at their credit is to be paid over as income tax. The only result will be that the trustees will take care to have as small a surplus as possible, and any saving of money in order to execute any larger work which would have excellent results will obviously

be discouraged. Such a result is, I think, utterly foreign to the proper idea of an income tax, which is meant to be a levy on what the person who pays would otherwise use for his own purposes, whether of business or enjoyment, and, in my view, a public body of this sort ought not to be subjected to any such tax. Of course, I do not go the length of saying that in some cases income tax ought not to be levied on a public body. If, for example, landed property is held by such a body, I do not think that that fact would justify what would be the removing from the natural incidence of the tax a subject which, held by anyone else, could give rise to no question. But there is nothing of that sort here. The only property of the board is the money raised by dues and the dues are totally expended on the objects for which the board is by Act of Parliament created.

Now, as to what ought to be the decision, I can myself see no true distinction between this case and the case of any public body raising rates for public service. Yet it is common ground that such rates are not liable to income tax. It has been sought to distinguish these cases from this, and I think it is done in one of the judgments which are about to be delivered, and which I have had the advantage of reading; that, in those cases, it is the ratepayers' own money, which has already paid income tax. The same thing might fairly be said in this present case, if you view the shipowners who use the river as a body, just as you view the taxpayers as a body. It may be said that a foreign ship might use the Forth, and that that owner has not paid income tax. Equally, it may be said that if any hereditament in a town belonged to a foreigner who was not personally present in the country for more than six months, his contribution to the rates would be from money on which he had not paid income tax.

I would, had I been free, have decided this case on the ground that the surplus dues which might be found to exist at the end of any year were not, in the sense of the Income Tax Acts, a profit or gain. It is trite law that all gains are not gains in the sense of the Income Tax Acts, and I would hold that these moneys were not of that sort. But I am bound by authority, and I cannot resist the authority of the *Mersey Docks Case* (1). The case itself was different, because the dock owners in that case held actual real property. But it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit, or not. I regret what was laid down in that decision. I think it would have been better to have followed what had been said before, namely, that once it was settled that a sum was a profit or gain the question of how it was employed did not matter, yet it was permissible to look at how it was to be expended in order to judge of the question whether it was a true profit or gain. There is, I think, no question that the same line of reasoning which appeals to me appealed to LORD PRESIDENT INGLIS in the first Glasgow case (*Glasgow Water Comrs. v. Inland Revenue* (10)). It is possible to doubt the soundness of that decision in the light of the *Mersey Docks Case* (1), which was subsequent and of higher authority. I think the decision can be saved by considering the supply of water, not in the light of supplying a commodity, but of rendering a public service, just as lighting or cleaning are public services, and this view is helped by the fact that one could not escape the water rate by offering to prove that one had used no water. That LORD PRESIDENT INGLIS had to consider whether the judgment would stand after the *Mersey Case* (1) is, I think, shown by the ground on which the second Glasgow case (*Glasgow Corp'n. Water Comrs. v. Miller (Surveyor of Taxes)* (9)) was distinguished from the first, and indeed in that case he distinctly said that he had re-considered his first judgment and still remained of the same opinion.

But whether I am right as to this or not, the fact remains, as I have stated, as to what was laid down in the *Mersey Case* (1), and, if I may not look at the ultimate destination of the moneys as affecting the question of whether they are properly profit or gains in the sense of the income tax or not, there is no more to be said. I, therefore, cannot dissent from the motion made.

A LORD WARRINGTON.—The appellants, the Forth Conservancy Board, are a statutory body incorporated by a Provisional Order confirmed by Act of Parliament passed on May 12, 1921. The objects with which the board was incorporated were the preservation, maintenance and improvement of the River and Firth of Forth from Stirling to an imaginary line drawn across the Firth approximately one mile east of the Forth Bridge.

B The board is invested with extensive powers for the carrying into effect the objects of its incorporation, and it is authorised to levy dues, rates and charges specified in Sched. 3 to the order in respect of vessels entering or using that part of the River and Firth of Forth which is within the board's jurisdiction and in respect of goods and passengers conveyed on or shipped or unshipped on the river. The board is also empowered to recover rates for the use of certain conveniences

C and in respect of services rendered in connection with the river. So far the sole revenues of the board as to which the present question arises have been derived from shipping dues.

By s. 75 of the order it is provided that all moneys received by the board in the nature of revenue are to be applied in payment of expenses, of interest on borrowed money, in providing a sinking fund in respect of borrowed moneys, in establishing

D a reserve fund not exceeding at any time £20,000, and the balance, if any, is to be applicable to such purposes and in such manner for the purpose of the undertaking of the board as the board may determine.

The board, having been assessed to income tax under Case VI of Sched. D, for the years 1921–2 to 1925–6 inclusive on their surplus revenues for those years, appealed to the General Commissioners, who allowed the appeal and discharged the assessments. The commissioners at the request of the Crown stated a Case for the opinion of the Court of Session on the question of law whether the surplus revenues of the board are profits and gains within the meaning of the Income Tax Act, 1918, Case VI of Sched. D, and assessable to income tax under that case. The First Division of the Court of Session by their interlocutor dated June 27, 1930, answered the question of law in the affirmative and reversed the decision of the commissioners. Hence this appeal.

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The respondents contended before the commissioners and the Court of Session and again in this House that the appellants are assessable either under Case I or under Case VI. I agree, however, with the opinions expressed by their Lordships in the Court of Session that the undertaking in question cannot properly be regarded as trade, or as an adventure or concern in the nature of trade (see s. 237).

G It is, however, an undertaking which produces surplus revenues in each year remaining as a balance after satisfying the purposes to which under the order the gross receipts in the nature of revenue are made applicable. I have a difficulty in understanding how on the plain reading of Case VI this annual balance of revenue can be anything but annual profits or gains within the meaning of Case VI. If this is so, then it is settled by the decision of this House in *Mersey Docks and Harbour Board v. Lucas* (1), that the fact that the balance in question is applicable only for the purposes of the board's undertaking can make no difference. But it was insisted that the board in this case is not carrying on an undertaking analogous to those mentioned under other heads in the schedule, and in particular that of trade, and that it ought to be treated as if it were on the same footing as a local body raising rates for public purposes, and having a surplus of revenue at the end of a

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I financial year. That such a body ought to be regarded as not making a profit or gain within the meaning of the Income Tax Acts has been recognised as good law: see *A.-G. v. Black* (11) and particularly the judgment of BLACKBURN, J. (L.R. 6 Exch. at p. 309). A public body making and administering rates collected from the ratepayers in the locality is not making a profit, but simply collecting in a particular financial year by prudent budgeting more than it actually required, leaving a balance which goes towards reducing the amount required to be collected in the following year.

In the present case the board is collecting dues and tolls from persons using the

river, but those persons are in no sense their constituents as are the ratepayers in the case of a local body. The profits here are those of the board itself arising from an undertaking analogous to a trade and, as I have already pointed out, the fact that the application of those profits is regulated and limited by the order cannot on the authorities prevent those profits from being taxable. A

As to the decision of ROWLATT, J., in the *Severn Fishery Board v. O'May* (2) I have read and considered carefully the judgment of the learned judge. The ground of his decision was that the surplus there in question was not the result of activities analogous to trade and was for that reason not liable to tax. On that footing the case is on its facts distinguishable from the present. B

Glasgow Water Comrs. v. Inland Revenue (10) was decided in the Court of Session before the decision in this House of the *Mersey Docks and Harbour Board v. Lucas* (1), and the question whether, in view of that decision, it can now be treated as an authority must, I think, be left open. At any rate, it is not binding on this House and is, I think, on its facts distinguishable from the present case. C

The result is that in my opinion the appeal fails, and ought to be dismissed with costs.

LORD THANKERTON.—The facts in the case and the statutory provisions have already been sufficiently stated by your Lordships, and I agree with the conclusion at which your Lordships have arrived. D

During the years here in question the appellants were undoubtedly carrying on a statutory undertaking and derived revenues from shipping dues in excess of their expenditure in each year. They have been assessed to income tax in respect of the surplus revenue so arising in each year under Case VI of Sched. D of the Income Tax Act, 1918, and in the present appeal they challenge these assessments on two grounds, namely: (i) That these surplus revenues are not "profits or gains" within the meaning of the statute; and (ii) that, in any event, they fall within Case I of Sched. D, and not Case VI. I will deal with these contentions in their order. E

The appellants maintained that the surplus revenues of a body administering public duties under the authority and directions of an Act of Parliament were not in the nature of profits or gains. This appeared to rest on two separate grounds; first, that they were bound by the provisions of their statute to apply these annual surplus revenues for the purposes of the undertaking, and, secondly, that the dues charged by them were ejusdem generis with such things as local rates, which have invariably been regarded as not being profits or gains. F

The first of these grounds is clearly not open to the appellants in view of the decision of this House in *Mersey Docks and Harbour Board v. Lucas* (1). LORD SELBORNE, L.C., says (8 App. Cas. at p. 905): G

"If it could reasonably be contended that the word 'profits' in these Acts has reference to some advantage which the persons carrying on the concern are to derive from it, it might be said perhaps that the same argument might have been raised upon the word 'gains'; but to my mind it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used, whether it is gained for the benefit of a community, or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is the same." H

The attempt to assimilate the imposition of these dues to the imposition of local rates equally fails, in my opinion. The appellants founded on the decision of the First Division of the Court of Session in *Glasgow Water Comrs. v. Inland Revenue* (10), and a decision of ROWLATT, J., in *Severn Fishery Board v. O'May* (2). It is important to ascertain the reason for the exemption of local rates from income tax. In my opinion, it is because the ratepayers are really levying the rate on themselves through their representative body, and, as complete accuracy is impossible in budgeting for the future, there is almost bound to be either a surplus or a deficiency, but such surplus is still the money of the ratepayers and cannot be I

A described as a profit or gain. In the present case, the Lord President's analogy of the surplus of the householder's allowance to his housekeeper in any year over the latter's expenditure in running the household in that year appears to me most apt. The distinction is well expressed by LORD PRESIDENT INGLIS in *Glasgow Water Comrs. v. Inland Revenue* (10), when he says (2 R. at p. 713):

B "The case is entirely different from those that have been cited which have been decided in the Court of Exchequer in England, because in those cases the statute which gave the right to levy the assessment did not impose it upon the citizens of the particular burgh or locality which obtained the Act. It was not an authority to the citizens of a particular locality to assess themselves. On the contrary, it was a right or privilege given to a particular corporation to assess everybody—the whole public who happened to import, in the one case, coals into the burgh, and, in the other case, to import something else—I forget what it was."

As appears from the opinion of the Lord President, the case was decided on the footing that the cost of the water supply was met by two compulsory rates, the public and domestic water rates, levied within the area of the city, and payable by the ratepayer whether he used the water or not, any surplus being carried forward in reduction of future rates. No attempt was made in that case to distinguish between the rates raised within the limits of compulsory supply and the revenue which was raised outside these limits, and the Lord President expressly reserved any question as to the assessability of the latter; this question was subsequently raised in *Glasgow Corp'n. Water Comrs. v. Miller (Surveyor of Taxes)* (9), in which LORD PRESIDENT INGLIS again delivered the judgment of the court, and in which *Mersey Docks and Harbour Board v. Lucas* (1) was before the court. It was held that the commissioners were assessable to income tax under Sched. D in so far as surplus revenue arose from either non-compulsory rates outside the compulsory limits of supply, or supplies of water by measure or in terms of special agreements for manufacturing or other trading purposes. Referring to the earlier case, LORD PRESIDENT INGLIS said (13 R. at p. 492):

G "We were all of opinion that within the limits of compulsory supply the concern or undertaking, as defined by the local Act, was of this nature, that the citizens of Glasgow undertook to assess themselves for accomplishing the important public purpose of supplying the city (being the limits of compulsory supply) with a good supply of pure water; that in doing so they had and could have no view of making profit, for that would have been equivalent to paying out of one pocket and into another pocket of the same individual or class; that they paid these assessments for no other purpose than that of obtaining the particular contemplated benefit, and when that benefit is fully attained and secured for the future the assessment and the authority to levy it came to an end. I have reconsidered that judgment and have not seen any reason to doubt its soundness."

H He added later that the principle and rule of construction laid down in his judgment were confirmed by the more recent case of *Mersey Docks and Harbour Board v. Lucas* (1). In my opinion, these statements of LORD PRESIDENT INGLIS precisely define the reasons why local rates are not profits or gains for purposes of income tax, and they clearly show that the dues charged by the appellants are not ejusdem generis with local rates, for they are levied by a particular corporation on all and sundry the vessels that take advantage of the navigation in their statutory area. The payers of dues have only a very limited representation on the appellant board, and in no sense can this be called an undertaking in which the payers of dues undertake to levy the dues on themselves.

I In *A.-G. v. Black* (11) Brighton Corporation were held liable to pay income tax in respect of dues which, under local Acts, they levied on all coal landed on the beach or brought into the town. KEATING, J., says (L.R. 6 Exch. at p. 311):

"Mr. Manisty does not contend that harbour and port dues, and other revenues of that description, are not taxable; and the Attorney-General admits that a district rate is not. The question then is, does the rate in question partake more of the nature of the one or the other? I am of opinion that it does not partake of the character of a district rate imposed by the inhabitants of a place upon themselves; and that on the other hand, it is very difficult to distinguish it from harbour dues."

In *Mersey Docks and Harbour Board v. Lucas* (1), LORD FITZGERALD says (8 App. Cas. at p. 913):

"There is nothing to be found in this income in the nature of a district or local rate, or of a rate or tax which could be considered as a payment by which the inhabitants of the locality procure for themselves some local benefit. The dues are in effect levied on the whole world coming to the Mersey or to Liverpool, and on those taking advantage of the docks or other property of the appellants."

There remains *Severn Fishery Board v. O'May* (2), the facts in which appear to be very similar to the present case. The board in that case was a statutory one, invested with the power and duty of protecting the salmon fishings in the river and to do such acts as they might deem expedient for the protection and improvement of these fishings. Their receipts were derived from fishing licences and fines for offences against the Salmon and Freshwater Fisheries Acts. ROWLATT, J., says ([1919] 2 K.B. at p. 490):

"Now what is the position of this board? The receipt of money by them has nothing to do with any sort of property, or any sort of undertaking in connection with which the subject of profit could be thought of. They have no property. They have no tolls nor any of the other things mentioned in the Act; they have no trade or concern in the nature of trade. They are simply acting as a public body protecting the fisheries for a particular locality, in the same way that the government might protect them, and raising for that purpose a revenue by taking licences from the people who enjoy those fisheries. It is not like a profit-making concern at all. The revenue authorities have treated them as carrying on something analogous to trade, and as making a profit out of the balance of the receipts over and above the expenses of upkeep. I do not think that is the right view at all. I think they make no profit. As in my view the resulting balance is not a profit it becomes unnecessary to consider whether the fact that they expended the balance under the statutes in making improvements to the rivers and fish passes relieves them from liability to taxation."

In my opinion, that statement is inconsistent with the decision in the *Mersey Docks Case* (1) in so far as (a) it implies that revenues raised by a public body intrusted with the discharge of a public duty cannot be profits or gains for the purposes of income tax, and (b) it assumes that the purpose to which the revenues are applied can procure relief from taxation, which would otherwise be due. But, further, I am unable to agree that the Severn Board were not carrying on an undertaking or concern, and I am unable to find any facts in the case which would place the board's sources of revenue in the same category as local rates; I therefore cannot regard the learned judge's conclusions as sound.

Accordingly, I am of opinion that the surplus revenues of the appellants are annual profits or gains within the meaning of the Income Tax Acts. I am further of opinion that these surplus revenues were rightly assessed under Case VI of Sched. D and not under Case I. In my opinion the appellants do not carry on a trade, which is defined by s. 237 to include every trade, manufacture, adventure or concern in the nature of trade, but they do carry on an undertaking or concern which is analogous to a trade. It is one of those somewhat unusual cases such as that of *Cooper v. Stubbs* (12). I therefore agree that the decision of the Court of Session should be affirmed and the appeal dismissed.

A **LORD RUSSELL.**—The question for decision in this case is whether the appellants were rightfully assessed to income tax under Sched. D of the Income Tax Act, 1918, in respect of each of the five years ending with April 5, 1926. In each of those years there has been a surplus of revenue income of the appellants, over revenue expenditure by the appellants; and it is in respect of such surplus that the assessments were made. The General Commissioners, having discharged the

B assessments, stated a Case pursuant to s. 149 of the Act, for the opinion of the Court of Session as the Court of Exchequer in Scotland, on the question of law—“whether the surplus revenues of the appellant board are profits or gains within the meaning of the Income Tax Act, 1918, Case VI of Sched. D, and assessable to income tax under that case.” The judges of the First Division answered the question in the affirmative, and with that answer I agree.

C There is no necessity for me to recapitulate the other facts in the case, or to refer to the provisions of the Forth Conservancy Order, 1920. They have already been sufficiently stated. From them it is established that the Forth Conservancy Board during the period in question were habitually engaged in activities which resulted annually in an excess of revenue receipts over revenue expenditure. Such excess falls within the plain wording of cl. 1 (b) of Sched. D, as “annual profits or gains not charged under Scheds. A, B, C, or E, and not specially exempted from tax.”

D It is therefore, *prima facie*, chargeable to tax under Sched. D, and the particular case under which it is chargeable must necessarily be Case VI; for while the activities of the appellants cannot, I think, be properly described as a trade or in the nature of a trade, they are such that the appellants can properly be said to carry on an undertaking analogous to a trade.

E The reasons urged before your Lordships by the appellants as justifying the view that this surplus was not chargeable to tax, were two in number. First it was said that the surplus revenue of a body such as this, which was bound to apply such surplus for the purpose of its undertaking, could not be profits or gains within the meaning of the Income Tax Acts. This point appears to me to have been concluded against the appellants by the decision of your Lordships’ House in the

F *Mersey Docks Case* (1). Secondly, it was contended that the surplus revenues of this body were on the same footing as local rates, which have never been treated as profits or gains assessable to tax. In relation to this argument I desire to add nothing to the remarks which my noble and learned friend, LORD THANKERTON, has addressed to your Lordships upon this point. They exactly express my own views.

G I agree that this appeal fails and should be dismissed, and I further agree that your Lordships’ decision in the present case must be taken to overrule the decision of ROWLATT, J., in relation to the Severn Fishery Board.

Appeal dismissed.

H Solicitors: *Grahames, Chapple & Co.*, for *James Learmonth*, Stirling; *Laing & Motherwell*, W.S., Edinburgh; Solicitor for England of Board of Inland Revenue, for Solicitor for Scotland of Board of Inland Revenue.

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re KING'S SETTLEMENT. KING v. KING

[CHANCERY DIVISION (Farwell, J.), June 23, 24, 25, 1931]

[Reported [1931] 2 Ch. 294; 100 L.J.Ch. 359; 145 L.T. 517]

Estoppel—Estoppel by deed—Conveyance absolute in form due to misstatement—Conveyance actually on trust—Subsequent equitable mortgages by grantee in breach of trust—Grantor and voluntary beneficiaries estopped from denying conveyance absolute.

If a grantor conveys property in a form actually and actively misleading, so that any person reading the conveyance would necessarily conclude that the grantee is the absolute owner, the grantor cannot subsequently be heard to say that it is not the real transaction, but that the grantee takes on a secret trust not disclosed in the conveyance. Volunteer beneficiaries claiming under the grantor as settlor on such a secret trust are also bound by this estoppel.

A father conveyed certain property to his son and daughter-in-law under an arrangement that they would look after him and his wife and a daughter of unsound mind. The conveyance was in terms absolute and "in consideration of his love and affection for the grantees." The grantees executed a declaration of trust of even date with the conveyance, by which, after reciting that they had agreed to execute such deed prior to the execution of the conveyance, they declared that they held the property on certain trusts for the father, the mother, and the daughter. The grantees dealt with the property as if they were absolute owners and created equitable incumbrances on it.

Held: the incumbrances were binding on the father and on the beneficiaries because there had been an actual misstatement of fact in the conveyance in that the execution of the declaration of trust was the consideration for it; as against the incumbrancers, the father and the beneficiaries were, therefore, estopped from saying that the conveyance was not an absolute disposition.

Carritt v. Real and Personal Advance Co. (1), 61 L.T. 163; 42 Ch.D. 263, distinguished.

Notes. Registration in the Middlesex Deeds Registry has been abolished and the Registry is now closed for all purposes: see the Middlesex Deeds Act, 1940, 20 HALSBURY'S STATUTES (2nd Edn.) 1103, and also 23 HALSBURY'S LAWS (3rd Edn.) 363, para. 906.

Referred to: *Tsang Chuen v. Li Po Kwai*, [1932] A.C. 715; *Abigail v. Lapin*, [1934] All E.R.Rep. 720.

As to the nature of estoppel by deed, see 15 HALSBURY'S LAWS (3rd Edn.) 214, para. 402; and for cases on the subject, see 21 DIGEST 242 et seq., 700 et seq. As to conflicts between a beneficiary under a trust and the owner of an incumbrance created by a trustee in breach of the trust, see 23 HALSBURY'S LAWS (2nd Edn.) 547, para. 805; and for case on the subject, see 35 DIGEST 485, 2173.

Cases referred to:

- (1) *Carritt v. Real and Personal Advance Co.* (1889), 42 Ch.D. 263; 58 L.J.Ch. 688; 61 L.T. 163; 37 W.R. 677; 5 T.L.R. 559; 21 Digest 261, 828.
- (2) *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L.J.Ch. 561; 86 L.T. 491; 50 W.R. 517; 18 T.L.R. 548; 17 Digest (Repl.) 380, 1857.
- (3) *Burgis v. Constantine*, [1908] 2 K.B. 484; 77 L.J.K.B. 1045; 99 L.T. 490; 24 T.L.R. 682; 11 Asp.M.L.C. 130; 13 Com. Cas. 299, C.A.; 21 Digest 364, 1419.

Witness Action by the beneficiaries under a trust.

F. W. King (hereinafter called the father) on Feb. 26, 1925, took out letters of administration to a daughter who had died intestate, and, as her father, became possessed of two freehold houses and a leasehold house at Finchley. He was desirous of conveying these houses to his son and daughter-in-law (hereinafter called the grantees) absolutely, having full confidence that they would look after

A himself and their mother and another daughter, Ruth, who was a person of unsound mind not so found by inquisition. The father and the grantees instructed their solicitor that no trust should be mentioned in the conveyance, but the solicitor advised that there should be a contemporaneous declaration of trust by the grantees, and the parties ultimately agreed to this. After full explanation the following conveyance was executed. Dated Dec. 22, 1925, it was made between the father of the one part and the grantees of the other part; after reciting that the father was "desirous of giving the hereditaments and premises thereafter mentioned" to the grantees, it was witnessed that "in consideration of his love and affection" for the grantees the father as beneficial owner conveyed the freehold premises to the grantees in fee simple and assigned the leasehold premises to them absolutely for the residue of the ninety-nine years' term for which they were held. This deed was executed by the parties and registered in Middlesex.

C By a deed poll of even date under the hands and seals of the grantees it was recited that the deed poll was supplemental to the conveyance and that "it was agreed prior to the date of the principal indenture that" the grantees "should execute such declaration of trust as is hereinafter contained" the grantees declared "that they hold all the said hereditaments and premises described in and assigned and conveyed to them by the principal indenture and the proceeds of sale of them or any of them and all rents, profits and emoluments of whatsoever description of the same

E "upon trust to pay the income of the same to their father and mother during their joint lives and to the survivor and after the death of the survivor of them to apply the same in such manner as the grantees in their uncontrolled discretion should think fit for the maintenance support benefit and comfort of the daughter Ruth during her life and after her death in trust to divide such part (if any) as should then remain equally between the grandchildren of their father and mother."

F This deed poll was not registered in Middlesex, and the assignees did not admit that they had executed it, but the court at the trial found as a fact that it was executed by them.

G At the time of the execution of these deeds, the leasehold term and the legal estate in the freehold was vested in the grantees as trustees, but, on Jan. 1, 1926, by virtue of the Law of Property Act, 1925, the Settled Land Act, 1925, and the transitional provisions contained in them, the leasehold term and the legal estate in the freeholds became vested in the father and mother jointly as life tenants. The title deeds and the conveyance were handed to the grantees by the father's solicitor, who retained the declaration of trust, of which a copy was given to the grantees. As from that time the grantees began to deal with the property as absolute owners, and, on June 24, 1926, they sold the leasehold property to one Kerr, and received the proceeds of sale.

H On Feb. 29, 1928, the grantees mortgaged one of the freehold houses to one Beard for £2,250. The title was duly investigated on behalf of Beard and all proper searches were made, including searches in bankruptcy and the Middlesex Registry, but he obtained no notice of the declaration of trust.

I In June, 1928, the grantees deposited the title deeds of the other freehold house with the National Bank, Ltd., to secure a £600 overdraft on their account. The title was fully investigated on behalf of the bank and all proper searches were made, but no notice of any trust was given. These transactions became known in 1929, and the father, mother and Ruth, by her father as next friend, commenced this action against the grantees, Kerr, the National Bank, Ltd., and Beard. The action was subsequently discontinued against Kerr, as the father thought it more to his interest not to impeach the sale of the leasehold. As against the National Bank, Ltd., the plaintiffs claimed a declaration that the bank had no enforceable lien or charge on the freehold house of which the deeds had been deposited with them, and for an order for delivery up of the title deeds to the father and mother as joint life

tenants. As against Beard the plaintiffs asked for a similar declaration and order. A
 As against the grantees they asked for administration of the trust and all proper
 accounts and inquiries, for their removal from the trusteeship and the appointment
 of new trustees in their place. The grantees appeared in person and claimed that
 they were beneficial owners, and denied the existence of any trust, but they took
 no part in the legal arguments at the trial. The bank did not admit the existence
 of any trust, but contended that even if such trust were established, the father and B
 those claiming under him, being volunteers, were estopped by the conduct of the
 father from setting the trust up against the bank. The defendant Beard set up a
 similar claim of estoppel. The case was argued on the footing that Beard was an
 equitable incumbrancer.

Swords, K.C., and *Mulligan* for the plaintiffs, the beneficiaries.

Vaisey, K.C., and *W. M. Hunt*, for the defendant bank, an incumbrancer, referred to *Carritt v. Real and Personal Advance Co.* (1) and *Rimmer v. Webster* (2).

Braund for the defendant Beard, an incumbrancer.

Swords, K.C., in reply, relied on *Carritt v. Real and Personal Advance Co.* (1) and *Burgis v. Constantine* (3).

FARWELL, J., after stating the facts and holding that the declaration of trust D
 was duly executed, held that the solicitors of the incumbrancers were not bound
 to inquire of the father whether he was solvent at the date of the voluntary conveyance.
 From seeing him in the box he believed that, even if the father had
 been questioned as to his solvency, his memory was so bad that probably he would
 have said nothing about the declaration of trust. [His Lordship then continued:]
 It is clear that these properties, since Dec. 22, 1925, have been subject to a legal E
 binding trust in the hands of the grantees, and that their dealings with the properties
 since that date have been breaches of trust in fraud of their beneficiaries, and
 that the plaintiffs are entitled to full relief against the grantees. But, as against
 the defendant bank, who are only equitable incumbrancers, it is contended that
 the beneficiaries' title, being prior in date, must prevail. The same contention is
 made against the defendant Beard, treating him as an equitable incumbrancer, and F
 disregarding for the moment his possible claim to have a legal estate. Now, in
 my judgment, it is not open to the father, as against these incumbrancers, to set up
 that the conveyance of Dec. 22, 1925, did not operate as an absolute gift to the
 grantees. I have considered all the authorities cited, and, if this were a case of
 using merely ordinary conveyancing language, as in *Carritt v. Real and Personal*
Advance Co. (1), I should follow *CHITTY, J.*'s decision. However, that case has
 no application here. The present case is not an instance of the use of an ordinary G
 conveyancing form, not exhaustively accurate, but without any actual misstatement
 of fact, as was *Carritt v. Real and Personal Advance Co.* (1). Here the conveyance
 contains an actual definite misstatement of fact. If a grantor conveys in a form
 actually and actively misleading, so that any person reading the conveyance would
 necessarily conclude that the grantee is the absolute owner, the grantor cannot
 subsequently be heard to say that this is not the real transaction, but that the
 grantee takes on a secret trust not disclosed in the conveyance. The truth is that
 the conveyance and declaration of trust were all one transaction, and for the grantee
 to allow the conveyance alone to be put forward as the true transaction, and then to
 deny it, is clearly contrary to the ordinary principle of estoppel. As against the incumbrancers
 the father cannot be heard to say that the conveyance does not give the
 grantees an absolute title. Estoppel, of course, can only operate in favour of
 persons acting on the faith of the misrepresentation. In the present case it can
 only assist the incumbrancers; it prevents the father from recovering the property
 free from the incumbrances. I

It is contended, however, that there is no estoppel as against the other beneficiaries, but I do not accept the view that the volunteer beneficiaries claiming under the father as settlor are not bound by his estoppel. The plaintiffs rely

A strongly on *Carritt v. Real and Personal Advance Co.* (1) and on *Burgis v. Constantine* (3), particularly on FARWELL L.J.'s judgment in the latter case. He said:

B "As has been pointed out by LORD CAIRNS in *Shropshire Union Railways and Canal Co. v. The Queen*, the mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, and given him the title deeds, or the securities, or other indicia of title, does not justify anyone in assuming that the person to whom such transfer is made is the beneficial owner. If the trustee does in fact deal with the property, and convey the legal ownership to a bona fide purchaser or mortgagee for value without notice, the cestui que trust has to bear the loss. If such a subsequent purchaser or mortgagee does not get the legal estate it is because he has not taken those precautions which the law allows him in order to protect himself from all risks, and he cannot set up the apparent ownership of the trustee as any misconduct or negligence of the beneficial owner, because it is in accordance with the usages of mankind that the legal estate in property should be conveyed to, and the indicia of title deposited with, trustees, and no other member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred. We are therefore relegated to the ordinary doctrines of equity in considering equitable claims to shares in a ship standing in the name of a registered owner. Then what is there here which can be deemed to amount to a suggestion to the defendant that W. Hine was the beneficial owner of the shares, or to an invitation to him to deal with him on that footing?"

E The last sentence means that in that case there was nothing to justify a person dealing with the trustee in assuming that he might not be a trustee, and it is really in favour of the incumbrancers and not of the plaintiffs. Here there was everything on the face of the conveyance to indicate that the grantees were not trustees, but absolute owners. It was an absolute conveyance to them in consideration of the grantor's love and affection. It is a very unusual form for the creation of a trust to make an out-and-out conveyance to the donees and then to have a concealed declaration of trust. It is hopeless to maintain that it is an ordinary sort of transaction under which any person could possibly suspect that he was dealing with trustees.

G I have now to decide between the equities of the beneficiaries and of the incumbrancers, treating them both for the moment as equitable incumbrancers. *Primâ facie*, the beneficiaries' equity, being earlier in date, ought to prevail. But when I find that their title is based on a document in a form wholly misleading, and resulting necessarily in third parties being wholly misled as to the character in which the grantees take the property, I should be going against all equitable principles if I held that the beneficiaries' equity prevailed over that of other persons acting completely innocently, and misled by the settlor, through whom alone the beneficiaries claim, and I should be wrong if I allowed the equity of the settlor and his beneficiaries to prevail. I need not therefore consider whether the defendant H Beard has a legal estate or not.

I The incumbrancers must hand over their title deeds only on payment off of their incumbrances. There must be a full administration order, and the grantees must be removed and new trustees appointed. The plaintiffs must pay the incumbrancers' costs, and recover these costs and their own costs from the grantees. There will be liberty to apply.

Solicitors: *Ernest A. Kite; Stephenson, Harwood & Tatham; T. Richards & Co.*

[Reported by E. K. CORRIE, ESQ., Barrister-at-Law.]

Re WOODS. WOODS v. CREAGH

[CHANCERY DIVISION (Maugham, J.), March 26, 1931]

[Reported [1931] 2 Ch. 138; 100 L.J.Ch. 385; 145 L.T. 206]

Will—Gift to four daughters, A, B, C and D, or such of them as should be living at the death of the testatrix, in equal shares—Revocation by codicil of gift to B—Testatrix survived by all four daughters.

A testatrix gave her residuary estate to her four daughters, A, B, C and D, or such of them as should be living at her death in equal shares. By a codicil she revoked the gift to B. All four daughters survived the testatrix.

Held: the residuary estate was divisible between A, C and D in equal shares because the reference to survivorship showed that the testatrix regarded the objects of her bequest as a group of persons who were to take collectively, provided they answered the description of belonging to that group and were living at her death, and intended the whole fund to be taken by those members of the group who were capable of taking at her death, and there was, therefore, no intestacy as to the revoked gift.

Principle applicable to "class" gifts applied.

Notes. Applied: *Re Peacock*, [1952] 2 All E.R. 98. Considered: *Re Midgley, Barclays Bank, Ltd. v. Midgley*, [1955] 2 All E.R. 625.

As to the expression of an intention that the doctrine of survivorship should apply to a gift by will to persons as tenants in common, see 34 HALSBURY'S LAWS 142-143, paras. 185, 186.

Cases referred to:

- (1) *Re Coleman and Jarrom* (1876), 4 Ch.D. 165; 46 L.J.Ch. 33; sub nom. *Coleman v. Jarrom*, 35 L.T. 614; 25 W.R. 137; 44 Digest 515, 3349.
- (2) *Shaw v. McMahon* (1843), 4 Dr. & War. 431; 44 Digest 392, 2259 i.
- (3) *Re Hornby's Will* (1859), 34 L.T.O.S. 6; 7 W.R. 729; 44 Digest 498, 3179.
- (4) *Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162; 100 L.J.Ch. 122; 144 L.T. 297; Digest Supp.
- (5) *Kingsbury v. Walter*, [1901] A.C. 187; 70 L.J.Ch. 546; 84 L.T. 697, H.L.; 44 Digest 516, 3352.

Adjourned Summons as to the effect of a codicil revoking a gift of a share of residue.

The testatrix, who made her will in 1866, gave her residuary estate in trust for her four daughters, Amy, Sophia, Julia, and Amelia, or such of them as should be living at her death in equal shares. By a codicil made in 1867 the testatrix revoked the gift of the share to Sophia, and in other respects confirmed her will. The testatrix died in 1873, and each of the four daughters survived her. The question for decision raised by the summons was whether the gift of the share to Sophia which was revoked by the codicil became undisposed of by the will, and was the subject of an intestacy, or whether it went to the other three daughters.

C. J. Partan for the plaintiff, one of the present trustees of the will of the testatrix.

Jenkins, K.C., and *Alfred Adams*, for the personal representatives of the other three daughters, referred to *Re Coleman and Jarrom* (1), *Shaw v. McMahon* (2), JARMAN ON WILLS (7th Edn., vol. 1, p. 405), and *Re Hornby's Will* (3).

R. R. Formoy, for the defendant Alice Mary Woods, the personal representative of the testatrix's deceased daughter Julia, appointed to represent the next-of-kin of the testatrix, referred to *Re Forrest, Carr v. Forrest* (4).

MAUGHAM, J.—The point which I have to determine is not free from doubt, and I am desirous of not deciding more than I must necessarily decide. The question is, what is the effect of a codicil revoking a gift of a share given to a

A daughter in the testatrix's residue? By her will which she executed as long ago as 1866 the testatrix, Sophia Woods, a widow, bequeathed—stating it shortly—her residue in trust for her daughters Amy Bardenell Woods, Sophia Woods, Julia Ann Woods, and Amelia Woods “or such of them as shall be living at my death in equal shares.” She then proceeded to settle the shares of those daughters on trusts which for the present purpose are immaterial. By her codicil dated Aug. 21, 1867, **B** after reciting the gift by her will of her residue to her said four daughters or such of them as should be living at her death in equal shares, and also the bequest of an annuity of £40 to her son Frederick Woods, she proceeded as follows :

“Now I revoke my said will so far as regards the said bequests to my daughter Sophia Woods and my son Frederick Woods, and substitute in the place of the said bequest to my daughter Sophia Woods a legacy of £100, which I hereby bequeath and direct to be paid free of legacy duty.”

C After some other dispositions in other respects she confirmed her will.

The question that now arises, and which in fact arose on the death of the testatrix which took place in the year 1873, is this: Having regard to the revocation of the gift to Sophia Woods (who, I should mention, afterwards became Mrs. Sophia **D** Turner), did the residue go in thirds between the three other daughters, Amy Bardenell Woods, Julia Ann Woods, and Amelia Woods, all of whom survived the testatrix, or is there an intestacy as regards the one-fourth share to which, but for the codicil, Sophia Woods would have become entitled to, since she has survived the testatrix? It is well settled that if there is a gift of residue to four daughters or, indeed, to any persons described nominatim, as for instance, a gift of residue **E** to A, B, and C in equal shares, if one of the three dies before the death of the testator there is an intestacy. It is also well settled that, if in such a case the testator by his codicil revokes the gift to one of the persons and adds no other disposition, there is an intestacy just as there would be in the case of the death of one of those persons before the death of the testator. The question which I have to decide here is, what is the effect of this particular codicil, having regard to the **F** fact that the residue is given in trust for the four daughters, naming them “or such of them as shall be living at my death in equal shares.”

It does not seem necessary for the present purpose to decide whether the gift to the four named children, or such of them as should be living at the death of the testatrix, can properly be described as a class gift. *Primâ facie*, the definition of a class gift, which is to be found in *Kingsbury v. Walter* (5), confines the phrase **G** to persons who are included and comprehended under some general description and bear a certain relation to the testator. In general, but this, of course, is not more than a generality, a class within the meaning of the phrase as used by LORD HALSBURY in that case is capable of diminution or increase, either by events prior to the testator's death or by events prior to the death of the tenant for life, as the case may be. On the other hand, it may well be that a class is not capable of increase, **H** so that it is not necessary in order that a gift should be one to a class, that there should be a capability of increase. This much, however, may be asserted of a gift to A, B, C and D, “or such of them as shall be living at my death,” that the testator is looking at them, if not as a class in the technical sense, at any rate as a group of persons who have got to be living at the death of the testator in order to take any interest under the bequest, and if the testator is so regarding the **I** persons named and by his codicil uses language which shows that one of the persons named is to have no benefit under the gift contained in the will, it does not in my opinion take a very long step to conclude that the other members of the group using the neutral term shall take the whole of the interest which he in the first instance was desirous of giving to those of the group who should be living at his death.

In the case of a true class gift, where there is a revocation by a codicil of a gift to one of the members of the class, it is now well settled that there is no lapse, but that the whole goes to the other members of the class. In *Re Coleman and*

Jarrom (1) SIR GEORGE JESSEL, after an elaborate consideration of nearly all, if not all, the material cases, came to the conclusion that where there is a gift to a class the proper view of the testator's intention is that he intends that the class shall take so far as the law allows; and, accordingly, he is saying in effect that the members of the class who are living at the death of the testator and are capable of taking are the persons to take. He cites, in particular, a decision in *Shaw v. McMahon* (2), by SIR EDWARD SUGDEN, where the testator (who was a former Master of the Rolls in Ireland) had given a fund equally among his children living at his death and by a codicil revoked the gift to one of the children, and SIR EDWARD SUGDEN, then Lord Chancellor of Ireland, held that there was no intestacy, but that the whole fund went to the other children. The ground of the decision in *Re Coleman and Jarrom* (1), and in the other cases there referred to by SIR GEORGE JESSEL, is that in a case where there is a gift to a class the presumption is that the testator only desires those members of the class who shall be alive at his death to take, and from that the court concludes that he also desires that only those members of the class who are living at his death and capable of taking shall take. In my opinion the same result should follow in such a case as the present.

I do not think there is any solid ground for doubt as to the intention of the testatrix: she revokes her will so far as regards the bequest to her daughter Sophia and substitutes in the place of that bequest a legacy of £100. If one is to read that into the will, is there any doubt that in effect the will must be read as if, when she comes to dispose of her residue, she gives £100 to her daughter Sophia Woods to be paid out of the fund, and then provides that the trustees are to stand possessed of the rest of her trust moneys, stocks, funds, and securities in trust for, not her four daughters, for as regards one the bequest is revoked, but in trust for her three daughters who shall be living at her death in equal shares. Accordingly, in my opinion, there is here a sufficient indication of the intention of the testatrix that only those members of the class or group of her four daughters who are capable of taking shall take, and that they shall take the whole; and I so decide.

Declaration accordingly.

Solicitors: *Albert M. Oppenheimer; Bell, Broderick & Gray.*

[*Reported by J. H. G. BULLER, ESQ., Barrister-at-Law.*]

Re SMITH'S MORTGAGE. HARRISON v. EDWARDS

[CHANCERY DIVISION (Eve, J.), April 15, 22, 1931]

[Reported [1931] 2 Ch. 168; 100 L.J.Ch. 276; 145 L.T. 441]

Mortgage—Costs—Mortgagee's costs—Wrongful act of third person—Costs incurred in protecting title to estate—Sale—Bid by mortgagor—Costs of resisting unsuccessful action by mortgagor to enforce alleged sale—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 105.

Costs of litigation concerning the mortgaged property arising out of the wrongful act of a third person will not be allowed to the mortgagee [to be added to the mortgage and retained out of his security] unless they were incurred in protecting the title to the estate.

First mortgagees, having called in the mortgage, exercised their power of sale. The mortgagor made the highest bid at the auction, but her bid was rejected. The mortgagor then registered as an estate contract, and brought an action against the first mortgagees for specific performance of, the contract which she alleged her bid created. This action was dismissed with costs and the

A mortgagor was also ordered to pay the first mortgagees' costs of their motion to vacate the registration of the estate contract. On a claim by the first mortgagees to retain these costs out of the proceeds of sale as against second mortgagees as costs, charges and expenses properly incurred as incident to the sale within s. 105 of the Law of Property Act, 1925,

B **Held:** the claim failed because the costs arose out of actions by the mortgagor as the alleged highest bidder at the auction and not as mortgagor, and the dispute did not at any time touch the first mortgagees' title to the estate.

Parker v. Watkins (1) (1859), John. 133, and *Owen v. Crouch* (2) (1857), 5 W.R. 545, applied.

C **Notes.** As to costs of a mortgagee in defending his security against third parties, see 23 HALSBURY'S LAWS (2nd Edn.) 356, para. 531, text and note (n); as to costs of litigation allowed to a mortgagee, see *ibid.* 413, para. 618; and for cases on the subject, see 35 DIGEST 393, 1361, and *ibid.* 698 et seq., 4041 et seq., respectively. As to the application of money from a sale under the statutory powers, see 23 HALSBURY'S LAWS (2nd Edn.) 442, para. 651; and for s. 105 of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 467.

D Cases referred to:

(1) *Parker v. Watkins* (1859), John. 133; 33 L.T.O.S. 270; 70 E.R. 369; 35 Digest 689, 4324.

(2) *Owen v. Crouch* (1857), 5 W.R. 545; 35 Digest 647, 3777.

(3) *National Provincial Bank of England v. Games* (1886), 31 Ch.D. 582; 55 L.J.Ch. 576; 54 L.T. 696; 34 W.R. 600, C.A.; 35 Digest 669, 4048.

E **Adjourned Summons** as to whether a first mortgagee was entitled, as against second mortgagees, to deduct from the proceeds of sale of the security the costs of resisting unsuccessful proceedings by the mortgagor against the first mortgagee to enforce an alleged sale of the security to the mortgagor.

By an indenture of legal charge made on Jan. 16, 1929, A. T. Smith mortgaged Padmore Farm, Eastoft, in the county of Lincoln, to S. H. Harrison and L. C. Nicholl, the first mortgagees, to secure £800 with interest at £6 per cent. per annum. By an indenture of further charge made on April 9, 1929, the premises were mortgaged to E. E. and C. E. Edwards, the second mortgagees, to secure £200 with interest as therein mentioned, and this charge was duly registered as a puisne mortgage. The first mortgage was in due course called in and the first mortgagees exercised their power of sale and sold on Dec. 10, 1929, by auction to R. E. Taylor for £1,130. At the auction A. T. Smith, the mortgagor, claimed to be the highest bidder and registered an estate contract subsequently on the property. That bid was not accepted. An action was then brought against the first mortgagees for specific performance, which was dismissed with costs, the mortgagor being also ordered to pay the costs of a motion to take the contract off the register. They amounted to £275, which the mortgagor had no assets to meet.

H In these circumstances this summons was issued asking whether the first mortgagees were entitled to retain these costs out of the net proceeds of sale or whether, after deduction of the principal, interest, and costs, not including these, they held the balance on trust for the second mortgagees.

I *F. C. Watmough*, for the first mortgagees, the plaintiffs, cited s. 105 of the Law of Property Act, 1925; SETON, vol. 2, p. 1881; WOLSTENHOLME, CONVEYANCING STATUTES, vol. 1, p. 315; *National Provincial Bank v. Games* (3).

L. M. Jopling, for the second mortgagees, the defendants, referred to *Parker v. Watkins* (1) and *Owen v. Crouch* (2).

Cur. adv. vult.

April 22. The following judgment was read.

EVE, J.—The question for determination is whether the plaintiffs, the first mortgagees, are entitled to retain out of moneys in their hands representing proceeds

of sale of property sold by them by auction as mortgagees under their statutory power of sale all or any part of the costs of an action brought by the mortgagor claiming specific performance of an alleged contract effected by a bid made by her at the auction and of a motion by the first mortgagees for vacation of a land charge effected by the registration by the mortgagor of an estate contract in respect of the said bid. A

The mortgage was created by a legal charge dated Jan. 16, 1929, made between the mortgagor of the one part, and the first mortgagees of the other part, whereby certain lands and premises at Eastoft in the county of Lincoln were conveyed to the first mortgagees to secure an advance of £800 and interest at 6 per cent. per annum. The defendants, the second mortgagees, are puisne mortgagees of the same property by virtue of a charge dated April 9, 1929. The mortgagor made default in the payment of interest and the first mortgagees in exercise of their power of sale put the property up for sale by auction on Dec. 10, 1929, when it was sold to one Taylor for £1,130. The mortgagor, who was present at the sale, alleged that she and not Taylor was the highest bidder and that by her bid she accepted the vendors' offer to allow the highest bidder to be the purchaser so as to constitute a binding agreement between her and the vendors, and she thereupon registered a land charge under the Land Charges Act, 1925, in respect of the estate contract created by her alleged bid. The first mortgagees on Jan. 3, 1930, moved for an order to vacate this registration, but on the mortgagor intimating her intention of issuing a writ for specific performance of the alleged contract no order was made on the motion except that the costs thereof were to be dealt with in the action. B C D

The action, which was in substance one for specific performance, was duly brought, the first mortgagees and the purchaser being defendants, and on Oct. 30, 1930, it was dismissed with costs, the plaintiff in the action [the mortgagor] being also ordered to pay the costs of the motion. She has made no payment on account of the costs which were taxed at £275 15s. 2d., and if the first mortgagees are right in their claim to retain these costs out of the proceeds of sale there will remain little or nothing for the second mortgagees. In these circumstances the second mortgagees contest the first mortgagees' claim; they do not dispute that a mortgagee is entitled to retain costs of litigation properly and reasonably incurred, but they argue that this right is limited to costs of litigation incurred for the benefit of all parties interested, that is to say, in asserting or protecting the title to the estate, and does not extend to costs incurred by the mortgagee in defending his own security, still less to those involved in resisting the claim of a person whose cause of action is an alleged dereliction of duty on the part of the mortgagee. E F

In support of this contention they rely on *Parker v. Watkins* (1) and *Owen v. Crouch* (2). The following is a short statement of the material facts of the earlier of these two cases. In a settlement made in 1824 whereby five freehold houses at Oxford were settled on one Anne Eaton and her husband for their lives and the life of the survivor with remainder to all their children in fee, there was contained a power to the settlors to direct the trustees to raise the sum of £1,500 and to pay the same as they, the settlors, should appoint, with power to the trustees to raise the said sum by mortgage of the settled property except one house. In 1842 Mrs. Eaton and her husband assigned her life interest to the defendant Watkins by way of mortgage for securing £1,200 and interest. In 1845 the settlors appointed the whole sum of £1,500 and directed the same to be paid to four persons who were trustees of another settlement. The £1,500, together with £60, the estimated costs incurred in raising the same, was borrowed from the plaintiff Parker and secured by mortgage of the settled property except the one house. In 1852 Anne Eaton, then a widow, brought an action against the surviving trustee of the settlement, his solicitors, Parker and Watkins, wherein she claimed, amongst other things, a declaration that Parker's mortgage was a security for £1,500 only, alleging that the £60 for costs ought to have been provided out of the appointed fund. The action was dismissed with costs as against Parker and an appeal from this part of the decree met with the same result. Parker's costs of the suit and appeal were taxed G H I

A at £195 and upwards, but no part of this sum was paid by Mrs. Eaton and in the action, to the report of which I am referring and which was an action for foreclosure, Parker claimed to be paid this £195 by the defendants or some of them. The vice-chancellor expressed himself as having no doubt that the £60 was properly raised, but he dismissed Parker's claim to be paid the costs of Mrs. Eaton's action by Watkins and the reversioners, and gave his reason in these words:

B "I quite agree, that, where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate; but if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption unless they can be shown to have concurred in or assisted the litigation. It is the ordinary case of anyone who has the misfortune to have dealings with a litigious person, who is unable to pay the costs occasioned by his conduct."

C In *Owen v. Crouch* (2) the contrast between the two kinds of litigation was still more marked. There the mortgagee on entering into possession of the mortgaged premises found them in the occupation of two Irish families who had been planted therein by the next-door neighbour, one Millikin, whom the vice-chancellor described as a man of violent and unscrupulous character. The mortgagee turned the intruders out but later on was himself forcibly evicted by Millikin, who was accompanied by some twenty other Irishmen. On the advice of counsel the mortgagee brought an action for ejectment in which he obtained a verdict; he also defended an action of trespass brought by Millikin, who was non-suited. On a summons to determine whether the mortgagee should be allowed the costs of prosecuting the action of ejectment and defending the action of trespass, Wood, V.-C., after holding that the costs of the ejectment action must be allowed, proceeded as follows:

E "As to the costs of defending the action of trespass, the case was very different. This violent neighbour chose to bring an action of trespass against the mortgagee with as much reason as he might against anyone then in court. Was the court to fasten upon the mortgagor the consequences of this action? It was contended that if the mortgagor had paid the defendant at the proper time, there would have been no action; but this applied equally to the assault, or any other possible collateral damage arising from this inconvenient neighbour, which could not be fastened upon the mortgagor, who was only liable for any charges incurred in a just protection of the property. These costs did not come within that category, and they could not be allowed to the mortgagee."

G These cases show clearly that costs of litigation concerning the mortgaged property arising out of the wrongful act of a third person will not be allowed to the mortgagee unless they were incurred in protecting the title to the estate.

H All the costs involved in the present application were incurred in resisting an unfounded claim by the mortgagor that the mortgagee had entered into a contract to sell the property to her. The dispute did not at any point touch the title to the estate, but was confined to an attack upon the mortgagee and the fact that the mortgagor happened to be the attacking party was in the circumstances a mere accident and of no materiality. It was not in that capacity she sued, but as the alleged highest bidder at the auction. I must therefore answer the first question in the negative, the second in the affirmative, and order the first mortgagees to pay the second mortgagee's costs.

Declaration accordingly.

Solicitors: *E. C. Kilsby & Son; E. Edwards & Son.*

[Reported by A. W. CHASTER, Esq, Barrister-at-Law.]

Re WARREN. WARREN v. WARREN

[CHANCERY DIVISION (Maugham, J.), March 5, 6, 1931]

[Reported [1932] 1 Ch. 42; 101 L.J.Ch. 85; 146 L.T. 224]

Will—Ademption—Devise of undivided share in land in 1923 will—Statutory conversion in 1926—Will confirmed by codicil in 1927—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 26 (3), s. 35, Sched. I, Part IV, para. 1—Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11), s. 7, Sched.

A testatrix, who died in 1930, by her will made in 1923 devised an undivided share in land to her son absolutely. In 1926, by the operation of the Law of Property Act, 1925, Sched. I, Part IV, para. 1, the testatrix's interest in the land was converted into an interest in the proceeds of sale thereof. In 1927 the testatrix confirmed the will by a codicil which contained no mention of the land or of the testatrix's interest therein.

Held: the statutory conversion did not adeem the devise, which was, therefore, effective to give the son an absolute interest in the testatrix's share of the proceeds of sale of the land.

Re Mellish, Clark v. Buchanan (1) cited in *A.-G. v. Public Trustee and Tuck* (2), [1929] 2 K.B. 81 n; *Re Kempthorne, Charles v. Kempthorne* (3), [1930] 1 Ch. 268; and *Re Wheeler, Jameson v. Cotter* (4), [1929] 2 K.B. 81, n, considered.

Re Newman, Slater v. Newman (5), [1930] 2 Ch. 409; and *Powys v. Mansfield* (6), 3 Myl. & Cr. 359, distinguished.

Notes. Followed: *Re Harvey, Public Trustee v. Hoskin*, [1947] 1 All E.R. 349. Distinguished: *Re Viscount Galway's Will Trusts, Lowthen v. Viscount Galway*, [1949] 2 All E.R. 419; Considered: *Re Bradshaw, Bradshaw v. Bradshaw*, [1950] 1 All E.R. 643; *Bull v. Bull*, [1955] 1 All E.R. 253. Referred to: *Re Oakes' Will Trusts, Lloyds Bank v. Barker* (1948), 92 Sol. Jo. 167.

As to confirmatory codicil avoiding ademption by conversion, see 14 HALSBURY'S LAWS (3rd Edn.) 579, para. 1075, text and notes (l) and (m), and 34 *ibid.* (2nd Edn.) 100, para. 136, text and note (q), 129, para. 164, text and note (g); as to the effect of re-publication, see *ibid.* 97, para. 134; and as to the transitional provisions of the 1925 legislation as to undivided shares in land, see 37 *ibid.* 629 *et seq.*, para. 1104 *et seq.* For the Law of Property Act, 1925, s. 26 (3), s. 35, Sched. I, Part IV, para. 1; and for the Law of Property (Amendment) Act, 1926, s. 7, Sched., see 20 HALSBURY'S STATUTES (2nd Edn.) 903.

Cases referred to:

- (1) *Re Mellish, Clark v. Buchanan* (1927), unreported. Cited in [1929] 2 K.B. at p. 82 n.
- (2) *A.-G. v. Public Trustee and Tuck*, [1929] 2 K.B. 77; 98 L.J.K.B. 462; 141 L.T. 398; 73 Sol. Jo. 299; Digest Supp.
- (3) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 177; 142 L.T. 111; 46 T.L.R. 15, C.A.
- (4) *Re Wheeler, Jameson v. Cotter*, [1929] 2 K.B. 81, n; 141 L.T. 322; Digest Supp.
- (5) *Re Newman, Slater v. Newman*, [1930] 2 Ch. 409; 99 L.J.Ch. 427; 143 L.T. 676; Digest Supp.
- (6) *Powys v. Mansfield* (1837), 3 Myl. & Cr. 359; 7 L.J.Ch. 9; 1 Jur. 861; 40 E.R. 964, L.C.; 20 Digest 493, 2224.
- (7) *Re Price, Price v. Price*, [1929] 2 Ch. 400; 98 L.J.Ch. 417; 141 L.T. 511; Digest Supp.
- (8) *Stokes v. Salomons* (1851), 9 Hare 75; 20 L.J.Ch. 343; 17 L.T.O.S. 209; 15 Jur. 483; 68 E.R. 421; 44 Digest 701, 5439.

- A (9) *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348; 64 L.J.Ch. 567; 72 L.T. 816; 11 T.L.R. 396; 12 R. 362, C.A.; 44 Digest 428, 2575.
- (10) *Re Frewen*, [1926] Ch. 580; 95 L.J.Ch. 297; 134 L.T. 747; 70 Sol. Jo. 650; 40 Digest (Repl.) 804, 2832.
- (11) *Hopwood v. Hopwood* (1859), 7 H.L.Cas. 728; 29 L.J.Ch. 747; 34 L.T.O.S. 56; 5 Jur.N.S. 897; 11 E.R. 290, H.L.; 20 Digest 451, 1758.
- B (12) *Cowper v. Mantell (No. 1)*, *Cooper v. Mantell (No. 1)* (1856), 22 Beav. 223; 27 L.T.O.S. 130; 2 Jur.N.S. 745; 4 W.R. 500; 52 E.R. 1094; 44 Digest 379, 2136.
- (13) *Sidney v. Sidney* (1873), L.R. 17 Eq. 65; 43 L.J.Ch. 15; 29 L.T. 569; 22 W.R. 101; 23 Digest (Repl.) 391, 4623.
- C (14) *Oakes v. Oakes* (1852), 9 Hare 666; 68 E.R. 680; 44 Digest 413, 2438.
- (15) *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665; 97 L.T. 74; 76 L.J.Ch. 472, C.A.; 44 Digest 647, 4865.

Adjourned Summons raising the question whether a devise of an undivided share in land had been adeemed by its statutory conversion under the Law of Property Act, 1925.

D The following facts are taken from the judgment:

E Rebecca Charlotte Warren, hereinafter called the testatrix, by her will dated Feb. 11, 1923, provided, so far as is material, as follows: She appointed to be executors and trustees, her son, the defendant, Godfrey Francis Warren, and her daughter, the plaintiff, Eva Charlotte Warren, and by para. 3 of her will the testatrix devised her share in the land and hereditaments at Rampside in the county of Lancaster to the defendant, Godfrey Francis Warren, absolutely, but subject to and charged with all duties payable in respect of it by reason of her death.

F The testatrix devised and bequeathed all her residuary real and personal estate to her trustees upon trusts for sale and after payment of expenses and debts and an annuity thereby bequeathed, to divide the balance into four equal parts and to pay one equal fourth part to each of her children, namely, Godfrey Francis Warren, Eva Charlotte Warren, and the defendant Maud Ella Warren. As to the remaining one-fourth to invest it and to hold capital and income in trust, in equal shares, for the children of her late son, Alfred Robert Warren, who should attain twenty-five, and upon failure of that trust to divide that fourth share between such of the testatrix's children as should then be surviving.

G By a codicil to her will, dated May 22, 1927, the testatrix made certain alterations to her will not material to this summons, and subject to those alterations she confirmed her will. The testatrix died on May 25, 1930, without having, except as stated, revoked or altered her will and codicil, which were proved July 19, 1930. At the date of the will the testatrix was possessed in her own right of a one-fourth share of the property at Rampside referred to in her will, the remaining three-fourths share being held by other persons. At the date of her death that property had not been sold, and by virtue of the operation of para. 1, Part IV, of Sched. I to the Law of Property Act, 1925, it was held upon the statutory trusts declared by s. 35. Accordingly, as and from 1926, the testatrix was entitled only to a share of the proceeds of the sale. On May 21, 1930, there were living two children of the testatrix's son, Alfred Robert Warren, namely, the defendants, Reginald H Tancred Warren, born Oct. 18, 1911, and Phyllida Mary Warren, born Oct. 12, 1913.

I This summons asked that it might be determined: Whether the devise of the Rampside property to Godfrey Francis Warren was adeemed by the joint operation of s. 35 and Sched. I, Part IV, para. 1, of the Law of Property Act, 1925.

Roger Turnbull for the plaintiff.

J. F. Bowyer (*Evershed* with him), for the defendant son, Godfrey Francis Warren, referred to *Re Price, Price v. Price* (7); *Re Kempthorne, Charles v. Kempthorne* (3); *Re Newman, Slater v. Newman* (5); s. 35 of the Law of Property Act,

1925; *Re Mellish, Clark v. Buchannan* (1); *A.-G. v. Public Trustee and Tuck* (2); *Stokes v. Salomons* (8); STROUD'S JUDICIAL DICTIONARY (2nd Edn.), vol. 3 at p. 1859; *Powys v. Mansfield* (6); *Re Lowman, Devenish v. Pester* (9).

L. W. Byrne, for the defendants, *Maud Ella Warren, Reginald Tancred Warren and Phyllida Mary Warren*, referred to *Re Frewen* (10); *Hopwood v. Hopwood* (11); *Cowper v. Mantell* (12); *Sidney v. Sidney* (13); *Re Newman, Slater v. Newman* (5).

MAUGHAM, J., stated the facts, and continued: It is not correct to say that the testatrix was entitled only to a share of the proceeds of sale. She had certain other rights. Apart from the recent legislation, there can be no question but that the devise was an effective devise to the defendant, and the question for decision is whether, as the result of the recent legislation, the devise has been adeemed by operation of law. In considering that question it is important to note that the legislature has not deprived the testatrix of all interest in the land. The "statutory trusts"—the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925—are, shortly, to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land. Then by an amendment in the Schedule to the Law of Property (Amendment) Act, 1926, it is enacted, in substitution for s. 26 (3) of the Act of 1925, that

"trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with."

Having regard to the provisions of that subsection, it is clear that trustees for sale would be acting wrongly, in general, in selling, if undivided beneficial owners required them not to sell. There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was before. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act.

I must now refer as shortly as may be to a number of cases. The first is *Re Mellish, Clark v. Buchannan* (1), which has never been reported, but the effect of which is stated in *Re Wheeler, Jameson v. Cotter* (4). In *Re Mellish, Clark v. Buchannan* (1) the testator, who died in 1927, by his will made in 1923, devised all his share and interest in the "Rushall" estate to one C. J. Buchannan in fee simple. At the time of his death his interest in the "Rushall" estate was a one-ninth share in the legal estate in fee simple, and a one-ninth share in the net proceeds of sale of another third. He made no codicil, and *Eve, J.*, held that

"the devise of the testator's share or interest in the 'Rushall' estate was not adeemed in whole or in part by the Law of Property Act, 1925, and that the devise took effect as a bequest of the testator's interest therein and the proceeds of sale thereof."

The next case is *Re Wheeler, Jameson v. Cotter* (4), a decision of *TOMLIN, J.* In that case the devise was contained in a will dated June 24, 1925. The testator devised all his real estate and undivided shares of real estate in the county of York, subject to the payment of a yearly rentcharge, to his grandson, Sir Delaval James A. Cotter, Bart.—who was an infant—and his assigns during his life with remainders over. He made a codicil to his will dated Sept. 3, 1927, whereby he gave certain legacies and confirmed his will, and he died on Sept. 27, 1927. The estate duty on the real estate in the county of York was paid out of personal

- A property, the real estate being treated as personal estate by reason of the notional conversion of the statutory trust for sale on which the estate was held at the testator's death under the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (2). But the question arose how the duty ought ultimately to be borne as between the persons entitled to the testator's interest in the land or the proceeds of sale thereof, and the persons entitled to the testator's residuary estate, and *Re Mellish, Clark v. Buchanan* (1) was cited. TOMLIN, J., stated the relevant parts of the will, referred to the codicil, and cited *Re Mellish, Clark v. Buchanan* (1), of which decision he certainly did not disapprove. In regard to the question raised before him he followed that decision, and held that the estate duty on the proceeds of sale of the real estate of the tenant for life ought to be borne by the persons entitled to that interest.
- C A somewhat similar case came before me in *Re Kempthorne, Charles v. Kempthorne* (3). It will be noted, however, that in that case the testator, by his will dated Dec. 2, 1911, devised to his brother "all my freehold and copyhold property" in quite general terms, and disposed of the residue to persons other than the devisee. There was no codicil. The testator died on Aug. 15, 1928, and the question which arose was whether the real estate of which he was possessed at the date of his will did or did not become personal estate at the date of his death. Following what I thought was the view of CLAUSON, J., in *Re Price, Price v. Price* (7), I held that the undivided shares in the testator's land passed under the gift in the will contained of "all the personal estate" of the testator. The matter went to the Court of Appeal, and the Court of Appeal approved of, at any rate, that part of my decision. LORD HANWORTH, M.R., cited *Re Wheeler, Jameson v. Cotter* (4) and *Re Mellish, Clark v. Buchanan* (1), and did not disapprove of them, although he stated that they were "based upon the interpretation given to the gifts in the two wills." RUSSELL, L.J., also referred to those two cases without disapproval, and said that in *Re Wheeler, Jameson v. Cotter* (4) the distinguishing feature in his opinion was ([1930] 1 Ch. at p. 293)
- F "that although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will, so that his testamentary disposition had to be treated as one made at the date of the codicil,"
- and he added:
- G "The learned judge must necessarily have taken the view that, when the testator used that language, he must have been intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in the county of York."
- A somewhat similar problem came before FARWELL, J., in *Re Newman, Slater v. Newman* (5). In that case a testator and his brother John were entitled, at the date of the testator's will, to certain freehold property in Rose Alley and Bear Gardens, Southwark, as tenants in common in equal undivided moieties. By his will dated May 15, 1922, the testator devised unto and to the use of John, his heirs and assigns,
- H "all my moiety or equal half part or share and all other my share in the factory and hereditaments situate at Rose Alley and Bear Gardens . . ."
- I to hold the same for his own beneficial and absolute use subject to certain payments. The testator died on Dec. 29, 1929, without altering or confirming his will. FARWELL, J., decided that the specific devise was adeemed by the imposition of the statutory trusts by the Law of Property Act, 1925, and that the testator's brother John took nothing. He went through the relevant cases, and concluded that ([1930] 2 Ch. at p. 417):

"If the testator uses language that can only be construed as a devise of real estate, and, notwithstanding the imposition of the statutory trusts, he dies without altering or confirming his will, the conversion effected by the statutory

trusts adeems the devise, because there is nothing left for that devise to operate on. If on the other hand the testator uses language wide enough to carry any interest in the property whether it be in law real or personal property, the conversion is immaterial."

Dealing with the testator's language, the learned judge said :

"It is in my judgment not apt to pass anything but a moiety of real estate, and as there is no real estate left the devise does not operate."

and he held that the whole devise failed. I should add that the learned judge in that case did not rely on the fact that the actual language of the will was such as to make it clear that the testator was devising his real estate and nothing else. It is clear that that was not a case in which there was a confirmation by a codicil executed after the coming into force of the Law of Property Act, 1925. I should be disposed to follow that decision in a case that was like it. However, I attribute weight in these cases to the consideration that the result of the statutory trusts is not wholly to deprive the person previously entitled to an undivided share of all interest in the land, and the language of the testator may well be such that that consideration may result in the decision that there is no ademption.

In considering the effect of the codicil I have to bear in mind the decision in *Powys v. Mansfield* (6), where LORD COTTENHAM had to deal with the effect of such a codicil in relation to one of the various problems of ademption which arise as between persons in loco parentis and a child. There had been, it seems, a legacy of £10,000, which, according to the ordinary doctrine of the Court of Chancery, had been adeemed by a subsequent provision for the legatee. After the provision the testator had made a codicil in 1818 confirming the will, and LORD COTTENHAM points out as follows (3 Myl. & Cr. at p. 375):

"It has been argued that the codicil of June 23, 1818, confirming the will, makes the will speak as of the date of the codicil, and therefore revives the legacy, if it had been adeemed by the settlement; and, at all events, is evidence of an intention that the legacy should take effect. It is very true that a codicil re-publishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it."

He cites cases, and concludes :

"And as to the argument that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given which has been given to a similar argument in other cases, namely, that the testator, if he knew the rule of law, must have known that the codicil would not revive the adeemed legacy, and, therefore, it was unnecessary for him to mention it: the probability, however, is, that his attention being directed to the only object of the codicil, the words of confirmation of the will were introduced as words of course, without any reference to the legacy in question."

I am bound by that decision so far as it is in point, but it seems to me that, although we commonly use the word "ademption" to describe the results of ademption by portion or by acts of the testator after the date of the will, and also to describe the destruction or alteration of the subject-matter of the devise or bequest after the date of the will by events which take place independently of the testator and possibly without his knowledge, the two things are really different. The judgment of LORD COTTENHAM shows that, where the question is whether a new legacy is being given by the confirmation of a will by a codicil, so as to give a child a double portion, the question must be answered as he answered it. I am not satisfied, however, that the same result should follow when an alteration in the nature of property has taken place by operation of law, and the testator by a codicil has confirmed his will after the alteration of the law. It may be worth while pointing

A out that not every alteration in the nature of a testator's interest in specific property is enough to work ademption. It may, also, help to show the nature of the problem before the court to call attention to *Oakes v. Oakes* (14), a case dealing with shares in a railway company. At the end of his judgment Sir GEORGE TURNER, V.-C., said (9 Hare at p. 672):

B "If the testator gave all stock standing in his name at the date of his will, and it turned out that there was some stock standing in the name of a mortgagee, the equity of redemption in that stock would not pass; but if it happened that, at the date of his will, there was stock standing in his name, and that the testator had subsequently mortgaged it, the mortgage would not have adeemed or revoked the bequest. So, in this case, the testator had this property at the time he made his will, and it has since been changed in name or form only."

C That decision is approved in *Re Slater, Slater v. Slater* (15), where COZENS-HARDY, M.R., referred to the accuracy of the language, and said that there was great force in the words.

D "... changed in name or form only. The question is, whether a testator has at the time of his death the same thing existing, it may be in a different shape —yet substantially the same thing."

E I return now to the present case. The testatrix, subject to certain modifications, confirmed her will. *Primâ facie* that means that she confirmed the devises partly contained in para. 3 of the will. There can be no doubt at all that if, in the codicil, she had used the words contained in that paragraph, her undivided share in the proceeds of sale would have passed: *Re Lowman, Devenish v. Pester* (9). I do not regard *Powys v. Mansfield* (6) as laying down the general proposition that no kind of so-called ademption could be prevented by the confirmation of a will by a codicil. The question is one of the testator's intention, according to the rules laid down by the court for the construction of wills. Having regard to the various considerations that I have mentioned, and to the facts that the testatrix had not parted with the whole of her interest in the land, that what she is here devising is her share of it, and that she has, after the alteration of the law, confirmed her will without any mention of the real estate or of that share, I am of opinion that the devise took effect, in the sense that the interest in the proceeds of sale passed to the defendant absolutely. In coming to that conclusion, without saying that I rely on *Re Wheeler, Jameson v. Cotter* (4), I am glad to think that, in substance, I am following the line of thought which commended itself to the court in that case.

G Declaration accordingly.

Solicitors for all parties: *Ford, Lloyd, Bartlett & Michelmores*, for *Hillman, Burt & Warren*, Eastbourne.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

BOLDRINI v. BOLDRINI AND MARTINI

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slesser, L.J.J.),
November 26, 27, 1931]

[Reported [1932] P. 9; 101 L.J.P. 4; 146 L.T. 121; 48 T.L.R. 94;
75 Sol. Jo. 868]

*Domicil—Alien—Residence in England under Aliens Order—Capacity to acquire
domicil of choice in England.*

The husband, who was of Italian nationality, was registered as an alien in England and, as such, was subject to the provisions of the Aliens Restriction Act, 1914, and the Aliens Order, 1920. In a suit by the husband for dissolution of his marriage, the wife contended that the court had no jurisdiction on the ground that the husband's domicil was not English.

Held: (i) on the facts, the husband had discharged the onus on him of proving that he had acquired an English domicil of choice; and

(ii) the fact that he was an alien subject to the provisions of the Aliens Restriction Act, 1914, and the Aliens Order, 1920, did not preclude him from acquiring an English domicil of choice.

Notes. The Aliens Order, 1920 (S.R. & O. 1920 No. 448, as amended) has been revoked and replaced by the Aliens Order, 1953 (S.I. 1953 No. 1671).

Considered: *May v. May and Lehmann*, [1943] 2 All E.R. 146. Applied: *Zanelli v. Zanelli* (1948), 64 T.L.R. 556.

As to change of domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 16–17, para. 31; and for cases on the subject, see 11 DIGEST (Repl.) 338–340, 97–118. For the Aliens Restriction Act, 1914, see 1 HALSBURY'S STATUTES (2nd Edn.) 691. For the Aliens Order, 1953, see 2 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

- (1) *Stanley v. Bernes* (1830), 3 Hag. Ecc. 373; 162 E.R. 1190; 11 Digest (Repl.) 329, 43.
- (2) *A.-G. v. Yule and Mercantile Bank of India* (1931), ante, p. 400; 145 L.T. 9, C.A.; 11 Digest (Repl.) 350, 181.
- (3) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, 39.
- (4) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, 22.
- (5) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, 41.
- (6) *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; 163 E.R. 296; 11 Digest (Repl.) 328, 35.

Appeal.

Appeals by the respondent and co-respondent from a decision of LORD MERRIVALE, P., dated July 21, 1931. The facts are set out in the judgment of LORD HANWORTH, M.R.

J. P. Eddy and William Latey for the appellants, the respondent and co-respondent.

G. C. Tyndale for the respondent, the petitioner.

LORD HANWORTH, M.R.—This appeal fails in spite of everything possible having been said in support of it. The question we have to determine is whether the President (LORD MERRIVALE) rightly directed himself on the law, and whether, on the facts, the petitioner was domiciled in England so as to entitle him to a decree nisi for the dissolution of his marriage.

- A** The facts are short. In 1914, the petitioner came to England. During the War he was called up to serve in the Italian army, he being an Italian, and from 1916 to 1920 he served with the Italian army. In 1920, he was demobilised and returned to England. In 1923, he married his wife, who was a Belgian, and whom he met in England. There were two children of the marriage. The name of the elder was Maurice Henry. The name Maurice is not a subject of comment, but it is noticeable that the husband did give his son the distinctly English name of Henry. The second son had as his first name an Italian name, Mario, but his second name was Paul. Both were living with the petitioner's parents in Italy, the elder having been living in Belgium till April last, while the younger was sent to Italy two-and-a-half years ago. There was a certain amount of restlessness as to where the petitioner and his wife should live. Some two years before the petition was heard, there was some talk of their going to the United States, and a visit to the United States consulate with a view to making inquiries as to going to some employment in the United States. That came to nothing. Soon after that, only last year, the petitioner went to Belgium with his wife for a fortnight with a view to getting suitable employment. That came to nothing. The petitioner said he had done those things to please his wife, but had no intention of leaving England.
- D** The petitioner was a waiter, who had saved some money. On July 1, 1930, he took a tenancy agreement of premises in Stacey Street, Soho, as a suitable house in which they could live and let rooms. For that he put down a premium of £400. After that, the respondent went to live with somebody else, and adultery was clear. The petition was presented in September, 1930, the petitioner being resident at the time at the home for which he had paid the premium, a substantial part of his savings, and in respect of which he had undertaken serious responsibilities. The charge of adultery was not contested, and two questions were left for decision—domicil and damages. The amount awarded in damages was the not inconsiderable sum of £200.

- Jurisdiction in divorce in England depends on domicil, and there is no doubt that anyone seeking to override his domicil of origin takes on himself a heavy burden of proof. There must be an *animus manendi* accompanied by acts showing that it was more than a mere intention. That has been held over and over again. The principle was stated by SIR JOHN NICHOLL in the early case of *Stanley v. Bernes* (1) as follows:

- G** “For certain purposes a man takes his character, *primâ facie*, from the place where he is domiciled, and, *primâ facie*, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive, for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice—it depends on the intention, on the *quo animo*—that is the true basis and foundation of domicil; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*: a temporary residence for the purposes of health, or travel, or business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicil of origin; yet liable still to a subsequent change of intention.”

- I** In *A.-G. v. Yule and Mercantile Bank of India* (2), which was recently before this court, I went through all the cases, including *Bell v. Kennedy* (3), *Udny v. Udny* (4) and *Winans v. A.-G.* (5), and I deduced the law on this subject to short and simple principles, such as few of our laws are capable of being reduced to, and I quoted the short summing-up of LORD MACNAGHTEN in *Winans v. A.-G.* (5) ([1904] A.C. at p. 291):

“So heavy is the burden cast upon those who seek to show that the domicil of origin has been superseded by a domicil of choice. And rightly I think. A

change of domicile is a serious matter . . . The change may involve far-reaching consequences in regard to succession and distribution, and other things which depend on domicile,"

and I said (145 L.T. at p. 14):

"The question must be decided *animo et facto*. The *animus manendi* must be considered, the intention of the resident must be observed and deduced."

The learned President not only shows in his judgment that he is fully aware of all these principles, but he says:

"If the matter had arisen two years ago, I think it would have been difficult to say that there was proof which could satisfy the court of a fixed and settled intention of the petitioner to make his permanent home here."

He is there referring to the fact that until 1929 there had not been any overt act such as there had been since by reason of the petitioner taking a lease of his house and paying down £400 by way of premium out of his savings.

The petitioner said he returned to this country after being demobilised, because "England was my country to stop here and live." The petitioner's evidence must be considered on that point, and it is to be noted that he did get a pass from the Italian Government after being demobilised to enable him to return to what he contends is his domicile of choice. Then he goes on to say that he established himself here with his wife and that he was carrying on with his wife the business of lodging-house keeper, he being the waiter and she the cook, a not unsatisfactory business; and the learned President held that he had discharged the onus of proving that he had become domiciled in this country.

Let us test the matter according to the suggestions of the respondent. She said the petitioner was of a wayward inclination, one moment looking to America and another to Belgium. Is not the right inference that, after these wayward and irresolute attempts to go elsewhere, he comes back to the view that he will remain in England and that he puts down what may be called an anchor in the sense that he takes a house and depletes his savings of £400?

An attempt has been made to put in further evidence and we admitted it, though this must not be taken as a precedent, because, as the petitioner was of Italian nationality and his wife a Belgian, it seemed best not to exclude the evidence.

The effect of this evidence is that the petitioner said, after his wife had left him, that he regretted having bought his house and would be glad to sell it, with the result that someone was brought to see it who thought of taking it, but it came to nothing. The purpose of this evidence is to show that he had abandoned his intention of residing in England. I am unable to take that view of the evidence. What does it mean but that a man who has lost his wife by her being unfaithful to him with a man who has wronged him, as is shown by the fact that the President granted £200 damages, thinks of going away? Are we to attach much importance to the fact that the petitioner while acutely suffering owing to his wife's conduct, says: "I wish to be free and I am sorry I have got this house"? What weight is to be given to these circumstances caused by misfortune? There is clear evidence of expressed intention to change the domicile and of acts adding force to that intention and proving both *animus* and *factum*. It is said the President has too lightly allowed the onus to be discharged. It is always difficult to weigh the evidence of witnesses who, as here, have not been seen in the box. Everything points to the President being entitled to attach full weight to the facts proved before him, in order to justify him in holding the onus to be discharged.

Then there is one more point to which I must refer, namely, that the petitioner is an alien subject to the Aliens Order, 1920, under which he had to report any movements of his to the police, and was subject in certain circumstances to deportation. It was contended that such a man could not acquire a domicile here. There are cases which show that a person who is a prisoner or under restraint is incapable of selecting a domicile of choice and retains the domicile that he had when he was

A incarcerated. But it is possible for a foreigner, after being in England for five years, to become naturalised. It is beside the point, therefore, that the petitioner is an alien subject to the restrictions imposed by the Aliens Order, 1920, and that does not prevent his acquisition of an English domicile. The possible danger of being deported, if he misbehaves himself, does not militate against the acquisition of a domicile of choice *animo et facto*. It is impossible, therefore, to hold that, B though subject to the restrictions imposed by the Aliens Order, the petitioner could not comply with the court's requirement as to acquiring a new domicile. He can still be master of his own destiny, and it may even be that he will be naturalised.

There is, therefore, no ground for setting aside the decision of the learned President or for directing a new trial of an issue, as suggested by Mr. Latey. It is quite true that the Divorce Court does sometimes direct the trial of an issue, but C here the simple issue to be determined by the President was as to domicile, and it was not complicated by questions of adultery and so forth, so that there is no ground for adopting the suggestion as to a separate issue. The appeal must, therefore, be dismissed with costs..

LAWRENCE, L.J.—I agree. The principles on which the question of domicile D falls to be determined are well established and are not in dispute. On this appeal, the only question is whether the evidence given at the trial justified the finding arrived at by the learned President. We have read and carefully considered the evidence, some of which is conflicting. We have not seen the witnesses, but, so far as I can judge from the shorthand notes, I have come to the conclusion, not only that there was sufficient evidence to justify the finding of the learned President, E but that, on the evidence, this finding was clearly right. I do not propose to go through the evidence; my Lord has stated his view of the result of it, and I entirely agree with that view.

But then it was contended that the learned President had not given sufficient weight to the fact that the petitioner was an alien and, therefore, subject to the restrictions imposed by the Aliens Restriction Act, 1914, and the Aliens Order, F 1920. It was said that, as an alien, he was residing in England on sufferance, as he had to report every change of address and was liable in certain circumstances to be deported. I think Mr. Eddy went so far as to contend that so long as the Act and order were in force no alien could acquire an English domicile; Mr. Latey, on the other hand, did not put his contention so high as that, but was content to submit that the President had not given due weight to the effect of the statutory G restrictions in considering the question whether the petitioner had discharged the onus, which admittedly lay heavily on him, to prove that he had changed his domicile of origin. I agree with what my Lord has said on that point. What had to be shown is that, when the petitioner presented his petition, he was residing in England with the fixed intention of making England his home. Such an intention may be proved notwithstanding the existence of statutory regulations imposing H certain restrictions which had to be complied with so long as an alien stays in this country; he may choose to live here permanently and to subject himself to those restrictions.

In my opinion, the provisions of the Aliens Restriction Act, 1914, and the Aliens Order, 1920, did not preclude the petitioner from acquiring a domicile of choice in England, and I have no doubt that the learned President, in arriving at his conclusion, gave due weight to the fact that the petitioner was an alien to whom those I provisions were applicable.

I agree, therefore, that the appeal should be dismissed.

SLESSER, L.J.—I agree, and I propose to confine my observations to the argument that, owing to the Aliens Restriction Act, 1914, and the Aliens Order, 1920, it is impossible for any alien, subject to the peril of being deported in certain circumstances, and suffering certain restrictions before being deported, to acquire a domicile of choice in this country. Mr. Latey did not put the argument quite so

high, but contended that sufficient weight had not been given to these circumstances. I do not think that those advancing the argument have fully considered the history of the matter in question. It appears that, at common law, the King as *custos regni* had the right to expel aliens when they caused disorder. It is so stated by BLACKSTONE (*BLACKSTONE'S COMMENTARIES*, Vol. 1, p. 259). Speaking of aliens he says: A

“For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King’s protection; though liable to be sent home whenever the King sees occasion.” B

The next step in the history was that, owing to the excesses of the French Revolution, a number of persons sought refuge here, and Lord Grenville’s Aliens Act was passed in 1793 to control the entry of aliens and put restrictions on them, and a number of Acts dealing with aliens restrictively were subsequently passed. But it is interesting to observe that, in 1838, while Acts imposing restrictions on aliens were in force, *De Bonneval v. De Bonneval* (6) dealt with the domicile of the Marquis de Bonneval, who died in Fitzroy Square on Sept. 22, 1836, and was a French marquis, who had fled from France in 1792 and lived in England until 1814, when he returned to France, and from that time only resided occasionally in this country. The court considered his actual residence here as an exile, and whether it indicated an intention *animo et facto* of changing his domicile, and decided on the facts that it was not established that he was domiciled in this country; but what is interesting to observe is that the court indicates that, if it had come to a different conclusion on the facts, it would have decided in favour of an English domicile, no suggestion being made by the court, or in argument, that the existence of the Aliens Act of that time altered the position. It is not conclusive as the point was not argued, but it is an indication to justify the views that my Lord has taken, and which I share, that the fact of there being a danger of deportation hanging over the alien does not affect the question. C

Finally, I am not satisfied that this point was ever argued in the court below. D

Appeal dismissed. E

Solicitors: *Wilfrid Light; Gisborne & Co.* F

[Reported by GEOFFREY P. LANGWORTHY, Esq., *Barrister-at-Law.*]

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A

Re TOMLINE'S WILL TRUSTS. PRETYMAN *v.* PRETYMAN

[CHANCERY DIVISION (Maugham, J.), January 29, 1931]

[Reported [1931] 1 Ch. 521; 100 L.J.Ch. 156; 144 L.T. 592;
47 T.L.R. 274]

B

Will—Construction—Bequest of “books”—Manuscript letters inlaid in sheets and bound—“Article of vertu.”

By his will, the testator, after settling his two mansion houses, bequeathed all the pictures, prints, statues, sculptures, articles of vertu, books, furniture, and plate therein as heirlooms. Among the testator's effects were the original manuscripts known as the Paston letters. Each letter had been inlaid into a sheet of paper, and these sheets, with a few blank sheets, had been bound up into three volumes. The volumes were in book form, had the appearance of and could be handled and read like books, and the letters had been so inlaid as to be in substance permanent parts of the volumes, removable only by cutting or force.

C

D

Held: the letters were “books” and so formed part of the heirlooms.

Per **Curiam**: An article of vertu must be in some sense a product of the fine arts, and the phrase connotes, if not artistic merit, a certain effort of the person who originally produced it in the direction of what he conceived to be the fine arts.

Notes. Considered: *Re Coxen, MacCallum v. Coxen*, [1948] 2 All E.R. 492.

E

As to the meaning of the word “books” in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 261, para. 312, text and note (g); and for cases on the subject, see 44 DIGEST 735, 5900–5901. As to “articles of vertu,” see *ibid.*, text and note (g); and for case on the subject, see *ibid.* 712, 5568.

Cases referred to:

F

(1) *Re Baroness Zouche, Dugdale v. Baroness Zouche*, [1919] 2 Ch. 178; 88 L.J.Ch. 274; 121 L.T. 82; 63 Sol. Jo. 554; 44 Digest 712, 5568.

(2) *Re Plowden, Plowden v. Plowden* (1908), 24 T.L.R. 883; 44 Digest 692, 5331.

(3) *Willis v. Curtois* (1838), 1 Beav. 189; 8 L.J.Ch. 105; 48 E.R. 911; 44 Digest 692, 5330.

(4) *Re Barratt, Barratt v. Coates* (1915), 31 T.L.R. 502, C.A.; 44 Digest 692, 5332.

G

(5) *Re Masson, Norton v. Masson* (1917), 86 L.J.Ch. 753; 117 L.T. 548; 33 T.L.R. 527; 61 Sol. Jo. 676, C.A.; 44 Digest 713, 5602.

Adjourned Summons as to whether three bound volumes of manuscript letters passed under a bequest of “books.”

The following statement of facts is taken from the judgment of MAUGHAM, J.:

H

In this case I have to decide a very interesting point which depends on the question whether a number of originals of a series of letters known as “the Paston letters” were included in the chattels which were settled by the will of George Tomline so as to devolve as heirlooms, or whether they formed part of his residuary personal estate. The material words under which the testator settled certain chattels by his will to go as heirlooms are these. He bequeathed

I

“all the pictures prints statues sculptures articles of vertu books furniture and plate in my mansion houses at Orwell Park and Riby Grove aforesaid unto the trustees . . . upon trust to allow the same (hereinafter referred to as ‘the said heirlooms’) to be used and enjoyed as far as the law will permit by the person or persons who under the limitations hereinbefore contained shall for the time being be in the actual possession or in the receipt of the rent and profits of the said hereditaments. . . .”

The testator by the same will bequeathed all his money, securities for money, goods, chattels, and personal estate not thereinbefore otherwise disposed of to his trustees

upon trust for sale and conversion in the usual way and upon trust to stand A
possessed of the residue of the said moneys to lay out the same from time to time
in the purchase of land.

The testator died on Aug. 25, 1889. . . . As I have said, the apparently simple
question is whether such of the originals of the Paston letters that were comprised
in the estate of the testator pass as heirlooms, or do they fall into residue. In
order to determine that matter it is of vital importance to appreciate the facts in B
relation to the letters in question. The testator owned 155 of the original manu-
script letters in question, but he did not own them in the form of letters included
in particular folios or kept in a safe, inasmuch as in the latter part of the eighteenth
century it is shown that the originals of the present letters belonged to one Sir John
Fenn by whom they were edited and published, and Sir John Fenn caused manu-
script letters which at his death belonged to the testator to be mounted, or, rather, C
inlaid, in sheets of paper, and then had such sheets of paper bound into three
volumes, in which condition they remained at the time of the testator's death, and
still remain. The three volumes are present in court, and I have examined them
with very great interest. The first one, which is now before me, is in the form of
an oblong book half bound in old calf, and on the inside of the binding I find the
signature of John Fenn and the date 1777, and what certainly is undoubtedly the D
book plate of Sir John Fenn. The book is described on the binding as "Ms letters
Henry VI, Volume I," and then there is the description of the dates 1440 to 1460.
Inside that, which, as I say, from the exterior looks like a book, I find this
inscription :

"Original Ms letters written during the reigns of Henry VI, Edward IV and E
Richard III in three volumes. Volume I : This volume contains all the original
Ms letters, being 53 in number, written during the reign of Henry VI from
1440 to 1460 which are printed in the first quarto volume published in 1787
from page 1 to page 214 and which are there illustrated with notes historical
and explanatory."

I pause there to say that that is a reference to the first volume of Sir John Fenn's F
edition of the present letters. Then the inscription goes on :

"All the original letters in this collection which are here placed in chronological
order were written by various persons of rank or consequence,"

and so on. He signs it "John Fenn." Then in the volume of the book, if it is a
book, I find a number of sheets of paper in which sheet by sheet there is inlaid,
and so skilfully that it seems to be almost as if the letter was part of the sheet in G
which it is inlaid, fifty-three original manuscript letters, part of the series known
as the Paston letters. Accordingly, there are a number of sheets, in fact some
fifty-four or fifty-five sheets, because one or two of them are blank, the end papers
and so forth, and on each side of the sheet you can read a portion or the whole of
a Paston letter, because being inlaid in the sheets the letter is visible or readable
on both sides of the paper in which it is inlaid. There are, as I have already said, H
three volumes.

A summons was taken out to determine whether the volumes of Paston letters
were "books" passing under the bequest of heirlooms, or whether they formed part
of the residuary personal estate.

Rawlence for the plaintiff, the tenant for life.

David Farrer for tenants in tail male in remainder who had attained twenty- I
one years.

J. V. Nesbit for the trustees.

MAUGHAM, J. (after stating the facts continued :) I need not say anything
about the very great interest and the substantial value of those three volumes
owned by the late Mr. Tomline when he made his will, but I think it is obvious
that if he had been asked the question whether he desired these three remarkable
volumes to be sold as part of his residuary estate and the proceeds invested in land,

A or whether he would prefer that they should pass as chattels under the clause to which I have referred, nobody can entertain a doubt that his answer would have been in favour of the latter alternative.

Now, apart from that—it may be a consideration to which not very much weight ought to be attached—what is the meaning of the phrase “articles of vertu, books, furniture and plate in my mansion houses at Orwell Park and Riby Grove,” and
B do the three volumes in question, according to the original meaning of the English language “articles of vertu,” fall within the description of “books”? On that, by the industry of counsel, I have been referred to probably all the material cases which have been decided in the last hundred years.

First, I want to express my opinion with regard to the phrase “articles of vertu,” a phrase which I have always thought a little unhappy because ordinary English-
C men use the phrase as a sort of book phrase, and it is often used without a very exact knowledge of what it includes. However, I have the advantage of a decision of LAWRENCE, J., in *Re Baroness Zouche, Dugdale v. Baroness Zouche* (1), where there was a gift by Lady Zouche under her will of all the furniture, pictures, plate, articles of vertu and curiosities at Ourham House at the time of her decease. The question which arose for decision was in reference to some books of great value
D including a copy of the Mazarin Bible, worth several thousands of pounds, and some other books of very great value. It is to be noted that in the description of articles bequeathed, books were not included. The learned judge scouted the opinion that books of this kind could be included as furniture. He then had to decide whether such books could be included as articles of vertu and curiosities. I observe that the IMPERIAL DICTIONARY and the OXFORD ENGLISH DICTIONARY were
E cited. The IMPERIAL DICTIONARY stated that the words “an article of vertu” meant an object of art, antiquity or curiosity, whereas in the OXFORD ENGLISH DICTIONARY the phrase was defined as including a curio, antique or other product of the fine arts. The learned judge preferred to accept the latter definition, and stated that in his opinion an article in order to be an article of vertu must have some artistic merit. There must be, as I think, many objects of antiquity or curiosity which
F are not, ordinarily speaking, articles of vertu. I have suggested two, a prehistoric article and an Egyptian mummy. I do not think anybody in ordinary parlance would describe either of those things as articles of vertu. For my part I, like LAWRENCE, J., think that an article of vertu must be in some sense a product of the fine arts, and the phrase connotes, if not artistic merit, a certain effort of the person who originally produced it in the direction of what he conceived to be the
G fine arts.

Now I come to the question whether the three volumes in question are not included in the word “books.” It is plain that a book is not necessarily a printed book. Until the invention of printing towards the close of the fifteenth century, there were no printed books, and there still exist, even at the present time in England, a vast number of books which are not printed books. In addition, how-
H ever, according to the ordinary meaning of the English word “book,” there are many books which are not necessarily the sort of book which you find in a library at all and which yet are books. I might mention as an example the book which I have before me, a judge’s notebook. I do not know how you could describe that otherwise than as a book. I would add that it has been held in one of the cases which has been cited to me, namely, *Re Plowden, Plowden v. Plowden* (2), that a
I volume containing manuscript music by Beethoven and Mozart, the sheets of music being bound together with an outer cover with considerable care by a bookbinder, passed under the description of the word “books.” That is a decision of SWINFEN EADY, J. In a much older case, *Willis v. Curtois* (3), LORD LANGDALE decided that the manuscript notes of a physician relating to his attendance on King George III and the Queen, and a manuscript journal containing private memoranda and observations on the state of health and the malady of his late Majesty, passed under the word “books” or, rather, under the description of “all and every the books in and about my house in Tenterden Street.”

Finally, I mention *Re Barratt, Barratt v. Coates* (4), where a manuscript book described as the log-book of H.M.S. *Victory*, apparently the original log-book of the *Victory*, containing the original entries and being a book in manuscript not consisting of separate sheets of paper afterwards bound up, but a book in which entries were made from time to time by the proper officer, was held to pass under a bequest of books. On the other hand, I must not forget that a collection of postage stamps bound up in an album has been held not to pass under the description of books, pictures, prints and other household effects. That was the decision of the Court of Appeal in *Re Masson, Norton v. Masson* (5). I should add perhaps that the ratio decidendi of that case was that the album in which the stamps were contained was a mere accessory to the stamps, being no more than a receptacle in which the stamps were kept. WARRINGTON, L.J., attributed some weight to the fact that stamps are not, at any rate when they are stamps of any value, usually, and were not in that case, pasted or permanently fastened into a book, but are attached in such a way that they are readily removable.

In the present case, I have come to the conclusion that these three volumes are books. The elements that make me come to that conclusion are these: the volumes are in book form; to the outward eye they look like books, and in the ordinary course they can be and are handled like books. Next, I observe that they can be used like books in the sense that as you turn over the sheets you can, if you are able to decipher the handwriting, read the various letters as a collection of letters bound up in the book. Next, I observe that they are not detachable letters in the ordinary sense, but have been so inserted in the sheets of the volumes that they are in substance permanent parts of the volume, unless indeed they should be cut or removed by some forcible effort. On these grounds I think I am justified in holding that the volumes in question do pass under the various articles which are described as books under the gift of various chattels to be held as heirlooms, and I do so with the greater satisfaction for the reason, as I have already said, that I have no doubt at all as to what the intention of the testator was in relation to this matter.

Declaration accordingly.

Solicitors: *Farren & Co.*

[*Reported by A. W. CHASTER, ESQ., Barrister-at-Law.*]

A

R. v. CUMBERLAND JUSTICES. Ex parte HEPWORTH

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slessor, L.JJ.), July 30, 1931]

B

[Reported 146 L.T. 5; 95 J.P. 206; 47 T.L.R. 610; 30 L.G.R. 1; 29 Cox, C.C. 374]

Road Traffic—Driving licence—Application—Declaration that applicant suffering from specified disease—Refusal of licence—Right of applicant to appeal as person aggrieved—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 5 (2), (5).

C

By s. 5 (1) of the Road Traffic Act, 1930, on an application for a driving licence the applicant had to make a declaration in the prescribed form whether or not he was suffering from any disease or physical disability specified in the form. By s. 5 (2), if from the declaration it appeared that the applicant was suffering from any such disease or disability, "the licensing authority shall refuse to grant the licence"; and by s. 5 (5) a person aggrieved by the refusal of a licensing authority to grant a licence could appeal to a court of summary jurisdiction. Under the power to make regulations under s. 30 (1), one of the questions on the prescribed form was whether the applicant was able to read at a distance of twenty-five yards in good daylight (with glasses if worn) a motor-car number plate containing six letters and figures. The appellant, in applying for a driving licence, answered the question as to his ability to see in the negative. On the refusal of the licensing authority to grant him a licence, he appealed under s. 5 (5) as an aggrieved person.

D

E

Held: the duty of the licensing authority under s. 5 (2) to refuse the grant of a licence was unqualified, and, therefore, the appellant having answered the question in the negative and there being nothing to bring him within the proviso to s. 5 (2), he was not a "person aggrieved" within the meaning of s. 5 (5).

F

Notes. The Road Traffic Act, 1930, s. 5 (2), has been amended by the Road Traffic Act, 1956, s. 51 and Sched. 8, para. 10, by the insertion after the word "appears," where it first occurs, of the words "or if on inquiry into other information the licensing authority are satisfied."

As to appeals by a person aggrieved against refusal of a driving licence, see 31 HALSBURY'S LAWS (2nd Edn.) 782, para. 1222; and for cases on the subject, see 42 DIGEST 868-869, 187-188. For the Road Traffic Act, 1930, s. 5, see 24 HALSBURY'S STATUTES (2nd Edn.) 577.

G

Appeal from the justices of the county of Cumberland.

The appellant, Edwin James Hepworth, appealed to a court of summary jurisdiction as an aggrieved person under s. 5 (5) of the Road Traffic Act, 1930. The magistrates held that they had no jurisdiction to hear the appeal and the Divisional Court refused the appellant's application for a rule nisi for a writ of mandamus. The Court of Appeal granted a rule.

H

The facts are set out in the judgment of LORD HANWORTH, M.R. The justices did not appear to show cause but filed an affidavit.

Charles Doughty, K.C., and Lawrence Vine for the appellant.

I

LORD HANWORTH, M.R.—This rule must be discharged. It may be a matter of regret to the court, as I dare say it was to the justices, that the licence applied for in the present case had to be refused; but we have to see whether there is any right or any duty on the part of this court to issue a mandamus to the justices to hear and determine the matter that was brought before them.

The appellant, of Camp Hill, Maryport, applied for a licence to drive a motor car. He had to fill up a form. Part C of that form required a declaration from him as to physical fitness of the applicant. One of the questions that he was asked was this:

"Are you able to read at a distance of twenty-five yards in good daylight (with glasses if worn) a motor-car number plate containing six letters and figures?"
See note 4 overleaf."

He replied, conscientiously, as one would expect, and truthfully, "No"; but he felt justified (as I think he was) in adding: "But see accompanying letter." The letter he wrote was this:

"I have been driving for eight years without any accident. I can see persons or animals on the road two or three hundred yards off and cars at a much greater distance. I cannot conscientiously say that I can read the figures and letters on a number plate at a distance of twenty-five yards, as they seem blurred to me. I have driven over many parts of Scotland—Perth, Inverness down to Oban, through the Trossachs; Edinburgh (three times); all the well-known roads in the Lake District very frequently; through Lancashire towns to Oxford, along the Great North Road to Enfield (N. London), &c."

That letter, which obviously is frank and truthful, bears on its face statements which clearly indicate that the appellant was a competent driver, and not only a competent driver but a driver of experience, and I think that, coupled with the fact that, in spite of that, he answered this question as to seeing letters at a distance of twenty-five yards, it shows that his experience had taught him what it was material for a driver to be able to do, and that he was a person who was able to take care, not only of his own car, but of all other traffic he should meet on the road. One cannot, therefore, avoid somewhat regretting that this question should be put in the form in which it is put, because it would seem that a driver of great experience, of great care and consideration for others, seems to be unable to answer a test which may, for the purpose of driving, be framed ill for the purpose of securing competence and fitness to drive. But there it is. The appellant may be complimented on the accuracy with which he has replied to the question; but still, there stands the question, and he, as an honest man, has been compelled to say "No" to it.

These questions are questions which are prescribed by the Minister pursuant to the powers which are given to him in s. 30 of the Road Traffic Act, 1930, under which he has power to make regulations, "and for prescribing anything which may be prescribed under this Part of this Act." No question is taken or arises challenging the prescriptions that have been made under that power to prescribe. On those answers on the application, the matter came before the licensing authority. By s. 4 (1) of the Act of 1930 it is declared that a person is not to drive a motor vehicle "unless he is the holder of a licence"; and by sub-s. (2),

"Subject to the provisions of this Part of this Act as to the physical fitness of applicants for licences, the licensing authority, except in the case of an applicant who is disqualified as hereinafter mentioned, shall on payment of a fee of five shillings grant a licence to any person who applies for it in the prescribed manner. . . ."

So that, to hold a licence, he had to ask for it on the prescribed form, and he would be entitled as of course to receive his licence, unless he is within the exception introduced by the words "except in the case of an applicant who is disqualified as hereinafter mentioned." By s. 5 that exception is stated in fuller terms. Section 5 (1) says:

"On an application for the grant of a licence the applicant shall make a declaration in the prescribed form as to whether or not he is suffering from any such disease or physical disability as may be specified in the form. . . ."

The appellant has made a declaration that he is suffering from a physical disability specified in the form, namely, this failure to read the letters at twenty-five yards. Section 5 (2) provides:

"If from the declaration it appears that the applicant is suffering from any

- A such disease or disability as aforesaid, the licensing authority shall refuse to grant the licence. . . ."

It is not contested, therefore, that, in the plain words of the statute, this declaration of physical disability appearing in the application, it was the duty of the licensing authority to refuse to grant the licence. That duty is imposed on them by the word "shall."

- B But it is said on behalf of the appellant that there is a proviso to s. 5 (2). So there is, and the proviso provides for certain cases where a licence could be granted. For instance, under para. (a), there could be a licence limited to driving an invalid carriage, if the licensing authority are satisfied that he is fit to drive such a carriage, and he may be subjected to a test in certain cases as to his fitness or ability. But
- C though the proviso embraces within it a number of cases in which the duty of absolutely refusing to grant the licence is not imposed on the licensing authority, there are excepted from the proviso certain cases by the words "except in the case of such diseases and disabilities as may be prescribed." It is impossible to say that, having regard to the terms of the form, this disability is not one that is prescribed and which has to be answered, and, if so, it is expressly included within the words excepting from the proviso certain cases. That being so, the duty of the
- D licensing authority stands unqualified, and they are required to refuse to grant the licence. There is nothing that brings the appellant within the proviso, but it is said that he must be a person aggrieved by the refusal of the licensing authority. If there was any possibility of re-considering the matter, such as there would be under para. (a) to the proviso, or the certain cases in para. (b), or the like, it might well be that he is within the term a person aggrieved by the refusal of the
- E licensing authority. But where the refusal of the licensing authority is plainly required under the terms of the section, and the case is not one within the proviso, it is not possible to hold that the appellant is a person aggrieved by the refusal, for he is a person in respect of whose application the licensing authority have merely fulfilled the duty necessarily imposed on them without question in consequence of the negative which he had to give to this prescribed question. If the matter
- F were remitted once more to the justices, their plain duty would be to say that they had, under the proviso, no power given to them to deal with this particular case, with the result that the licensing authority's refusal stands good. Counsel for the appellant does not even suggest that, as matters stood before the licensing authority, they were not compelled to refuse to grant the licence. If the matter could be brought before the justices they would have to affirm what has been done by the
- G licensing authority.

Therefore, it appears, as the justices say, that the appellant is not aggrieved, and it is not a case in which one can make the rule absolute for a mandamus.

- I do desire to say this, however, that, although I think the answer on this application is plain and clear, it may well be a matter for those who are charged with the framing or prescribing of these questions to consider whether or not this
- H question is framed so as to embrace the cases where defective eyesight ought to be a ground of refusal, and whether it does not, as it stands, leave the possibility of a number of experienced motor drivers being excluded when they would be able, if the question was somewhat differently framed, to satisfy all proper requirements as to their capacity effectively and safely to drive a motor car.

- I **LAWRENCE, L.J.**—I agree, and have nothing to add.

SLESSER, L.J.—I agree.

Solicitors: *Amery-Parkes & Co.*

[Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.]

PARKFIELD TRUST, LTD. v. DENT

[KING'S BENCH DIVISION (Swift, J.), July 2, 1931]

[Reported [1931] 2 K.B. 579; 101 L.J.K.B. 6; 146 L.T. 90]

Moneylender—Rate of interest—Statutory rate exceeded—Onus on moneylender to prove transaction not harsh and unconscionable—Need to prove note or memorandum of contract—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6, s. 10 (1).

Stamp Duty—Moneylender's contract—Note or memorandum—Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 1, Sched. I.

In an action by a moneylender for judgment against a borrower for more than a sum equivalent to the money lent and 48 per cent. per annum interest, the onus of satisfying the court under s. 10 (1) of the Moneylenders Act, 1927, that the rate of interest charged is not excessive and that the transaction is not harsh and unconscionable is on the moneylender, although the borrower does not appear to the writ or further defend the proceedings, and the moneylender must, therefore, prove a transaction which comes within s. 6 of the Act and, consequently, must prove a note or memorandum of the contract made in accordance with that section.

Such a note or memorandum is a memorandum of a contract within the meaning of s. 1 and Sched. I of the Stamp Act, 1891, and, therefore, must be stamped with a 6d. stamp.

Notes. Considered: *Collings v. Charles Broadbury, Ltd.*, [1936] 3 All E.R. 369.

As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190–191, para. 280. As to the presumption of excessive interest, see 23 HALSBURY'S LAWS (2nd Edn.) 202–203, para. 306; and for cases on the subject, see 35 DIGEST 213, 381–389. For the Stamp Act, 1891, s. 1 and Sched. I, see 21 HALSBURY'S STATUTES (2nd Edn.) 613, 656. For the Moneylenders Act, 1927, s. 6 and s. 10, see 16 HALSBURY'S STATUTES (2nd Edn.) 386, 392.

Cases referred to:

- (1) *Mills Conduit Investments, Ltd. v. Leslie (and Denholm)*, ante, p. 442; [1932] 1 K.B. 233; 100 L.J.K.B. 685; 145 L.T. 585; 47 T.L.R. 514, C.A.; Digest Supp.
- (2) *Carringtons, Ltd. v. Smith*, [1906] 1 K.B. 79; 75 L.J.K.B. 49; 93 L.T. 779; 54 W.R. 424; 22 T.L.R. 109; 50 Sol. Jo. 171; 35 Digest 215, 409.
- (3) *Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K.B. 492; 99 L.J.K.B. 186; 142 L.T. 361; 74 Sol. Jo. 12; 49 T.L.R. 117, C.A.; Digest Supp.

Action tried as a short cause.

By a promissory note dated Nov. 6, 1930, the defendant agreed to pay the plaintiffs, who were licensed moneylenders, interest on £250, money lent, at the rate of 160 per cent. per annum and to repay principal and interest by monthly instalments of £50 each. The plaintiffs brought an action for the recovery of £414 10s. 8d., being the balance of principal and interest under the promissory note. On June 24, 1931, they obtained judgment under Order 14 for £232 17s. 4d., being principal due and interest at 48 per cent., and the defendant was allowed to defend the claim as to the balance. The case was set down in the short cause list. The action came before SWIFT, J., and was not defended. The attention of the court was drawn to the fact that the note or memorandum of the contract required by s. 6 of the Moneylenders Act, 1927, was not stamped as required by the Stamp Act, 1891.

The Moneylenders Act, 1927, provides:

"6 (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender . . . or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless

A a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract: . . .

"(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

B
C "10 (1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of 48 per cent. per annum . . . the court shall, unless the contrary be proved, presume for the purposes of s. 1 of the Money-lenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable. . . ."

D The Stamp Act, 1891, provides:

"1 . . . the stamp duties to be charged . . . upon the several instruments specified in Sched. 3 to this Act shall be the several duties in the said schedule specified . . ."

E "Sched. I . . . Agreement or any memorandum of an agreement, made in England or Ireland under hand only . . . and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument 6d."

R. F. Levy for the plaintiffs.

The defendant did not defend the action.

SWIFT, J.—Since the coming into operation of the Moneylenders Act, 1927, a moneylender who desires the court to give judgment against a borrower for more than a sum equivalent to the money lent and 48 per cent. per annum interest must satisfy the court that, in all the circumstances of the case, the rate of interest is not excessive and that the transaction is not harsh and unconscionable. Although the borrower does not appear to the writ, or does not further defend the proceedings, the onus is still on the plaintiff moneylender, and he cannot have the judgment of the court, even in default of appearance, unless and until he satisfies the court that the interest charged is not excessive, and that the transaction is not harsh and unconscionable: see s. 10 of the Moneylenders Act, 1927, and *Mills Conduit Investments, Ltd. v. Leslie (and Denholm)* (1). The onus being on the plaintiff moneylender to show that the transaction in respect of which he sues is not harsh and unconscionable, he is bound to prove what, in his particular case, "the transaction" was. He must, therefore, prove a transaction which comes within s. 6 of the Moneylenders Act, 1927, and, consequently, he must prove a note or memorandum of the contract made in accordance with the provisions of that section.

I Such a note or memorandum is, I think, clearly a memorandum of a contract within the meaning of s. 1 of, and Sched. I to, the Stamp Act, 1891, and, therefore, must be stamped with a 6d. stamp. If it is not so stamped it cannot be produced in evidence unless the appropriate penalties are paid. The plaintiff cannot prove an enforceable transaction—he cannot have a judgment until he produces a memorandum complying with the requirements of s. 6 of the Act of 1927, and he cannot produce such a memorandum unless it is duly stamped. [An undertaking was given to pay the stamp duty and any penalty.]

In determining whether interest is excessive or a transaction is harsh and unconscionable, the court may consider, among all the circumstances, in addition to those mentioned by CHANNELL, J., in *Carringtons, Ltd. v. Smith* (2) and SCRUTTON, L.J., in *Reading Trust, Ltd. v. Spero* (3), the fact that the borrower himself has

never suggested that the interest is excessive or the transaction is harsh and unconscionable, and that he has not appeared and does not defend the action or ask for any relief: see the observations of GREER, L.J., in *Mills Conduit Investments, Ltd. v. Leslie and Denholm* (1).

In this case the interest (160 per cent. per annum) is very high, but I am satisfied that, having regard to all the circumstances, it is not excessive, and, even if it were, I am satisfied that the transaction was not harsh and unconscionable, and I, therefore, give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitor: *Solomon Arbeid.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

DAMPSKIBSSELSKABET BOTNIA A/S v. C. P. BELL & CO.

[KING'S BENCH DIVISION (Bateson, J., sitting as additional judge of the Division), November 27, 1931]

[Reported [1932] 2 K.B. 569; 101 L.J.K.B. 574; 147 L.T. 499;
48 T.L.R. 93; 76 Sol. Jo. 10; 18 Asp.M.L.C. 307]

Shipping—Charterparty—Weather working day—Ice preventing loading.

A charterparty provided that a cargo of timber should be loaded at the rate of 125 fathoms per weather working day. Under the charterparty, the ship proceeded to the port of Mollersvik, Finland, to load timber for carriage to Cardiff. Ice formed at Mollersvik shortly after the ship's arrival, in consequence whereof the timber could not be loaded at the agreed rate. Before the loading was complete the ship was obliged to leave port to avoid being icebound.

Held: the days on which work at the port of loading could not be carried on by reason of the presence of ice were not weather working days.

Notes. As to weather working days, see 30 HALSBURY'S LAWS (2nd Edn.) 341-344, para. 523; and for cases on the subject, see 41 DIGEST 573-575, 3965-3984.

Case referred to:

- (1) *Bennetts & Co. v. Brown*, [1908] 1 K.B. 490; 77 L.J.K.B. 515; 98 L.T. 281; 24 T.L.R. 199; 52 Sol. Jo. 160; 11 Asp.M.L.C. 10; 13 Com. Cas. 110; 41 Digest 573, 3976.

Action.

By a charterparty dated Oct. 27, 1930, in the "Wood Charter (Scandinavia and Finland) to the United Kingdom, 1924" (the "Scanfin") form, it was provided that the plaintiffs' ship *Sydhavet* should go to one place in Middle Finland as ordered by the charterers and load a cargo of pit props, and being so loaded should proceed to Cardiff and there deliver the cargo on payment of the freight. The defendants were the owners of the pit props and holders of the bill of lading, which incorporated all the material terms of the charterparty. Clause 5 of the charterparty provided as follows:

"At loading port the cargo shall be brought alongside the vessel at charterers' risk and expense. The cargo shall be loaded at the rate of 125 fathoms per weather working day on an average during the ordinary working hours of the port, but according to the custom of the port. Sundays and general or local holidays excepted (unless used)."

A Clause 7 (d) provided:

"If after arrival the master for fear of vessel being frozen in deems it advisable to sail he shall be at liberty to leave without cargo, in which case the charter shall be cancelled . . . by telegram accordingly, or to leave with part cargo and to fill up for vessel's benefit at any port or ports whether such ports are in the course of the chartered voyage or not. . . ."

B The charterparty further provided, by cl. 18, that the master or owners should have an absolute lien on the cargo for dead freight. The facts appear in the judgment of BATESON, J.

G. St. C. Pilcher for the plaintiffs.

Willink for the defendants.

C **BATESON, J.**—This is an action by shipowners against cargo-owners to recover dead freight on the steamship *Sydhavet*, which was chartered to carry pit props from a port in Middle Finland to Cardiff. On Nov. 8, 1930, the ship arrived at Mollersvik, which is a port in Middle Finland. At Mollersvik the cargo has to be brought down a river to an estuary, and the ship lies at an anchorage one or two, or possibly three, miles out in the bay, and the method of loading is by towing rafts of timber from the mouth of the river out to the ship. Any part of the raft that is not completely loaded in the day is towed back again, because it is not safe to leave it alongside the ship.**D** The ship arrived at this port in the afternoon, and the following day was a Sunday. From Nov. 10 to Nov. 16 there was only one day on which the ship could be loaded, namely, Nov. 11, and she then loaded 136 fathoms. There was some little question as to whether she ought to have loaded a little more on the Saturday, but the tug towing the raft out got ashore owing to a snowstorm. It does not look as if it was a very good day for loading, and nothing was loaded on that particular day. It was very unfortunate from the point of view of the ship, because, if it had been fine weather, she would have been loaded and would have got away. On Sunday, Nov. 16, which was not a working day, ice began to appear.**E** A little cargo was loaded on Nov. 17 and 18, but the ice set in substantially, and, with the exception of some small parcels which were farther outside than the mouth of the river in places where some small quantities were kept stored, no more loading was done before Nov. 21. The reason for this was ice which prevented any more cargo being brought to the ship from the storage place, and the port was practically shut on Nov. 18 for the winter. It was obvious that no more cargo could be given**F** than what the shippers had managed to get from the other small place where there was a small store, and it was no good the ship waiting any longer. The master, and his owners, wanted to get a full cargo, and, if he did not get a full cargo, he wanted dead freight, and, in order to protect himself, the master would not go without getting a letter from the shippers to say that it was not possible to ship any more cargo. Thereupon the shippers gave him a letter in the following terms:**G** "As we now, on account of weather hindrances (ice), consider ourselves unable to supply any more props in Mollersvik, we are ready to clear your vessel, in accordance with the charterparty, with the approximate 400 fathoms loaded. On account of the reason mentioned above we are now also unable to deliver any props from any other place stipulated in the charterparty."**H** Of course, if the master had stayed very much longer he would have been frozen in himself. He had to go, and there was no chance of his getting any more cargo. In fact, 394 fathoms were loaded, leaving 356 fathoms short. The vessel proceeded to Cardiff on Nov. 22 and arrived there on Nov. 27. The claim was made for dead freight, and a deposit was made under the Merchant Shipping Act, 1894, on Dec. 2.

The charterparty was made on Oct. 27, a fortnight before the vessel arrived at the port of loading, and was in the "Scanfin" form. It was agreed between Messrs. Galbraith, Pembroke & Co., agents for the owners, and Messrs. Pitwood, the charterers, that the vessel should proceed to one place in Middle Finland and load

a full and complete cargo of short pit props and being so loaded should proceed to Cardiff. [His Lordship read cl. 5 and cl. 7 (d) of the charterparty, and continued:] A

The question which I am asked to decide really comes to this: What is the meaning of "weather working day" in cl. 5? Counsel for the plaintiffs points out that cl. 7 (d), the sub-clause in the ice clause, does not apply to this shipper, and that it is only put in for the protection of the owners. Counsel for the defendants, on the other hand, says that the corresponding protection for the shipper is under cl. 5, which regulates his duty to put cargo on board the ship on weather working days only. That is really the dispute between the parties. Counsel for the plaintiffs says that cl. 5 merely relates to the rate for loading, and that it does not negative or cut down the obligation to load a full and complete cargo; that the shipper is bound to ship at the fixed rate per weather working day, and he says that ice is not weather; that it may be the result of weather, but that it is not weather; and that, on a perfectly fine, bright, cold day, ice would not prevent the vessel being loaded. He further says that, if they had wanted to except ice from the loading, they could have said so in that clause, or they could have made it clear elsewhere in the charterparty, and they have not chosen to do so. He goes on further to say that there is no reported case where it has ever been held that, when loading is prevented by ice, it is not a weather working day. B

Of course, the answer to that is the one so often made where no cases can be found in the books, that nobody ever thought of saying so before. But the question has arisen now, and I have to determine it, and the way I approach it is this. Is a day on which ice prevents loading a weather working day within the meaning of this charterparty? It was a charterparty for a vessel to go to an ice port at a very late period in the season. One of the worst things of an ice port is, I suppose, that ice prevents the loading; and I, myself, think that where, in such a charter as this, for such a place as this, the parties have agreed that the loading is only to take place on weather working days, if the conditions are such that the cargo cannot be got out of the ice in order to be taken to the ship, that day will cease to be a weather working day. I think that the formation of ice by cold which prevents the loading is weather, and that the meaning of the phrase "weather working day" between business men dealing with this kind of charterparty must relate to prevention from loading by ice. C

Passages in the correspondence have been referred to where the parties themselves talked about it being the weather that prevented the loading, and such expressions are used as "If the weather turns mild we might get on with the loading." The actual wording of the notice which the master got the shippers to give him says "weather hindrances," and I think, in ordinary English, the meaning of the words in this charterparty are that ice, such as prevented the loading in this case, was weather preventing the loading, and that the excuse for not loading more is that there were no more weather working days on which that could be done. Counsel for the defendants pointed out that, if ice is not weather, the waves which are produced by the wind and which prevent lighters or rafts from getting alongside vessels could not be said to be weather. I think that is somewhat analogous. I think the phrase means loading weather, and if you have ice which prevents you from loading you have not got loading weather. In other words, you have not got a "weather working day." D

Counsel for the plaintiffs says there is only one case, namely, *Bennetts v. Brown* (1), where the words "weather working day" have ever been interpreted. In that case, WALTON, J., said ([1908] 1 K.B. at p. 496): E

"I think it has a natural meaning, viz., a day on which the work of discharge—it might be of loading, but in the present case it is of discharge—is not prevented by bad weather."

Counsel says that this was not bad weather, that ice is very often beautiful weather; but I think that in this charterparty it is bad weather when ice prevents loading. SCRUTTON, L.J., in his book on CHARTERPARTIES (13th Edn.), p. 365, says that F

- A "‘weather working days’ means days on which the weather allows working." Those two definitions are almost identical in meaning, and I am satisfied that, in this case, the proper interpretation of these words is that which I have put on them. There will, therefore, be judgment for the defendants.

Solicitors: *William A. Crump & Son*, for *Gilbert Robertson & Co.*, Cardiff; *Botterell & Roche*, for *Botterell, Roche & Temperley*, Newcastle.

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

ANGLO-PERSIAN OIL CO., LTD. v. DALE

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.J.J.), May 5, 6, 8, June 8, 1931]

[Reported [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 47 T.L.R. 487; 75 Sol. Jo. 408; 16 Tax Cas. 253]

- E *Income Tax—Deduction in computing profits—Capital expenditure—Agency contract—Sum paid by principal for determination.*

By an agreement dated May 6, 1914, the taxpayer, a limited company, appointed S. Co., Ltd., to be its agents for a fixed term to manage the taxpayer's business in Persia and elsewhere. The remuneration payable to S. Co., Ltd., under the agreement of 1914 proved to be much larger than the taxpayer had anticipated, amounting to £90,000 in 1919–20, and £130,000 in 1920–1. In 1922 the taxpayer began negotiations to terminate the agency, being of the view that, apart from the question of the remuneration, it would be an advantage to the taxpayer to have greater freedom of action with regard to the conduct of its business and to have more effective control by its being in direct touch with employees and customers in the relevant countries. On Nov. 17, 1922, an agreement was executed between the taxpayer and S. Co., Ltd., under which S. Co., Ltd., agreed to go into liquidation, and the taxpayer was to pay to S. Co., Ltd., £300,000. Other terms provided for the taxpayer to employ, for the rest of the period which the agency had to run under the agreement of 1914, servants of S. Co., Ltd., if they wished to be so employed, and a separate agreement provided that the taxpayer would purchase buildings, plant and machinery belonging to S. Co., Ltd. The agreements were carried out and resulted in considerable saving to the taxpayer. The £300,000 was treated by the taxpayer as a revenue payment, and was charged to revenue in equal annual instalments of £60,000. On the question whether these sums were correctly charged to revenue for the purposes of income tax,

- I **Held:** the £300,000 was properly chargeable to revenue and was not a capital expense because the taxpayer did not by cancelling the agency agreement enlarge the area of its operations, or improve its goodwill, or embark on a new enterprise, or in any other way benefit its fixed capital, since the agency agreement related entirely to the working of its business.

British Insulated and Helsby Cables, Ltd. v. Atherton (1), [1926] A.C. 205, applied.

Notes. Considered: *Investment Trust Corp., Ltd. v. Singapore Traction Co.*, [1935] All E.R.Rep. 348; *Collins v. Adamson & Co.*, [1937] 4 All E.R. 236; *Rushden Heel Co. v. Keene*, *Rushden Heel Co. v. I.R. Comrs.*, [1946] 2 All E.R. 141;

Mann, Crossman and Paulin, Ltd. v. Compton, Mann, Crossman and Paulin, Ltd. v. I.R. Comrs., [1947] 1 All E.R. 742. Referred to: *Hughes v. British Burmah Petroleum Co.* (1932), 17 Tax Cas. 286; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] All E.R. Rep. 402; *Whelan v. Dover Harbour Board* (1934), 151 L.T. 288; *Van den Berghs, Ltd. v. Clark*, [1935] All E.R. Rep. 874; *Henderson v. Meade-King Robinson & Co.* (1938), 22 Tax Cas. 97; *Scammell & Nephew, Ltd. v. Rowles*, [1939] 1 All E.R. 337; *Doncaster Amalgamated Collieries, Ltd. v. Bean*, [1946] 1 All E.R. 642; *Alexander Howard & Co. v. Bentley* (1948), 30 Tax Cas. 334; *Green v. Cravens Railway Carriage and Wagon Co., I.R. Comrs. v. Cravens Railway Carriage and Wagon Co.* (1951), 32 Tax Cas. 359; *Stow Bardolph Gravel Co. v. Poole*, [1954] 2 All E.R. 661.

As to what is capital expenditure, see 20 HALSBURY'S LAWS (3rd Edn.) 161-164, paras. 280, 281; and for cases on the subject, see 28 DIGEST 47-49, 242-252.

Cases referred to:

- (1) *British Insulated and Helsby Cables Co., Ltd. v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187; 10 Tax Cas. 155, H.L.; 28 Digest 52, 264.
- (2) *Mitchell v. B. W. Noble, Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; 43 T.L.R. 245; 71 Sol. Jo. 175; sub nom. *B. W. Noble, Ltd. v. Mitchell*, *Mitchell v. B. W. Noble, Ltd.*, 11 Tax Cas. 372, C.A.; Digest Supp.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest 56, 287.
- (4) *Southwell v. Savill Bros., Ltd.*, [1901] 2 K.B. 349; 70 L.J.K.B. 815; 85 L.T. 167; 65 J.P. 649; 49 W.R. 682; 17 T.L.R. 513; 45 Sol. Jo. 521; 4 Tax Cas. 430, D.C.; 28 Digest 57, 288.
- (5) *Moore & Co. v. Hare* (1914), 6 Tax Cas. 572; sub nom. *Moore & Co. v. Inland Revenue*, 15 S.C. 91; 52 S.L.R. 59; 1914 2 S.L.T. 316; 28 Digest 48, l.
- (6) *Ounsworth v. Vickers, Ltd.*, [1915] 3 K.B. 267; 84 L.J.K.B. 2036; 113 L.T. 865; 31 T.L.R. 530; 6 Tax Cas. 671; 28 Digest 48, 251.
- (7) *John Smith & Son v. Moore*, [1921] 2 A.C. 13; 90 L.J.P.C. 149; 125 L.T. 481; 37 T.L.R. 613; 65 Sol. Jo. 492; 12 Tax Cas. 266, H.L.; Digest Supp.
- (8) *Countess Warwick Steamship Co., Ltd. v. Ogg*, [1924] 2 K.B. 292; 93 L.J.K.B. 736; 131 L.T. 348; 8 Tax Cas. 652; 28 Digest 49, 252.
- (9) *Rowntree & Co., Ltd. v. Curtis*, [1925] 1 K.B. 328; 93 L.J.K.B. 570; 131 L.T. 41; 40 T.L.R. 363; 8 Tax Cas. 678, C.A.; 28 Digest 52, 264.
- (10) *Mallett v. Staveley Coal and Iron Co., Ltd.*, [1928] 2 K.B. 405; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772, C.A.; Digest Supp.
- (11) *Hancock v. General Reversionary and Investment Co., Ltd.*, [1919] 1 K.B. 25; 88 L.J.K.B. 248; 119 L.T. 737; 35 T.L.R. 11; sub nom. *Hancock v. General Reversionary and Investment Co., Ltd.*, *General Reversionary and Investment Co., Ltd. v. Hancock*, 7 Tax Cas. 358; 28 Digest 51, 260.

Appeal by the Crown from an order of ROWLATT, J., dated March 4, 1931, whereby he allowed the appeal by the Anglo-Persian Oil Co., Ltd., made by Case Stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The Case Stated was as follows.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on April 9, 1930, the Anglo-Persian Oil Co., Ltd. (hereinafter called "the company"), appealed against the following assessments to income tax which had been made upon the company under Sched. D of the Income Tax Act, 1918, viz.:

(a) An assessment in the sum of £1,000,000 for the year ending April 5, 1923; (b) an additional assessment in the sum of £737,712 for the year ending April 5, 1923; (c) an assessment in the sum of £1,500,000 for the year ending April 5, 1924; (d) an assessment in the sum of £1,500,000 for the year ending April 5, 1925; (e) an assessment in the sum of £1,500,000 for the year ending April 5, 1926; (f) an additional

A assessment in the sum of £646,908 for the year ending April 5, 1926; (g) an additional assessment in the sum of £454,384 for the year ending April 5, 1926.

The assessments under appeal are made under Case I of Sched. D of the Income Tax Act, 1918, and are in respect of the profits arising to the company from the producing, refining, and selling of oil, &c.

B The company was incorporated in the year 1909 with the object of raising, refining, selling and otherwise dealing with crude oil and its products in Persia and elsewhere. In accordance with the practice usual with companies with large interests overseas, the company at its inception appointed agents for the conduct of its business in remote parts of the world. But as business developed the company from time to time dispensed with the services of such agents, finding itself able to carry on the business more economically directly by its own servants.

C By an agreement dated March 21, 1910, and made between the company of the one part and Lloyd, Scott & Co., Ltd., of the other part, the company appointed Lloyd, Scott & Co., Ltd., as their managing agents to manage their business in Persia and the East and to effect and carry out the sale of oil petroleum and other products of the company and generally to act as their agents in Persia and the East upon the terms therein mentioned, such terms to be subject to alteration according
D to mutual agreement. By an agreement dated May 6, 1914, and made between the company of the one part and Strick, Scott & Co., Ltd. (formerly Lloyd, Scott & Co., Ltd.) (thereinafter called "the agents"), of the other part, it was agreed (inter alia) that:

(i) The said agreement dated March 21, 1910, should be deemed to have been cancelled as on March 31, 1913.

E (ii) The company should appoint and engage the agents as their managing agents to manage their business in Persia and the East and to effect and carry out the sale of petroleum and other products of the company and generally to act as their agents in Persia and the East and should, during the continuance of the said agreement, pay to the agents by way of remuneration for their services the respective rates of commission therein mentioned, being those specified in paras. (a), (b), (c),
F and (d) of clause 5.

(iii) In addition to the commission payable by the company to the agents as aforesaid the company agreed by para. (e) of cl. 5 to pay to the agents the out-of-pocket expenses incurred by them in travelling on the business of the company and the administration expenses of the said agency.

G (iv) The agents should keep in proper books full records of the company's business passing through their hands or the hands of the sub-agents, and the said records and all documents relating to the premises in the possession or under the control of the agents should belong to the company.

(v) All moneys belonging to the company received by the agents should be paid into a separate banking account at a bank to be approved by the company.

H (vi) The agents should at all times during the continuance of the said agreement observe the directions and instructions of the company.

(vii) The said agreement of May 6, 1914, should subsist for a term of ten years from Jan. 1, 1914, and on the expiration of such period of ten years the employment of the agents was to be continued for a further period of ten years under the conditions of the said agreement, but upon such term of remuneration as should be arranged or failing arrangement as should be fixed by arbitration.

I The company has not at any time held shares in Strick, Scott & Co., Ltd. Some of the directors of the company are also directors of Strick, Scott & Co., Ltd.

As time went on the commission payable to Strick, Scott & Co., Ltd., under the said agreement of May 6, 1914, became very large and much in excess of the amount anticipated. In June, 1919, Strick, Scott & Co., Ltd., decided that they would not for the time being ask the company to pay the expenses of the administration of the said agency under para. (e) of cl. 5 of the said agreement of May 6, 1914, and they communicated this decision to the company by letter dated June 16, 1919. An analysis, expressed partly in sterling, partly in rupees, and partly in

Persian krans, of the amounts payable to Strick, Scott & Co., Ltd., by way of commission under the said agreement for the years ending March 31, 1919, 1920, and 1921, is contained in the statements marked J, which are attached to and form part of this Case. In round figures the aggregate remuneration for the said three years was as follows: 1918-19, £70,000; 1919-20, £90,000; and 1920-21, £130,000. A

At a meeting of directors of the company held on Jan. 31, 1921, the chairman pointed out that as the commissions then being earned by Strick, Scott & Co., Ltd., were much in excess of the amount anticipated at the time the said agreement of May 6, 1914, was entered into he thought they might be induced to modify the terms for the balance of their present agreement subject to a settlement of the terms for the renewal period. It was thereupon resolved at the said meeting to appoint a committee to discuss the matter with a committee of Strick, Scott, & Co., Ltd., and to submit their recommendations to the board. Negotiations then ensued for the cancellation of the said agreement of May 6, 1914, and by Oct. 31, 1922, terms for cancellation had been agreed upon between the company and Strick, Scott, & Co., Ltd. The course of these negotiations are set out in extracts from the minutes of the meetings of the board of directors of the company and of the managing directors and in a copy report dated Sept. 28, 1922, from the company's auditors. The terms of cancellation which were agreed upon are set out in the minutes of the committee appointed to examine the question dated Oct. 31, 1922. B C D

The terms of cancellation were embodied in an agreement dated Nov. 17, 1922, and made between the company of the one part and Strick, Scott & Co., Ltd., of the other part, and expressed to be supplemental to the said agreement of May 6, 1914 (thereinafter referred to as "the principal agreement"). By the said agreement of Nov. 17, 1922, it was agreed (inter alia) that: E

(i) The principal agreement and the appointment thereby made should cease and determine as from Dec. 31, 1922.

(ii) Strick, Scott & Co., Ltd., should take steps to go into voluntary liquidation on or before Dec. 31, 1922, and to wind up their business, and should not be parties to any scheme for the reconstruction of the business of Strick, Scott & Co., Ltd., by the formation of any other company having as part of its objects the carrying on at Mohammerah in Persia of any business connected with petroleum or any of its products. F

(iii) As part of the consideration for such cancellation the company should pay in cash to Strick, Scott & Co., Ltd., on Dec. 31, 1922, or so soon thereafter as Strick, Scott & Co., Ltd., should have passed an effective resolution for winding-up to the liquidator thereof, £300,000. G

(iv) As a further part of such consideration the company agreed to employ upon the terms of their existing agreements and for the balance of the periods covered by such agreements such of the employees of Strick, Scott & Co., Ltd., as were on Dec. 31, 1922, employed exclusively for the purposes of the agency thereby agreed to be terminated and as were willing to be transferred into the service of the company. H

(v) Upon payment of the said sum of £300,000, Strick, Scott & Co., Ltd., or their liquidator should purchase at par and pay for in cash 5 per cent first mortgage debenture stock of the company to a nominal amount of £198,700 ex interest due on Dec. 31, 1922. I

By a further agreement also dated Nov. 17, 1922, and made between Strick, Scott & Co., Ltd., of the one part, and the company of the other part, the company acquired from Strick, Scott & Co., Ltd., their land at Mohammerah together with the buildings thereon and their furniture, fittings, machinery, plant, and launches for £100,000, and, in addition, a sum equal to the total amount of capital expenditure made by Strick, Scott & Co., Ltd., in respect of the said premises at Mohammerah between April 1 and Dec. 31, 1922. This price was arrived at on the basis of a sale between a willing purchaser and a willing seller and independently of the said sum paid for cancellation of the contract of May 6, 1914. The business of Strick, Scott & Co., Ltd., in Persia continued to be carried on by a company called

A Frank C. Strick (Basra), Ltd., in Basra and Baghdad. The two agreements of Dec. 17, 1922, were duly carried into effect, and Strick, Scott & Co., Ltd., ceased to act as agents for the company as from Dec. 31, 1922, and went into liquidation. The company took over the property and employees of the agency, and paid the said two sums of £300,000 and £100,000 to the liquidator of Strick, Scott & Co., Ltd., who purchased the £198,700 debentures at par. The said sum of £300,000

B was paid in cash in the year ending March 31, 1923. The said sum was treated in the company's accounts as a revenue payment and was charged to revenue at the rate of £60,000 a year for five years.

Lord Incheape, who was a director of the company appointed by the government in the year 1922, was called as a witness before the commissioners, and they accepted his evidence. He stated that (a) the cancellation of the agency agreement of May 6, 1914, was done entirely in the interests of the company; (b) before consenting to the said cancellation, he consulted with His Majesty's Treasury, as the

C British Government held about 44 per cent. of the shares in the company; (c) the cancellation of the said agreement had been fully justified by results, and a considerable economy and saving in working expenses had resulted to the company therefrom.

D It was contended on behalf of the company that: (a) The said sum of £300,000 was money wholly and exclusively laid out or expended for the purposes of the company's trade; (b) the said sum was an admissible deduction in computing the company's profits for the year ending March 31, 1923; (c) that the case was analogous to and governed in principle by *Mitchell v. B. W. Noble, Ltd.* (2). It was contended on behalf of the respondent, inter alia, that the said sum of £300,000

F was capital expenditure and therefore not an admissible deduction in computing the profits of the company.

Having considered the evidence and arguments adduced, the commissioners found that the said sum of £300,000 was an expenditure of a capital nature to secure an enduring benefit for the company's trade by getting rid of an onerous contract, and was not an admissible deduction in computing the company's profits for the

F year ending March 31, 1923, and they adjusted the figures of the assessments under appeal to amounts which were agreed upon between the parties.

The company, immediately upon the determination of the appeal, declared its dissatisfaction with the decision as to the said sum of £300,000 as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court pursuant to s. 149 of the Income Tax Act, 1918.

G *The Attorney-General (Sir William Jowitt, K.C.) and R. P. Hills for the Crown. Latter, K.C., and Cyril King for the company, the taxpayer.*

Cur. adv. vult.

June 8. The following judgments were read.

H **LORD HANWORTH, M.R.**—This appeal is from an order of ROWLATT, J., dated March 4, 1931, whereby he reversed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, and held that the sum of £300,000 which is in question was an admissible deduction in computing the company's profits for the year ending March 31, 1923.

The facts out of which the point to be decided arises are as follows: The Anglo-

J Persian Oil Co., Ltd., the taxpayer, is a company incorporated in 1909 with the object of raising, refining, selling, and otherwise dealing with crude oil and its products in Persia and elsewhere. By an agreement dated May 6, 1914, made between the taxpayer and Strick, Scott & Co., Ltd., the latter company were made the agents of the taxpayer to manage its business in Persia and the East, and to carry out the sale of petroleum and other products of the company, and generally to act as the agents of the taxpayer during the continuance of the term stated in the agreement. Certain commissions were made by the agreement payable to the agents, and fuller details of the agreement are stated in the Case. The agreement

was to continue for ten years from Jan. 1, 1914, and on the completion of that term, A
for a further term of ten years on the same conditions, but on such terms of remuneration as should be arranged, or, failing arrangement, as should be fixed by arbitration. The remuneration payable under the agreement of May, 1914, to the agents proved to be larger and more onerous than had been anticipated by the taxpayer. It amounted to £90,000 in the year 1919-20, and to £130,000 in 1920-21.

In September, 1922, a committee of the board of directors of the taxpayer reported B
in favour of bringing the agency of Strick, Scott & Co., Ltd., to an end. They stated that if this course were adopted:

"The Anglo-Persian Oil Co., Ltd., would have greater freedom of action with regard to the conduct of its business in the East. It would have more effective control by being in direct touch with the employees and customers, and would be entirely dissociated from any other operations commercial or political." C

Accordingly, negotiations to bring the agency to an end, which had been entered on, were continued; and ultimately terms were agreed and embodied in an agreement dated Nov. 17, 1922, whereby it was agreed that the agreement of May 6, 1914, and the appointment of Strick, Scott & Co., Ltd., as agents thereby made, should cease and determine as from Dec. 31, 1922. Strick, Scott & Co., Ltd., were to go into liquidation and to wind up their business, and, in short, were not to start or act in or about any business connected with petroleum at Mohammerah in Persia, while, in return, the respondents were to pay to Strick, Scott & Co., Ltd., £300,000. Among other terms, it may be stated that the taxpayer agreed to take into its employ for the balance of the period for which the agency had to run any of the employees of Strick, Scott & Co., Ltd., on Dec. 31, 1922, who were willing to be transferred to the service of the taxpayer. D

Another, and separate, agreement was also entered into between the parties, under which for the sum of £100,000 the taxpayer acquired from Strick, Scott & Co., Ltd., their land at Mohammerah, with the buildings thereon and the contents therein, together with plant, machinery, launches, &c. This agreement, and the sum paid under it, was separate from the agreement which brought the agency to an end. E

The agreements were carried out; the £300,000 was paid; the agency was terminated; and thereafter the taxpayer has acted as distributor of its oil and products, and has not appointed any other agents. The cancellation of the agreement is stated in the Case to have resulted in a considerable economy and saving in working expenses to the taxpayer. F

The sum of £300,000 was treated in the taxpayer's accounts as a revenue payment, and was charged to revenue in instalments of £60,000 for five years, and it claims that this course was correct, and justifies the deduction of the £300,000 from their annual expenses in seeking profits and gains. The Crown disputes this course, and claims that the £300,000 ought to be treated as an expenditure on capital account, an expenditure which brought to an end an onerous contract, and secured to the taxpayer a freedom from charges which would have continued for some years. The commissioners accepted this latter argument and ordered the debits relating to the £300,000 to be eliminated from the profit and loss accounts of the taxpayer. ROWLATT, J., has held that the sum in question was an admissible deduction. G

The deductions that are permitted to a trader are not affirmatively stated in the Income Tax Act, 1918. They are to be ascertained by an examination of the deductions which are not allowed by r. 3 of the Rules applicable to Cases I and II of Sched. D. It has been said by LORD SUMNER in *Usher's Wiltshire Brewery Co. v. Bruce* (3) ([1915] A.C. 433 at p. 468) that H

"The effect of this structure, I think, is this: that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such I

A that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is, or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it."

B It was argued that the finding of the commissioners in the present case ought to be accepted as one of fact within their own sphere, and so not the subject of appeal as a question of law. This argument is not, to my mind, well founded. The cases on this point of what is attributable to revenue, and what to capital account, run on fine lines of distinction, and the commissioners have to direct themselves correctly on the questions of law that are involved. The deductions that are permissible must be examined from the point of view of law. They cannot be said to be simply questions of fact irrespective of the principles of law. It is, therefore, C necessary to consider the principles on which items have been held to belong to capital or revenue, and the characteristics which have been held to turn a particular item into the one category or the other.

D Certain illustrations can be given of items that have been held to fall on one side of the line or the other. Thus in *Southwell v. Savill Bros., Ltd.*, (4) it was held that the cost of calling in and surrender of some licences so as to get new licences is not a revenue expense, but capital expenditure on extending the business. In *Moore & Co. v. Hare* (5) the expense of promoting Bills in Parliament whereby further facilities were obtained from an existing railway, was held to be a capital outlay. In *Ounsworth v. Vickers, Ltd.* (6) the outlay on making a new channel for a large vessel to find its way from the stocks, where it was being built, into the Walney Channel, and so to a harbour, was held to be a capital outlay, and not an expenditure chargeable to income. In *John Smith & Son v. Moore* (7) the purchase of some unexecuted coal contracts under which coal would be supplied, was held to be capital expenditure. *Countess Warwick Steamship Co., Ltd. v. Ogg* (8), the cancellation of a contract to supply a ship which was to be used as one of the fleet in the business carried on, was held to be a capital expenditure. So, too, in *Rowntree & Co., Ltd. v. Curtis* (9) a lump sum paid to an employees' F benefit fund was held to be a capital expense. And in *British Insulated and Helsby Cables Co., Ltd. v. Atherton* (1) the contribution actuarially ascertained as a nucleus to the pension fund of its salaried staff was held not to be an admissible deduction but followed the decision in *Rowntree & Co., Ltd. v. Curtis* (9) and was held to be expenditure to secure an advantage, or an enduring benefit: see per LORD CAVE, [1926] A.C. at pp. 213, 214. On this principle, in *Mallett v. Staveley Coal and G Iron Co., Ltd.* (10) the purchase and surrender of leases by which the terms on which the mines were being worked were varied, was held to be on capital account. The company freed themselves from a capital liability. In this case the test suggested was whether or not the money provided was from the fixed or the circulating capital.

H In *Mitchell v. B. W. Noble, Ltd.* (2) a test is suggested that if the expenditure is not to secure an asset, but to enable the business to continue its same course as before, and only to remove a difficulty in carrying the business on on the same lines as before, then the expenditure is from revenue, and not from capital. In *Hancock v. General Reversionary and Investment Co., Ltd.* (11) the cost of buying up or putting a lump sum down in lieu of an annual pension was held to be an admissible expenditure on revenue account, because it merely anticipated payments which I were, or would have been in each year, attributable to revenue. And so, too, in *Mitchell v. B. W. Noble, Ltd.* (2) the payments to get rid of a director in order to facilitate the general carrying on of the business was also held attributable to revenue. It is not easy to define the principle which is to be deduced from the characteristics of these cases. I am inclined to think that the question whether the money paid is provided from the fixed or the circulating capital comes as near to accuracy as can be suggested.

LORD CAVE's test that where money is spent for an enduring benefit it is capital,

seems to leave open doubts as to what is meant by "enduring." In *Mitchell v. B. W. Noble, Ltd.* (2) the dismissal of the director once and for all might have connoted an enduring benefit, but the expenditure was held not to be a capital expense. The Attorney-General pressed on the court that where there is brought into existence an asset for the company, the expenditure is from capital; and he claimed that the taking of the agency back into the hands of the taxpayer, together with the engagement of the employees of Strick, Scott & Co., Ltd., if they were willing to be employed, was the creation, or taking over, of a valuable asset. This does not appear to be a true reading of what took place. The taxpayer had appointed Messrs. Strick, Scott & Co., Ltd., as its agents. They have now withdrawn that agency, and are doing the business themselves. It seems difficult to accept the view that the appointment of an agent, or the withdrawal of an agency, in the very business belonging to the principals creates or destroys a business of a separate nature or an asset which is to be added to the capital account. It seems rather that *Hancock v. General Reversionary and Investment Co., Ltd.* (11), and *Mitchell v. B. W. Noble, Ltd.* (2), and *Mallett v. Staveley Coal Co., Ltd.* (10) give illustrations that the test of fixed or circulating capital is the true one; and where, as in this case, the expenditure is to bring back into the hands of the company a necessary ingredient of their existing business—important, but still ancillary and necessary to the business which they carry on—the expenditure ought to be debited to the circulating capital rather than to the fixed capital, which is employed in and sunk in the permanent—even if wasting—assets of the business.

On this survey of the cases I have come to the conclusion that the commissioners have not asked themselves the right question, and have not directed themselves aright in this difficult point of law. The consequent result is that I think it is open for the court to express its opinion in law. Then, as ROWLATT, J., points out, there is no evidence of the purchase of the goodwill of some business, or of somebody who has a right to stay; nor is there any trace of a payment to start a business. The payment is to put an end to an expensive method of carrying on the business which remains the same whether the distributive side is in the hands of the taxpayer itself, or of its agents.

For the reasons that I have given, I agree with the judgment of ROWLATT, J. The appeal must be dismissed with costs.

LAWRENCE, L.J.—In my judgment the decision of ROWLATT, J., in this case was plainly right. It is common ground that the £300,000 in question was a disbursement wholly and exclusively expended for the purposes of the taxpayer's trade, and the only question is whether it was an admissible deduction in computing the taxpayer's profits for the relevant accounting period. I cannot help thinking that, but for the magnitude of the amount involved, it would not have occurred to the commissioners to challenge the propriety of treating the disbursements in question as a charge to revenue.

It is not open to doubt that under ordinary circumstances where a trader, in order to effect a saving in his working expenses, dispenses with the services of a particular agent or servant, and makes a payment for the cancellation of the agency or service agreement, such a payment is properly chargeable to revenue; it does not involve any addition to or withdrawal from fixed capital; it is purely a working expense. The fact that the payment includes a sum in consideration of the agent or servant agreeing not to compete with his principal or employer after the determination of his employment (a stipulation frequently met with in these cases) does not alter the character of the payment.

In the present case the sum paid to the agent for the cancellation of his agreement, and the winding-up of his concern, was very large; but it has to be remembered that the annual profits of the taxpayer were enormous. Thus, in the year in which the payment was made the profits amounted to just under £3,000,000, and the £300,000 in question was charged to revenue at the rate of £60,000 a year for five years. Moreover, according to the evidence, a considerable economy and

A saving in working expenses resulted to the company from the cancellation of the agency agreement, and therefore it is not unreasonable to suppose that the increased revenue of the taxpayer will more than cover the expenditure in question. But whether that be so or not does not affect the principle that such a payment is an income expenditure. Even if the taxpayer had been mistaken in its policy, and by getting rid of its agent had increased the working expenses instead of diminishing them, the payment would still have been a mere working expense, and, as such, chargeable to revenue.

The main argument addressed to us by counsel for the Crown was that the taxpayer, by getting rid of its agent in Persia, was enlarging the area of its operations, was improving its goodwill, and was in fact embarking on a new enterprise. Indeed, the argument was pressed so far as to suggest that the payment was really made by way of purchase money for the goodwill which the agent has built up in Persia during his agency. The fallacy underlying the whole of this argument, in my judgment, consists in treating the agent as if he were an independent trader, and not the agent of the taxpayer carrying on the taxpayer's trade. It is plain that the agent was throughout acting on behalf of his principal, and the area of his operations was the area of the taxpayer's operations, and the goodwill built up by him was the taxpayer's goodwill. It follows that the company by cancelling the agency agreement, and itself undertaking the future management of its business in Persia, neither enlarged the area of its operations, nor improved its goodwill, nor embarked on a new enterprise; it merely effected a change in its business methods and internal organisation, leaving its fixed capital untouched.

E We have been referred to a number of cases in which the question whether a particular payment was a capital payment or an income payment has been debated. In none of these cases, however, were the facts the same as in the present case. Of all the cases cited, *Mitchell v. B. W. Noble, Ltd.* (2) most closely resembles the present case. In that case the large sum of £9,000 was paid by the company to one of its managing directors in order to get rid of him, and it was held by this court that the payment was properly chargeable to revenue. LORD HANWORTH, M.R., in the course of his judgment, said ([1927] 1 K.B. at p. 737):

"It was a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made, not in order to secure an actual asset to the company, but to enable them to continue as they had in the past to carry on the same type and high quality of business."

G And SARGANT, L.J., said ([1927] 1 K.B. at p. 740):

H "It is quite impossible to put against the capital account of the company a payment of this nature. It seems to me that the payment, though large, and though exceptional, was not of such a nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed in the business. . . . To my mind it is essentially different from those various payments in the cases which have been referred to which were of the nature of adding to, or improving, the equipment, or otherwise, for the permanent benefit of the company."

I These remarks appear to me to apply a fortiori to the present case. The £300,000 in question was not paid out of capital, therefore no capital of the taxpayer has been withdrawn, nor was the £300,000 employed, or intended to be employed, in the business by way of addition to, or improvement of, the capital of the taxpayer.

Except in so far as any general principle can be extracted from the other cases cited to us, they are not of much assistance in deciding the present case. The broad principle applicable to a case like the present is stated by VISCOUNT CAVE, L.C., in *British Insulated and Helsby Cables, Ltd. v. Atherton* (1) as follows ([1926] A.C. at p. 213):

"But when an expenditure is made not only once for all, but with a view to bringing into existence an asset, or an advantage, for the enduring benefit of a

trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating an expenditure as properly attributable, not to revenue, but to capital."

Applying that test to the present case, the payment in question did not bring any asset into existence, nor can it, in my opinion, properly be said that it brought into existence an advantage for the enduring benefit of the taxpayer's trade within the meaning of that expression in the passage which I have quoted. What the House of Lords was considering in that case was a sum irrevocably set aside as a nucleus of a pension fund established by a trust deed for the benefit of the company's clerical and technical salaried staff, and I have no doubt that LORD CAVE had that fact in mind when he spoke of an advantage for the enduring benefit of the company's trade. Such an expenditure differs fundamentally from the expenditure with which we are concerned in the present case. There the expenditure brought into existence a permanent fund which would endure for the benefit of the company's staff during the existence of the company, however much the personnel of that staff might change, whereas in the present case the expenditure brought no such permanent advantage into existence, as the taxpayer might, at any time, revert to its former method of conducting its business and place the management of its business in Persia again in the hands of an agent. The change in the method of carrying on the taxpayer's business in Persia has, in fact, resulted in a more economical and efficient working of the taxpayer's trade, and in that sense has proved to be advantageous to the taxpayer's business, but it cannot be said that the expenditure in bringing about such a change has created an advantage for the enduring benefit of the taxpayer's trade.

The Special Commissioners apparently founded their decision on the case of *Mallett v. Staveley Coal and Iron Co., Ltd.* (10). In that case a sum had been paid for the surrender of certain seams of coal which were held by a mining company under leases containing onerous terms, and the court held that the sum so paid was a capital expenditure relating to the fixed, and not to the circulating, capital of the company, as the company was not a company formed to deal in mining leases, but a company formed to deal in coal won under its mining leases. The mining leases, therefore, constituted part of the fixed capital of the company.

The Special Commissioners in the present case seem to have thought that as the payment made in the present case was for the purpose of getting rid of an onerous contract it came within the principle of *Mallett's Case* (10). In my opinion they seem to have misunderstood the ratio decidendi of that case which, in my judgment, has no application to a contract of agency such as we are concerned with here. Although it is true to say that the taxpaying company is not formed for the purpose of dealing in contracts of agency, that fact did not make the agency contract which was cancelled in the present case a part of the fixed capital of the taxpayer. The taxpayer's oil concessions in Persia are part of the taxpayer's fixed capital, and if a sum were paid for the cancellation of such a concession on the ground that it was onerous, that would, no doubt, be a capital expenditure within the principle of the decision in *Mallett's Case* (10). The taxpayer's contracts for the delivery of oil forms part of its circulating capital, and if a sum were paid for the cancellation of such a contract it would no doubt be a payment in respect of its circulating capital, and properly attributable to revenue. The contract to employ an agent to manage the taxpayer's business in Persia, however, in no sense forms part of the fixed capital of the taxpayer, but is a contract relating entirely to the working of the taxpayer's business, the method of managing which may be changed from time to time. Neither the contract itself nor a payment to cancel it would, in my opinion, find any place in the capital accounts of the taxpayer. For these reasons I agree that this appeal fails, and should be dismissed.

ROMER, L.J.—It is unnecessary for me to recapitulate the facts of this case that resulted in the payment by the taxpayer of £300,000 to the liquidator of Strick, Scott & Co., Ltd., and I can turn at once to a consideration of the question whether

A that sum was or was not an admissible deduction in computing the respondent company's profits for the year ending March 31, 1923.

Towards the solution of this problem little, if any, assistance is afforded by the Income Tax Act, 1918. It is, indeed, provided by s. 309 that in arriving at the amount of profits or gains for the purpose of income tax, no other deductions are to be made than such as are expressly enumerated in the Act. But, as has often
B been pointed out, the Act nowhere enumerates the deductions that may be made. It merely prohibits the making of certain specified deductions. Nor is it to be taken that any deduction may legitimately be made that is not expressly prohibited by r. 3 to Cases I and II under Sched. D or that deductions are to be limited to those expressly excepted from the prohibitions in that rule. The reason for this is to be found in the fact that under Case I the income tax is to be computed on
C the full amount of the balance of the profits or gains, and this connotes that all debit items that ought, in accordance with the ordinary principles of accountancy to be charged against incomings of the trade when computing the balance of its profits and none others, will be so charged: see *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) ([1915] A.C. at p. 468). But why, this being so, the legislature should have taken the trouble to prohibit all the deductions specified in r. 3, many of
D which are such as no one would dream of deducting from the incomings of the trade for the purpose of computing the balance of profits will, for me at any rate, ever remain a mystery.

So far as the Act itself is concerned, one is, therefore, left without guidance as to the deductions that are permissible, but with the mind somewhat unsettled by reason of the list of prohibited deductions as to what, in the view of the legislature,
E is to be considered for the purposes of income tax the balance of the profits or gains. In these circumstances, it is not surprising that the cases in which the court has been called on to say whether some particular deduction is or is not permissible should have been numerous and not always easy to reconcile with others in which the facts were not dissimilar. Nor is it surprising that learned judges should have applied tests which, however satisfactory for the purpose of solving the particular
F problem before them, should turn out to be inconclusive or insufficient when applied to the facts of another case.

At the end of 1925, however, all these authorities were considered by the House of Lords in *British Insulated and Helsby Cables Co., Ltd. v. Atherton* (1) ([1926] A.C. 205), and the law applicable to such cases as the present was, as it seems to me, placed beyond the realms of controversy. The boundary line between deduc-
G tions that were permissible and those that were not had previously been uncertain and difficult to follow. As regards the large majority of deductions, there was and could be no conceivable doubt. They were clearly on one side of the line or the other. But as regards a comparatively small number, it was difficult to say on which side of the line they fell. This was particularly the case where, as in the present one, an expenditure is not a recurring one, but is made once and for all.
H It was pointed out by LORD CAVE in *Atherton's Case* (1) that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this ([1926] A.C. at p. 213):

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circum-
I stances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made "with a view" to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the "enduring" benefit of the trade. I agree with ROWLATT, J., that by "enduring" is meant "enduring in the way that fixed capital endures." An expenditure on acquiring floating

capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital, that is of an onerous character, as was pointed out by this court in *Mallett v. Staveley Coal and Iron Co., Ltd.* (10).

This being the test to be applied in such cases as the present, it is obvious that the question whether an expenditure made once and for all is or is not to be treated as chargeable to capital and not revenue is one of fact only. Being a question that the commissioners are eminently qualified to answer, it is to be hoped that in future they will answer it by reference to the language of the test laid down by LORD CAVE and not as though they are deciding a question of law. Too often in the past the commissioners have found that a particular sum is or is not a permissible deduction. That is a question of law, or, at any rate, a mixed law and fact. If they will find that the expenditure in question was or was not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, their finding will be one of fact, and if there be some evidence on which the finding can reasonably be made, it will not be subject to review in the courts.

This leads me to inquire whether they have so found in the present case. What they say is this: "We found that the said sum of £300,000 was an expenditure of a capital nature to secure an enduring benefit for the company's trade by getting rid of an onerous contract." If this be a finding that by getting rid of the agreement of May 6, 1914, the company secured an enduring benefit for its trade, it would, as it seems to me, be a finding of fact, and one therefore which the court must treat as conclusive if there was evidence upon which it could reasonably have been made. But I cannot help thinking that the finding is not addressed so much to the particular contract that was got rid of in the present case as to onerous contracts in general; that the commissioners, in other words, were of opinion that the getting rid by a company of an onerous contract always secured an enduring benefit for its trade. This was the view of the finding that was taken by ROWLATT, J. After referring to the finding, he said this:

"In my judgment that is a finding which is perfectly inconclusive. It does not deal with the question. The question is not merely getting rid of an onerous contract but an onerous contract for what."

I agree. If a contract be onerous simply and solely because it entails a heavy drain on the annual revenue of the company, the company will not secure an "enduring" benefit for its trade by getting rid of it. Yet looking at the special Case, it would appear that the commissioners thought that it necessarily would, for there is nothing in it from beginning to end to suggest that the taxpayer in fact secured an enduring benefit such as was referred to by LORD CAVE. We are told that Lord Incheape gave evidence on behalf of the taxpayer to the effect that the cancellation of the agreement had resulted in a considerable economy and saving in working expenses, and this revenue benefit is the only one referred to. The Case nowhere refers to any evidence of the taxpayer having obtained any capital benefit, nor do the commissioners in any way intimate in what respect the trade of the taxpayer was benefited except in the way indicated by Lord Incheape.

In these circumstances the finding of the commissioners cannot in my opinion be treated as conclusive, and it is therefore incumbent on the court itself to decide the question whether the fixed capital of the taxpayer has or has not been benefited by the expenditure of the £300,000. In my judgment this question must be answered in the negative. When the negotiations with Strick, Scott & Co., Ltd., that ultimately led to a cancellation of their agreement were first set on foot, the only reason suggested by the taxpayer's chairman was that the commissions then being earned by the agents were much in excess of the amount anticipated at the time the agreement was entered into, and it was merely a modification and not a cancel-

A lation of that agreement that was contemplated. I can find no indication that any enduring advantage to the taxpayer's trade from a capital point of view was being sought, nor was it suggested that any such advantage would be gained in fact. It is true that the committee of directors appointed to negotiate with Strick, Scott & Co., Ltd., reported on Sept. 28, 1922, that, in addition to the large saving to the taxpayer that would be effected by the cancellation of the contract with them, there would be other material advantages, but the committee did not explain what those advantages would be. They might well have been, and probably were, merely revenue advantages. For myself, at any rate, I cannot see what other advantages could accrue to the taxpayer from the cancellation. The result would merely be that the taxpayer would be represented in the East by agents other than Strick, Scott & Co., Ltd., for it is obvious that, being a corporation, it must have agents of some sort out there. Those agents would no doubt be employed on terms more favourable to the taxpayer than those contained in the agreement of May 6, 1914, and it may well be that the taxpayer would retain a greater measure of control over such agents than it could over Strick, Scott & Co., Ltd. All this would lead to the economy and saving in working expenses spoken of by Lord Inchcape. Of any further advantage than this there is no evidence. Except for the change of agents, and for all that I know to the contrary, the business of the taxpayer continued exactly as it was before the change. I cannot find that any advantage or benefit either positive or negative accrued to the capital of the taxpayer by the expenditure of the £300,000. All the advantage and benefit that it brought seems to have been merely of a revenue character.

In my opinion this appeal should be dismissed.

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Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Linklaters & Paines.*

[*Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.*]

F

G

Re CURWEN. CURWEN v. GRAHAM

[CHANCERY DIVISION (Luxmoore, J.), July 11, 1931]

[Reported [1931] 2 Ch. 341; 100 L.J.Ch. 387; 146 L.T. 7]

H

Settlement—Vesting deed—Trustees described as those of principal settlement—Trustees also of a compound settlement—Validity—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 5 (1), (3), s. 110 (2), Sched. 2, para. 1 (1), (2).

By a vesting deed made under the Settled Land Act, 1925, property vested in a tenant for life. The deed contained a statement that the trustees who were executing it were trustees of the principal settlement, but it did not contain a reference to the fact that they were also trustees of a compound settlement.

I

Held: this description was sufficient and the vesting deed was a valid and effective principal vesting deed, executed pursuant to the Settled Land Act, 1925, in respect of the land comprised in the compound settlement.

Notes. As to the effect of errors in a vesting deed, see 29 HALSBURY'S LAWS (2nd Edn.) 536-537, para. 786; and for cases on the subject, see 40 DIGEST (Repl.) 850, 3262-3269. For the Settled Land Act, 1925, s. 5, s. 110 (2), and Sched. 2, para. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 25, 235, 264.

Cases referred to:

- (1) *Re Cradock's Settled Estates*, [1926] Ch. 944; 95 L.J.Ch. 364; 135 L.T. 370; 40 Digest (Repl.) 846, 3232.
- (2) *Re Cayley and Evans' Contract*, [1930] 2 Ch. 143; 99 L.J.Ch. 411; 143 L.T. 405; 40 Digest (Repl.) 851, 3268.
- (3) *Re Ogle's Settled Estates*, [1927] 1 Ch. 229; 96 L.J.Ch. 113; 136 L.T. 300; 70 Sol. Jo. 953; 40 Digest (Repl.) 790, 2720.

Summons.

By a settlement made in 1892, certain freehold property was settled to the use of Chaloner Curwen for life, remainder to his first and other sons in tail male, with power to the first tenant for life to appoint a life or any less estate to a widow who should survive him. In view of his intended marriage to the plaintiff, C. Curwen, a month later, by deed poll appointed to her a life interest therein. The issue of the marriage were two, the first being tenant in tail male. In 1897, the tenant for life died, and the plaintiff became entitled to her life estate. In 1914, the tenant in tail, then of full age, executed a disentailing assurance and resettlement. To this the plaintiff was a party, to permit of certain charges taking priority to her life estate, and her original life estate was restored. In 1926, the vesting deed in question was executed between the trustees of the settlement for the purposes of the Settled Land Act, 1925, of the one part and the plaintiff of the other part, whereby it was witnessed (i) that it was executed to give effect to the requirements of that Act and at the request of the plaintiff, as tenant for life in possession or a person having like powers in relation to the property under the said settlement and appointment; (ii) that the trustees thereby declared that the property described, being that subject to the settlement and the subsequent documents and all others, if any, subject thereto, vested for the legal estate therein in the plaintiff; (iii) that she would stand possessed thereof on the trusts and subject to the powers and provisions on and subject to which the same ought to be held from time to time under the settlement and the appointment or otherwise; (iv) that the trustees were trustees of the settlement for the purposes of the Settled Land Act, 1925; (v) that the settlement of 1892 contained no power to appoint new trustees and the statutory power applied. By virtue of s. 31 (1) of the Act of 1925, the trustees were also trustees of the compound settlement, consisting of the settlement of 1892, the appointment, the disentailing deed, and the resettlement. On a subsequent sale of a portion of the property, the purchaser took objection to the validity of the vesting deed as it did not refer to the fact that the trustees were also trustees of the compound settlement. This summons was then taken out by the plaintiff asking whether the deed of 1926 was valid and effectual or otherwise.

C. A. J. Bonner, for the plaintiff, referred to *Re Cradock's Settled Estates* (1), *Re Cayley and Evans' Contract* (2).

W. J. Whittaker, for the defendants, referred to *Re Ogle's Settled Estates* (3).

LUXMOORE, J.—The question I have to determine is whether a vesting deed which was executed with the intended object of giving effect to the provisions of the Settled Land Act, 1925, with regard to the vesting of the settled land in the tenant for life is a valid vesting deed or not.

It is said that the vesting deed is invalid, because it contains no reference to the fact that the three gentlemen named as trustees, and who are the persons executing the deed, are, in fact, trustees of the compound settlement, but it only refers to them as trustees of the settlement of 1892. The vesting deed was executed under the provisions of the Act of 1925. The Act provides that, where there is a subsisting settlement at the date of the Act, the provisions which are set out in Sched. 2 of the Act shall apply. Those provisions, so far as they are material, are:

"1 (1) A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument. (2) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every

- A** settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall, at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner and including themselves if they are the statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants."

Section 5 is the section which provides as to the contents of the vesting deed.

- C** Subsection (1) provides:

- "Every vesting deed for giving effect to a settlement or for conveying settled land to a tenant for life or statutory owner during the subsistence of the settlement (in this Act referred to as a 'principal vesting deed') shall contain the following statements and particulars, namely: (a) A description, either specific or general, of the settled land; (b) A statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land; (c) The names of the persons who are the trustees of the settlement; (d) Any additional or larger powers conferred by the trust instrument relating to the settled land which, by virtue of this Act, operate and are exercisable as if conferred by this Act on a tenant for life; (e) The name of any person for the time being entitled under the trust instrument to appoint new trustees of the settlement."

Subsection (3) provides:

"A principal vesting deed shall not be invalidated by reason only of any error in any of the statements or particulars by this Act required to be contained therein."

- F** It seems to me that all that s. 5 says is that the vesting deed shall contain certain statements and particulars. What are the statements and particulars that it is to contain? First there is to be "a description, either specific or general, of the settled land." There is no difficulty here with regard to that. Then the section requires:

- G** "A statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land."

That statement is contained in the vesting deed. Then: "The names of the persons who are the trustees of the settlement." The names of the trustees are set out.

- H** It is true that a description of them has been added; in cl. 4 of the vesting deed it says: "The trustees are the trustees of the settlement of 1892 for the purposes of the Settled Land Act, 1925." That is a perfectly true statement, and, as a result of their being trustees of the settlement of 1892, they are also trustees of the compound settlement that exists and is constituted by the various documents to which I have already referred for the purposes of the Act. There is nothing in s. 5 that says that they must state the actual documents which constitute the settlement of which they are trustees. If the persons stated in the vesting deed to be the trustees are, in fact, the trustees of the compound settlement, that seems to me, so far as s. 5 is concerned, sufficient.

I It is also said that s. 110 shows the deed to be bad. Subsection (2) enacts as follows:

"A purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem

stamp duty thereon, and whether or not he has notice of its contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that—(a) the person in whom the land is by the said instrument vested or declared to be vested is the tenant for life or statutory owner and has all the powers of a tenant for life under this Act, including such additional or larger powers, if any, as are therein mentioned; (b) the persons by the said instrument stated to be the trustees of the settlement, or their successors appearing to be duly appointed, are the properly constituted trustees of the settlement; (c) the statements and particulars required by this Act and contained (expressly or by reference) in the said instrument were correct at the date thereof; (d) the statements contained in any deed executed in accordance with this Act declaring who are the trustees of the settlement for the purposes of this Act are correct; (e) the statements contained in any deed of discharge executed in accordance with this Act are correct.”

That is followed by a proviso:

“Provided that, as regards the first vesting instrument executed for the purpose of giving effect to—(a) a settlement subsisting at the commencement of this Act; . . . a purchaser shall be concerned to see—(i) that the land disposed of to him is comprised in such settlement or instrument; (ii) that the person in whom the settled land is by such vesting instrument vested, or declared to be vested, is the person in whom it ought to be vested as tenant for life or statutory owner; (iii) that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement.”

If there is a compound settlement, that is the relevant settlement for the purposes of the vesting deed (see the proviso at the end of s. 1 (1)), and a purchaser is entitled to be satisfied that the persons stated in the vesting deed to be the trustees of the settlement are the trustees of that compound settlement. But there is no provision in s. 110 that the vesting deed should contain a statement of what document or documents the particular settlement under which the trustees are acting consists. All that the Act requires is that the persons who are to execute the vesting deed should be, in fact, the trustees of the relevant settlement whatever it is. So far as I can see, there is nothing in the Act which makes the vesting deed in this case an invalid deed.

My attention has been called to various decisions, a decision of *ASTBURY, J.*, in *Re Cradock's Settled Estates* (1), and *BENNETT, J.*, in *Re Cayley and Evans' Contract* (2). Neither of these cases deals with the point I have to decide in this case. In neither case was the learned judge considering the validity of the instrument having regard to what was stated in the body of the instrument. The question in each case was, who were the persons who ought in the particular case to execute a vesting deed? That is not the question I have to determine. Everybody admits that the persons who have executed the vesting deed in this case are, in fact, those persons who ought to execute the vesting deed, and the tenant for life is the person in whose favour they want to execute it. In those circumstances, I see no reason to say the vesting deed in this case is an invalid deed, and I answer the question raised by the summons by stating that the vesting deed dated July 1, 1926, is a valid and effective principal vesting deed, executed or made pursuant to the Settled Land Act, 1925, and in respect of the land comprised in the settlement constituted by the various documents which are set out in the title to the summons.

Solicitors: *Lawrence, Graham & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

A

Re CLEVELAND LITERARY AND PHILOSOPHICAL SOCIETY'S
LAND. BOLCHOW *v.* LAUGHTON

[CHANCERY DIVISION (Farwell, J.), May 5, 1931]

B

[Reported [1931] 2 Ch. 247; 100 L.J.Ch. 363; 145 L.T. 486]

Literary and Scientific Society—Land vested in trustees for purposes of the society—Power of trustees to raise money on mortgage—Trustee Appointment Act, 1850 (13 & 14 Vict., c. 28)—Literary and Scientific Institutions Act, 1854 (17 & 18 Vict., c. 112)—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 29 (1).

C

Freehold land was conveyed to the trustees of a society, whose object, by its rules, was the encouragement of literature, science and art. The benefits of the society were limited to its members. It was desired to make alterations to buildings erected by the society and to raise money by mortgage of the land for that purpose.

D

Held: the land was vested in the trustees for "public purposes" within the meaning of the Settled Land Act, 1925, s. 29 (1), and was, therefore, settled land; accordingly, the trustees had the powers of a tenant for life and could raise the money required by mortgage.

E

Notes. As to dealings by trustees of Literary and Scientific Institutions, see 21 HALSBURY'S LAWS (2nd Edn.) 6-8, paras. 12-14. For the Settled Land Act, 1925, s. 29, see 23 HALSBURY'S STATUTES (2nd Edn.) 79.

Adjourned Summons.

F

The Cleveland Literary and Philosophical Society was an unincorporated society formed about 1863. In 1876 it acquired freehold land, on which was erected a lecture hall, library and reading rooms. The land was conveyed to seven persons, as trustees for the society, and was mortgaged by them for £2,000 to provide for the purchase price and the erection of the buildings. The trustees, on Oct. 3, 1876, executed a declaration of trust of the property in favour of the society. By r. 1 of the rules of the society, the object of the society was stated to be "the encouragement of literature, science and art." The premises of the society were only used by annual subscribers. The last survivor of the original trustees of the society died in 1922, but no new trustees were appointed until November, 1929. On Nov. 21,

G

1929, a duly convened meeting of the society was held, at which the president of the society and the chairman of the meeting executed a deed appointing seven persons to be trustees of the society. This deed was in conformity with the statutory form prescribed by the Trustee Appointment Act, 1850. Since 1876 the value of the property of the society had largely increased, and the mortgage money had been reduced to £500 by payments from time to time out of moneys of the society. It was now proposed that the buildings of the society, which had remained in almost the same condition as when they were erected, should be altered to provide for the present requirements of the society, and that a further mortgage should be made to raise the necessary expenses of the alterations.

H

I

Questions arose as to the power of the present trustees to raise money by mortgage, and the trustees issued this summons to determine the point. The court held that the society came within the provisions of the Literary and Scientific Institutions Act, 1854, with which was incorporated the Trustee Appointment Act, 1850, and also that s. 34 of the Trustee Act, 1925, as to the restrictions on the number of trustees, did not apply. The question then arose whether the powers of a tenant for life in respect of the property could be exercised under s. 29 of the Settled Land Act, 1925, by the trustees.

The Settled Land Act, 1925, s. 29 (1), provides:

"For the purposes of this section, all land vested or to be vested in the trustees

on or for charitable, ecclesiastical, or public trusts or purposes shall be deemed to be settled land, and the trustees shall, without constituting them statutory owners, have in reference to the land, all the powers which are by this Act conferred on a tenant for life and on the trustees of a settlement . . .”

R. G. Nicholson Combe for the trustees.

C. J. Radcliffe for the president of the society.

Droop for a member of the society.

P. J. Sykes for the mortgagee.

FARWELL, J.—The question to be decided here is whether the land belonging to the Cleveland Literary and Scientific Society is vested in the trustees of the society for “public purposes” within the meaning of s. 29 (1) of the Settled Land Act, 1925, and “shall be deemed to be settled land.”

The authorities have clearly decided that a society of this nature is not a charity, and compel me to hold that this society is not a charitable society. Neither is it an ecclesiastical trust. Then the question arises whether it comes within the meaning of “public purposes.” It is plain, in reading s. 29, that “public purposes” are something different from charitable or ecclesiastical purposes. In my judgment, this land is vested in the trustees for public purposes; it was conveyed to the trustees for the purposes of this society, the object of which, under r. 1 of its rules, is the encouragement of literature, science and art. It is true that the rules limit the benefits of the society to members, so that, in the first instance, it is not the general public, but particular members of the public, who benefit; but, notwithstanding that, in my judgment the land is, in this case, held for public purposes within the meaning of the section.

It may be that, but for the Literary and Scientific Institutions Act, 1854, the land of this society would not be held on public trusts, since, apart from that Act, the members could have put an end to the trust at any time, and disposed as they thought fit of the assets. But that Act expressly provides that, on the dissolution of a society of this kind, no profit shall accrue to a member of the society, but that the assets are to pass to a society of a like nature.

The true view is that this property is held primarily for the encouragement of literature, science and art, and not for the benefit of the members, and, since the encouragement of literature, science and art is a public purpose, the primary purpose for which the land is held is public.

In these circumstances, I think that this is a case of a public and not of a private trust, and that it comes within s. 29. There will, therefore, be a declaration that the land is vested in the plaintiffs as trustees on or for public trusts or purposes within the meaning of s. 29, and that, for the purposes of that section, the land is deemed to be settled land.

I am further of opinion that the alterations proposed are transactions for the benefit of the land or the persons interested within the meaning of s. 29 and s. 64 of the Settled Land Act, 1925, and there will be a declaration that the plaintiffs may raise, by way of mortgage, an amount sufficient to pay the expenses of carrying out those alterations.

Solicitors: *Iliffe, Sweet & Co.*, for *J. W. R. Punch & Robson*, Middlesbrough.

[Reported by *E. K. CORRIE, Esq., Barrister-at-Law.*]

A

DAVIS v. PARKER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 28, 29, 1931]

B

[Reported [1931] 2 K.B. 210; 100 L.J.K.B. 590; 95 J.P. 146; 47 T.L.R. 418; 29 L.G.R. 387; 145 L.T. 188; 75 Sol. Jo. 312; 29 Cox, C.C. 297]

Gaming—Common gaming house—Games of skill—Public resorting to premises to play games on automatic machines—Gaming Houses Act, 1854 (17 & 18 Vict., c. 38), s. 4.

C

The fact that the public are invited to resort, and do resort, to premises to play games of skill on automatic machines does not render the premises a common gaming house.

Notes. Referred to: *Ankers v. Bartlett*, [1936] 1 K.B. 147.

D

As to what constitutes a common gaming house, see 18 HALSBURY'S LAWS (3rd Edn.) 189–191, paras. 374, 375; and for cases on the subject, see 25 DIGEST 427–428, 283–285. For the Gaming Houses Act, 1854, s. 4, see 10 HALSBURY'S STATUTES (2nd Edn.) 771.

Cases referred to:

E

- (1) *Jenks v. Turpin* (1884), 13 Q.B.D. 505; 53 L.J.M.C. 161; 50 L.T. 808; 49 J.P. 20; 15 Cox, C.C. 486, D.C.; 25 Digest 423, 260.
- (2) *Pessers, Moody, Wraith, and Gurr, Ltd. v. Catt* (1913), 77 J.P. 429; 29 T.L.R. 381, C.A.; 25 Digest 426, 276.
- (3) *R. v. Hendrick* (1921), 37 T.L.R. 447; 15 Cr. App. Rep. 149; 151 L.T.Jo. 163; [1921] W.N. 87, C.C.A.; 25 Digest 423, 255.

Case Stated by Southampton justices.

F

Informations under s. 4 of the Gaming Houses Act, 1854, were preferred by the respondent, William Henry Parker, chief inspector of police, against the appellants, George James Davis, George Reginald Davis, and Cyril Henry Davis, the owners of a place known as "Fun Fair," 74, East Street, Southampton, for that, on July 26, 1930, they knowingly and wilfully permitted it to be opened for the purpose of unlawful gaming, and against the respondent, William James Leach, as manager of the premises.

G

On the hearing of the informations the following facts were proved or admitted: The place was open to the public and contained automatic machines of different types operated by coins placed in the appropriate slots. Only one of the types of machines on the premises permitted the operator to win anything. That machine was called the "Circle of Skill," and was worked by the operator putting a penny in the slot and thereby releasing a steel ball which fell into a circular plate studded with spikes, which could be moved by the operator in an endeavour to enable him to direct the ball into one of three winning cups. If the operator was successful he got his penny back and another ball to continue play. There was no evidence that any operator had successfully moved the plate, but it was proved that the ball on one occasion did fall into one of the cups without the plate being moved. Nor was there any evidence that chance predominated or that the chances were not alike favourable to all the players. The place was open to any members of the public who wished to enter, and members of the public were on the premises on the date charged in the informations and on other occasions, and children were sometimes there.

I

It was contended for the respondent: (a) that the merit of any particular machine used or the skill required was not in issue; (b) that the place was a common gaming house because the games there carried on constituted unlawful gaming, and as being a place to which a large number of persons were invited habitually to congregate for the purpose of gaming; that it was not necessary to prove that any

person found playing was then playing for any money; (c) that the games played, though lawful in themselves, became unlawful when played in a common gaming house, and that, therefore, the appellants were guilty of the offences charged against them. The respondent cited and relied on *Jenks v. Turpin* (1). It was contended for the appellants: (a) that the invitation to resort by the public to a house or room to play lawful games was not in law sufficient to constitute the premises a common gaming house; (b) that there was no evidence that the premises ever were used as or constituted in law a common gaming house; (c) that proof that an unlawful game or a game in which chance predominated was, in the circumstances, necessary, and there was no such evidence; (d) that the "Circle of Skill" was a lawful game, and/or that the use of a similar machine had been held to be a game of skill and not unlawful in *Pessers, Moody, Wraith, and Gurr, Ltd. v. Catt* (2); that none of the other machines then on the premises were capable of use or used for gaming at all, and that no unlawful game was carried on on the said premises, and the offence charged against the appellants had not been committed by them.

The justices were of opinion that the public were invited to resort to the premises, and did resort to them, to play games thereon; and that the playing of games there, irrespective of the lawfulness of the games so played, constituted the place a common gaming house. They accordingly convicted the appellants, and fined them 20s. each. The appellants appealed.

J. G. Trapnell, K.C., and R. H. Bayford for the appellants.

W. E. Lloyd for the respondent.

LORD HEWART, C.J.—The Case arises under an information preferred by the respondent, an inspector of police, under s. 4 of the Gaming Houses Act, 1854, against the appellants, for that they, being the owners of a certain place, knowingly and wilfully did permit the same to be opened for the purpose of unlawful gaming, and against one of them as having the care and management of the place. The only authority relied on by the respondent was *Jenks v. Turpin* (1). Notwithstanding the decision in *Pessers, Moody, Wraith, and Gurr, Ltd. v. Catt* (2), the justices apparently held that the decision in *Jenks v. Turpin* (1) was sufficient authority to convict the appellants, and they have expressed their opinion as follows:

"Being of opinion that the public were invited by the appellants to resort to the place and did resort to it to play games thereon, and that the playing of games upon the place to which the public were invited and did resort, irrespective of the lawfulness of the games so played, constituted the place a common gaming house, we convicted the appellants."

It is, I think, frankly admitted by counsel for the respondent, who has argued the case so clearly and carefully, that there is no existing authority in the mass of authorities relating to gaming which goes to that length, and he invites this court to take a new step in supporting the opinion expressed by the justices. I content myself by saying that I do not think that there is any authority to support the view which the justices have expressed, and I think that this appeal ought to be allowed.

AVORY, J.—I agree. I think that the proper inference from the finding of the justices in this case that there was no evidence "that chance predominated or that the chances were not alike favourable to all the players" is that the game was a game of skill, and, with regard to games of skill, the authorities seem to be quite clear, particularly the decision of the Court of Appeal in *Pessers, Moody, Wraith, and Gurr, Ltd. v. Catt* (2). The headnote, which summarises the judgment, is as follows:

"By an agreement made between the plaintiffs and the defendant, the plaintiffs agreed to supply and the defendant agreed to take on hire certain automatic machines. The machines were worked as follows: The operator having placed a penny in the slot pressed a spring which released a ball. The ball thereupon gyrated among a number of pins. The object of the operator was to catch the

- A** ball when it dropped by means of a cup attached to a movable bar. It entirely depended upon the skill of the operator in placing the cup in the right position for catching the ball. In an action claiming three weeks' rent of the machines, held, that there was a dominant element of skill in the use of the cup, that it was therefore a game of skill, and that the plaintiffs were entitled to succeed."
- B** That view is also, I think, borne out by the recital in the preamble to the Gaming Act, 1845, which after reciting,
- "Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise"
- enacts that so much of an Act passed in the thirty-third year of the reign of King
- C** Henry VIII, whereby any game of mere skill is declared an unlawful game, be repealed. As *HAWKINS, J.*, said in *Jenks v. Turpin* (1), commenting on that statute (13 Q.B.D. at p. 521):
- "Nothing could more clearly indicate the intention of the legislature to legalise to all persons and at all times mere games of skill, but to preserve in their integrity all the penalties which then attached to the playing at unlawful games
- D** anywhere, or gaming at all (even at lawful games) in common gaming houses."
- The same view, I think, is apparent from *R. v. Hendrick* (3)—a case tried before a jury—where the judgment of the court pointed out that the only relevant question which ought to be left to the jury was whether the game was one of mere skill. I agree, therefore, that the judgment of the justices in this case cannot be supported when they say that, irrespective of the lawfulness of the games played, it was
- E** sufficient to show that the public had been invited to resort to the place and to play a perfectly lawful game. Such a decision would, in its terms, apply to a place like Lord's cricket ground or the Oval, and I cannot suppose that that is a correct result of anything said in *Jenks v. Turpin* (1). I agree, therefore, that the appeal should be allowed.
- F** **HUMPHREYS, J.**—I agree. The question which the justices have asked of this court is "whether upon the above statement of facts we came to a correct determination and decision in point of law." Their determination and decision in point of law is stated under the head "opinion" in the Case and has been read. I agree that that is an erroneous statement of law. That being so, these appellants ought not to have been convicted.

- G** *Appeal allowed.*
- Solicitors: *Speechly, Mumford, & Craig*, for *Lamport, Bassitt & Hiscock*, Southampton; *Sharpe, Pritchard & Co.*, for *Town Clerk*, Southampton.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. SCOTTISH CENTRAL ELECTRIC POWER CO.

[HOUSE OF LORDS (Lord Hailsham, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), June 20, 23, 24, 1930, March 14, 1931]

[Reported 15 Tax Cas. 761; 145 L.T. 169; 1931 S.C. (H.L.) 36; 1931 S.L.T. 221]

Income Tax—Deductions in computing profits—Business premises—Allowance of annual value—Owner's rates in Scotland—Allowance against annual value for purposes of Sched. A—Amount of allowance for purposes of Sched. D—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Rules applicable to Cases I and II, r. 3 (a).

A company owned and occupied for the purposes of their business, which they carried on in Scotland, certain mills and factories in that country. The annual value of the mills and factories was £5,976, and the company paid owner's rates (a charge peculiar to Scotland) in respect of the premises amounting to £1,752 per annum. The company claimed and was allowed to deduct, in assessing their liability under the Income Tax Act, 1918, Sched. A, the £1,752 in respect of owner's rates from the annual value of £5,976. In the assessment of the company's profits for the purposes of Sched. D for the year ending April 5, 1927, the Crown sought to reduce the amount allowed in respect of the annual value of the mills and factories by deducting the £1,752 from the £5,976 and allowing only the net sum. The company challenged the assessment and the Court of Session held that the Crown was bound to allow the full sum of £5,976. In the following year the Crown allowed the sum of £5,976 in making the assessment under Sched. D, but refused to allow a further deduction of £1,752 in respect of owner's rates for which allowance had already been made in the assessment under Sched. A.

Held (LORD ATKIN dissenting): the further deduction of £1,752 was not permissible because the owner's rates were payable by the company as the owners of the land and not as traders, and the rates were, therefore, not disbursements or expenses "being money wholly and exclusively laid out or expended for the purposes of the trade" within r. 3 of the Rules applicable to Sched. D, Cases I and II, of the Act of 1918.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 3 (a), was replaced by the Income Tax Act, 1952, s. 137 (a).

Distinguished: *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412. Referred to: *Hughes v. Bank of New Zealand*, [1936] 3 All E.R. 975.

For the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.). As to allowances in respect of the annual value of business premises, see 20 HALSBURY'S LAWS (3rd Edn.) 172, 173, paras. 298, 299; and for cases on the subject, see 28 DIGEST 45, 227-229.

Cases referred to:

- (1) *Dow v. Merchiston Castle School, Ltd.*, 1921 S.C. 853; 8 Tax Cas. 149; Digest Supp.
- (2) *Small v. Inland Revenue*, 1920 S.C. 758; 57 S.L.T. 636; 1920 2 S.L.R. 185.
- (3) *Strong & Co., Ltd. v. Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 22 T.L.R. 754; 50 Sol. Jo. 666; 5 Tax Cas. 215, H.L.; 28 Digest 57, 290.
- (4) *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266, H.L.; Digest Supp.
- (5) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest 56, 287.

- A (6) *Russell v. Town and County Bank* (1883), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.T. 481; 53 J.P. 244; 4 T.L.R. 500; 2 Tax Cas. 321, H.L.; 28 Digest 45, 227.
- (7) *Stevens v. E. Boustead & Co.*, [1918] 1 K.B. 382; 87 L.J.K.B. 321; 118 L.T. 294; 34 T.L.R. 143; 62 Sol. Jo. 211; 7 Tax Cas. 107, C.A.; 28 Digest 45, 229.
- B (8) *Smith v. Lion Brewery Co., Ltd.*, [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 27 T.L.R. 261; 55 Sol. Jo. 269; 5 Tax Cas. 568; 75 J.P. 87, H.L.; 28 Digest 57, 291.
- (9) *L.C.C. v. A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 181; 4 Tax Cas. 265, H.L.; 28 Digest 73, 392.
- (10) *I.R. Comrs. v. Miller*, [1930] A.C. 222; 99 L.J.P.C. 87; 142 L.T. 497; 46 T.L.R. 207; 74 Sol. Jo. 188; sub nom. *Lady Miller v. I.R. Comrs.*, 15 Tax Cas. 25, H.L.; Digest Supp.
- C (11) *I.R. Comrs. v. Scottish Central Electric Power Co.* (1928), 13 Tax Cas. 331; 1928 S.C. 260; 1928 S.L.T. 99; Digest Supp.

Appeal against an interlocutor pronounced by the Court of Session as the Court of Exchequer in Scotland, dated Dec. 13, 1929, in a Case for the Inland Revenue Commissioners on appeal by them under the Income Tax Act, 1918, from a determination of the Commissioners for the Special Purposes of the Income Tax Acts relative to two assessments to income tax for the year ended April 5, 1928, made on the respondents, the Scottish Central Electric Power Co., under Sched D of the Income Tax Act, 1918.

E The following is the Case Stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Glasgow on March 4, 1929, the Scottish Central Electric Power Co., of Melville Street, Edinburgh, appealed against two assessments totalling £44,673, less £16,390 for wear and tear made upon them under Sched. D of the Income Tax Act, 1918, for the year ended April 5, 1928, by the additional Commissioners of Income Tax for the division of Falkirk.

F The following facts were admitted or proved:

(i) The said assessments were made upon the basis of the company's accounts for their trading year ending Dec. 31, 1926. The balance of the said accounts after deduction of all expenses of the company including rates and charges and assessments on lands, tenements and heritages owned and occupied by them for the purpose of their trade and the whole cost of the repairs and maintenance thereof, but inclusive of the profits and gains arising from the said lands, tenements and heritages deductible under r. 5 of Cases I and II of Sched. D of the Income Tax Act, 1918, was £48,897. The said balance does not make any provision for wear and tear of machinery and plant, such provision being calculated separately.

(ii) It is agreed that the lands and heritages owned and occupied by the company are "mills, factories, and other similar premises" within the meaning of the proviso to sub-s. (2) of the said r. 5, and that by the effect of the said proviso the operation of the said subsection is excluded in the present case.

(iii) The amount deductible under the said r. 5 from the said balance of profits and gains in respect of the annual value of the said lands, tenements and heritages was £5,976, in accordance with the assessments made under Sched. A and the decision in the previous case taken by the Crown against the company reported (1928 S.C. 260; 13 Tax Cas. 331).

(iv) Under r. 4 of No. V of Sched. A the Commissioners of Inland Revenue gave relief by abatement from the said assessments under Sched. A of a sum of £1,752 for the year 1926, and the said assessments were also for the purpose of collection reduced by certain allowances in respect of repairs, totalling £1,014 17s. 6d. for the year 1926.

(v) The said assessments under Sched. D appealed against were made by deducting the full amount of the said assessments under Sched. A (namely, £5,976) from

the said balance of the company's profits (namely, £48,897), but adding thereto the sum of £1,752, being the amount paid by the company in the year 1926, in respect of owner's rates, allowed in the Sched. A assessments. It was contended on behalf of the company that the addition of £1,752 for owner's rates was wrongly made and that this sum was a proper deduction in arriving at the balance of their profits and gains; and the company relied upon the decision of the Court of Session upon the case brought before the court for the previous year. On behalf of the Inland Revenue Commissioners it was contended that the owner's rates were paid by the company in their capacity of property owner, and not qua trader, and that the deduction should not be allowed.

The decision of the Special Commissioners was stated as follows :

"We had listened to arguments in support of the same method of assessment upon the appeal of the company for the previous year, and for reasons given in the Case Stated for the opinion of the Court of Session we had rejected them. We were confirmed in our previous opinion by the judgment of the Court of Session, and we accordingly allowed the present appeal and reduced the assessments under Sched. D upon the company by £1,752."

The question of law for the opinion of the court was : "Whether the company are entitled to deduct the said sum of £1,752 in arriving at the balance of the profits and gains of their trade."

The First Division of the Court of Session, sitting as Exchequer, held (LORD MORISON dissenting) that the cost of owner's rates wholly expended for the purposes of the company's trade was an admissible deduction in computing its profits assessable to income tax under Sched. D, notwithstanding that a similar deduction had been allowed in computing its profits assessable to tax under Sched. A.

The commissioners appealed.

The Attorney-General (Sir William Jowitt, K.C.), The Lord Advocate (Craigie Aitchison, K.C.), Reginald Hills, and A. N. Skelton (of the Scottish Bar) for the Crown.

T. M. Cooper, K.C., and A. M. Macrae Williamson (both of the Scottish Bar), and W. A. Barton for the respondents, the taxpayers.

The House took time for consideration.

March 14. The following opinions were read.

LORD HAILSHAM.—This is an appeal from an order of the First Division of the Court of Session affirming a decision of the Inland Revenue Commissioners and allowing a deduction of £1,752 to be made by the respondent company in calculating their profits for the purpose of assessment under Sched. D of the Income Tax Act, 1918. The question of law stated for the opinion of the court is whether that deduction is properly made in arriving at the balance of the profits and gains of the respondent company's trade. It appears from the facts as stated that the respondent company carry on business in Scotland, and that for the purposes of their business they own and occupy certain mills and factories in that country. The annual value of these mills and factories is £5,976; and the company pay owner's rates in respect of these premises to the amount of £1,752 annually. The right to deduct these owner's rates in the circumstances to which I shall presently allude, is the matter in dispute. The relevant sections of the Income Tax Act are as follows. Schedule A, No. V, r. 4, provides :

"Where it is shown to the satisfaction of the Commissioners of Inland Revenue that the landlord of lands in Scotland is by law, (a) charged with any public rates, taxes or assessments which in England are by law a charge on the occupiers of land; or (b) charged with any public rates or taxes or other public burdens, the like whereof are not chargeable on lands in England, the said commissioners shall cause such relief to be given in respect of tax as is just and reasonable having regard to the additional burden on the landlord."

A Schedule D, Case I, Rules applicable to Cases I and II, provides :

"1 (i). The tax shall be charged without any other deduction than is by this Act allowed.

3. In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade."

B Both in the years ending April, 1927, and April, 1928, the respondent company claimed to be allowed to deduct from their assessment of £5,976 the aforesaid sum of £1,752 paid by them in respect of owner's rates in assessing their liability under Sched. A; and the Inland Revenue Commissioners granted the allowance. In making their return to Sched. D the company claimed to be allowed to deduct the £5,976 as the annual value of premises used for the purposes of their trade and also the £1,752 as a disbursement of money wholly and exclusively laid out or expended for the purposes of the trade. In the assessment under Sched. D for the year ending April 5, 1927, the inland revenue authorities sought to reduce the amount allowed by way of reduction in respect of the annual value of the mills and factories by deducting the £1,752 from the £5,976. This deduction was challenged
C by the company and on appeal by way of Special Case the Court of Session upheld the company's contention. In assessing the profits under Sched. D for the following year, the inland revenue authorities accepted this decision and allowed the deduction of £5,976 as the annual value of the mills and factories; but they refused to allow the deduction of the £1,752 owner's rates for which allowance had already been given to the company in assessing their liability under Sched. A. The Court
D of Session has held that the revenue authorities are bound to allow the deduction, hence this appeal.

I confess that I have found very great difficulty in reaching a decision in this case. My difficulty is increased by the facts, first, that the conception of owner's rates is not one which is familiar to English lawyers, and secondly, that the argument presented for the Crown before your Lordships and, as we are informed, before
F the court below, is not dealt with in any of the judgments, so that we do not have the advantage of knowing the reasons which led to its rejection by the learned judges of the Court of Session. But after careful consideration I have reached the conclusion that the deduction was not admissible and that the appeal succeeds. It is conceded for the respondents that if their contention is correct, it follows that the same amount is being allowed as a deduction twice over, and that in the aggregate
G they will pay income tax on £1,752 less than their actual profits for the year. It is further to be noted that the allowance which is granted under r. 4 of No. V of Sched. A is plainly intended as an allowance conceded to landlords in Scotland in order to equalise their position with that of landlords in England. In the case of English landlords the Sched. A tax is assessed on the annual value, and it is expressly provided that where a landlord has agreed to pay the occupier's rates,
H those rates are to be deducted from the annual value of the property. Presumably in such a case the amount of the rent would reflect the result of the agreement, so that ultimately the Crown would receive tax on the full annual value of the premises. In the case where the landlord is also the occupier in England there could be no question of double allowance in respect of any part of the rates. It is an anomalous result if a rule which is designed to produce equality between land-
I lords in England and Scotland is so worded as to give to the Scottish owner-occupier a right to double deduction which the English owner-occupier cannot possibly obtain. But in my judgment that is not the result of the enactment.

Under r. 4 of No. V of Sched. A the commissioners are to cause such relief to be given as is just and reasonable having regard to the additional burden on the landlord, i.e., the burden additional to that borne by the English landlord. If, in fact, these owner's rates were really money wholly and exclusively expended for the purpose of the trade so as to be deductible under the rules of Sched. D there could be no additional burden on the landlord. In my judgment when the respondent

company applied for relief under Sched. A in respect of these owner's rates they were in effect representing that these rates were not money wholly and exclusively laid out or expended for the purpose of their trade, and that they were an additional burden laid on them as landlords and in respect of which they could not get relief otherwise than by allowance under Sched. A. Having obtained the relief under Sched. A on this basis, I do not think that it is open to them now to say that the rates are a proper allowance under Sched. D.

It is said that in some cases under the Income Tax Acts there is a possibility of double deduction and the case of repairs was expressly referred to; but in the case of repairs the allowance to be given under Sched. A is an arbitrary one and the right to receive it is expressly conferred in all cases under that schedule. No doubt the result is that the statute has given relief in case of repairs both under Sched. A and under Sched. D, though it is not calculated in the same way in each case. But in the case of these Scottish owner's rates I find no such right to double relief expressly conferred, and unless it is so conferred I do not think it can be claimed.

I do not decide that it is impossible for sums paid by way of owner's rates to come within the definition of disbursements and expenses wholly and exclusively expended for the purpose of trade; what I do decide is that it is not possible for a taxpayer to claim and obtain relief in respect of such rates under No. V, r. 4, of Sched. A, and afterwards to contend that they come within r. 3 of Cases I and II of Sched. D. In my opinion the appeal succeeds and must be allowed with costs here and below.

LORD WARRINGTON.—The respondents are the owners of certain heritages in Scotland which fall under the description of "mills, factories, and other similar premises," within the meaning of the proviso to r. 5 (2) of the Rules applicable to Cases I and II under Sched. D of the Income Tax Act, 1918, and they occupy those heritages for the purposes of their trade or business. They are, of course, liable to be assessed under Sched. A in respect of the annual value of these heritages and they have in fact been so assessed. They are also liable to be assessed under Sched. D in respect of the profits and gains arising or accruing to them from the trade carried on by them as purveyors of electric power. The computation of tax under this head is, under the well-known r. 5 (1) of the Rules applicable to Cases I and II of Sched. D, to be made exclusive of the annual value of the heritages above mentioned, occupied as they are for the purposes of trade and separately assessed and charged under Sched. A.

By the law of Scotland, differing in this respect from the law of England, the owner of heritages is required to pay a proportion of the local rates—usually one-half. This proportion may be conveniently referred to as "owner's rates." Under Sched. A, No. V, r. 4, the owner, or "landlord" as he is called, of lands in Scotland charged with owner's rates is entitled to reasonable relief in respect of this additional burden, and in practice this relief is usually allowed in respect of the total sum with which he is so charged. This practice has been followed in the present case and the respondents in the assessments against them in respect of the heritages in question have been allowed an abatement of £1,752, the amount of the owner's rates, from £5,976, the gross annual value.

In their assessment under Sched. D, in obedience to a decision of the Court of Session in proceedings between the same parties as in the present case, the gross annual value of the heritages in question, including the £1,752, has been excluded for the purposes of computation under that schedule. The profits are therefore not enhanced by that sum. The result is that the £1,752 is not included amongst the items of receipt in the account of profits and gains arising or accruing from the trade. The respondents nevertheless claim to deduct as an item on the disbursement side of the account the same £1,752, with the result that if the claim is justified they would obtain a double deduction from taxable income in respect of that sum. That this would be the result is not disputed. The commissioners

A upheld the respondents' claim and their decision has been affirmed by the First Division of the Court of Session (LORD MORISON dissenting). The Crown appeals.

B The first point raised by the Crown—a decision on which, in their favour, renders unnecessary a decision on the question as to double deduction—is that the deduction of the item of expenditure claimed by the respondents and allowed by the commissioners and the Court of Session, is prohibited by r. 3 (a) of the Rules applicable to Cases I and II under Sched. D as not being “money wholly and exclusively laid out or expended for the purposes of the trade.” Curiously enough, although this point was strenuously argued by counsel for the Crown, it is not alluded to by the majority of the learned Lords of the Court of Session. LORD MORISON did refer to it but only to say that he thought it “clear that the sums paid as owner's rates are disbursements made for the purposes of the business” and proceeds to decide in C favour of the Crown on the other point without giving any reasons for his opinion on the point in question. With all respect to the learned judge the question is not whether the disbursement is made for the purposes of the business but whether it is money wholly and exclusively laid out or expended for such purposes.

D It is, I think, clear that not every sum expended by an owner of land occupied by him for the purposes of his trade can be regarded as wholly and exclusively laid out for such purposes: see *Dow v. Merchiston Castle School, Ltd.* (1) and the judgment of LORD DUNDAS in *Small v. Inland Revenue* (2); see also *Strong & Co., Ltd. v. Woodfield* (3). Moreover, the recent decision in this House in *Fry v. Salisbury House Estate, Ltd.* (4) throws considerable light on the question. In that case receipts consisting of rents received by a company, owner of a large E building of flats, were excluded from the computation of profits and gains of a business carried on in connection with the same premises on the ground that they were received by the company in their capacity as landowners and not as traders. I see no reason why the same principle should not apply to expenditure. In the Income Tax Act, 1918, itself, the owner's rates are described as “an additional burden on the landlord” (see Sched. A, r. 5, No. IV) and are therefore dealt with under Sched. A and an abatement allowed accordingly.

F In my opinion the owner's rates are paid by the landlord as owner of the land and the fact that he also occupies the land for the purposes of trade is immaterial and does not of itself render the expenditure one that is wholly and exclusively made for the purposes of the trade.

G I think, therefore, on this point the Crown are right, and if so the appeal succeeds without it being necessary to express an opinion on the point as to double deduction. I will only say that having read the reasons given by the several learned judges in the Court of Session I prefer those of LORD MORISON. There would, if the respondents' claim be admitted, be a double deduction or allowance of the same sum in ascertaining what it is now settled is one tax only, though computed in different ways, in respect of different items of property, and I can see nothing in the provisions of the Act express or implied which authorises such double deduction or H allowance. I think the appeal should be allowed and the decisions of the commissioners and the Court of Session reversed with costs here and below.

I LORD ATKIN.—The respondents are owners of certain mills and factories which they occupy for the purpose of their trade as an electric power company. The question arises in an income tax case in relation to “owner's rates,” i.e., the proportion of rates which according to the law of Scotland would fall to be paid by owners as such, whether occupiers or not. The respondents have deducted the whole of the rates, occupier's and owner's, in computing their profits for assessment under Sched. D of the Income Tax Act. The Crown contests the deduction of the owner's rates. A former case between the parties raised a similar point in a different form. In that case the dispute also arose under assessments under Sched. D for the years 1923, 1924, 1925. The respondents had deducted the total amount of the assessment of the premises in question under Sched. A. They had also, as in the present case, deducted as expenses the amount of the owner's rates. The

commissioners had reduced for purposes of collection the Sched. A assessment by the amount of the owner's rates, exercising the discretion given them by Sched. A, r. 5, No. IV. They sought to have it declared that the respondents were not entitled to deduct the whole of the Sched. A assessment but only the amount less the owner's rates already allowed. The Court of Session decided that the statute entitled them to deduct the whole of the assessment. In that case the right to deduct the owner's rates in computing the profits under Sched. D was not questioned: the only dispute was as to the amount of the deduction in respect of Sched. A. In the present case the commissioners have again in their discretion made an allowance under Sched. A of the owner's rates: but they now challenge the deduction of those rates in the general computation of trading profits under Sched. D. Their case is put in two ways:

(i) It is said that the deduction of owner's rates is never a proper deduction under Sched. D. It is not money wholly and exclusively laid out for the purposes of trade, and therefore is a deduction prohibited under Sched. D, Cases I and II, r. 3 (a); or, which is much the same thing, it is an expense specially incident to the property in the heritages, and should be deducted if at all under Sched. A.

(ii) It is said that the deduction having been allowed, income tax under Sched. A cannot be allowed again under Sched. D. Income tax is one tax on the taxpayer's full income: and double deductions are not permitted.

The first contention is far-reaching. It will obviously affect many trading concerns not in Scotland only: and as it appears to me to disturb income tax law and practice as established for many years, and to conflict with a series of decisions of your Lordships' House, I will not apologise for dwelling on it. In the first place the question whether a deduction is money exclusively laid out for the purposes of the trade is primarily a question of fact: see *Usher's Wiltshire Brewery, Ltd. v. Bruce* (5), [1915] A.C. at p. 466, per LORD SUMNER. On this point no difference of opinion existed amongst the commissioners or the learned judges of the court of session. The commissioners in the Case Stated referred to the reasons given by them in the former Case Stated and admitted the deduction. In the former case they found in para. iv of the Case (13 Tax Cas. at p. 335),

"The allowance of the rates as of the repairs is properly made in arriving at the balances of the company's profits and gains."

In the former case the court had not to decide the point, but both the LORD PRESIDENT CLYDE and LORD SANDS appear to have had little doubt as to the propriety of the deduction: see 13 Tax Cas. at pp. 339 and 342. In the present case I think that there can be no doubt that the argument mainly relied on by the Crown was the argument as to double deduction. This probably accounts for the fact that the learned judges do not expressly deal with the first point. LORD BLACKBURN indeed treats it as conceded by the Crown. The LORD PRESIDENT CLYDE, after referring to "the usual deductions for all public rates" which had been allowed by the commissioners in the assessments in the former case, proceeds (1930 S.C. at p. 231), "the assessment allows, as before, deduction of all public rates," and goes on to say that if for any reason the company is not entitled to deduct from its gross trading returns the whole of the public rates paid by it on its premises, one would have expected the assessing commissioners to have ordered the deduction by so much as represents the owner's share. LORD MORISON, who dissents as to double deduction, says (1930 S.C. at p. 238):

"It is, I think, clear that the sums paid as owner's rates are disbursements made for the purposes of the business, and that their amount is a legitimate deduction in arriving at the amount of the assessable profits and gains."

Thus the commissioners and the learned judges are unanimous in their conclusion that these deductions are properly made in arriving at the profits or gains arising to the respondents from their trade as an electric supply company. The Crown, however, contends that as a matter of law they cannot be made; and this contention your Lordships have to decide. The detailed facts are not fully set out in the

A Case; but as narrated to the House by counsel they were not disputed. It appears that the site on which the premises are erected was purchased by the company for the purpose of erecting thereon the buildings in question; and these buildings consist of power house and machinery sheds necessary for the respondents' business and used solely for that purpose. It will be useful to refer to the findings in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (5), upon which this House set aside the commissioner's decision to disallow the deduction there claimed ([1915] A.C. at p. 435:

C "The said premises have been acquired by the appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business. The possession and employment of the said premises as aforesaid are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use as aforesaid the appellants' profits, if there were any at all, would be less in amount."

D The premises in that case were tied houses owned by brewers. I will refer presently to the deductions there allowed: for the present I content myself with saying that it could not be disputed that every word of that finding would apply to the present case; and that the finding of fact of the commissioners in this case must be taken to be equivalent. It is, however, contended that as the expenses in question fall on the respondents because they are owners of the premises, and as some similar expenses (not necessarily the same) would fall on them though the premises were occupied by other persons not for the business of the respondents, they cannot be taken into account in computing the profits under Sched. D. The argument seems to be (a) they are not expenses of the business; (b) if they are they are incurred in relation to so much of the income of the respondents as is derived from the property in the premises. This income is separately assessed under Sched. A, and the expenses in question may be taken into account under Sched. A: and therefore cannot be exclusively expended for the purposes of the business. As F I have stated it, one cannot avoid observing the non sequitur. Expenditure on the premises on which business is carried on is and must be in ordinary business circumstances business expenditure, which if annual has to be met before profits can be ascertained. Why is the annual value allowed to be deducted in computing the profits? Not to avoid double taxation but because the expense of providing the business premises is an outgoing of the business to be taken out of the gross receipts, and is imputed as an expense even if the trader owns the premises and does not year by year pay an annual rent. This was established in *Russell v. Town and County Bank* (6) in 1888. There the respondent bank owned branch premises on which they paid the Sched. A valuation. The premises were used in part as a dwelling-house for the respective branch managers. The bank deducted the whole of the Sched. A valuation. The Crown resisted the deduction of the whole, relying H on the rule which prohibited a deduction for the value of any dwelling-house except such part as is used for the purposes of the trade. This House decided against the Crown. LORD HERSCHELL says (13 App. Cas. at p. 425):

I "Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is money wholly and exclusively laid out or expended for the purposes of the trade."

It will be noticed that in this case the bank owned the premises which, of course, they might have let for other purposes, and paid Sched. A valuation upon them; and no suggestion is made as to the exemption being due to the desire to avoid double taxation. LORD HERSCHELL's reasoning is accepted and confirmed by both LORD FITZGERALD and LORD MACNAGHTEN who sat with him. I confess I find it difficult to see why if the annual expense incurred by an owner trader in providing the trade premises is allowed as a trade expense, the incidental expenses relating to those premises should be excluded, unless by express provision of the statute. The decision of the House that the provision of the trade premises is necessarily and exclusively a trade expense to be allowed in the computation of the profits was followed by the Court of Appeal affirming a decision of my own in *Stevens v. E. Boustead & Co.* (7), where there could be no question of double income tax inasmuch as the premises were situate at Singapore and Penang and were not assessable under Sched. A. The next case I would refer to is *Smith v. Lion Brewery Co., Ltd.* (8). In that case the brewery company owned a number of tied houses: and in accordance with the provisions of s. 3 of the Licensing Act, 1904, the tenants had made deductions from the rent of the proportion of the compensation levy as fixed by Sched. 2. The company in computing their profits under Sched. D had deducted these compensation charges by which their rents had been diminished. The Court of Appeal decided in favour of the deduction, reversing the decision of CHANNELL, J., who had held that the amount was not wholly and exclusively laid out for the purpose of the trade. The House was equally divided, LORD HALSBURY and LORD ATKINSON being in favour of the deduction, LORD LOREBURN and LORD SHAW being against it. It is unnecessary to remind your Lordships that the decision pro negante so given is authoritative and binds your Lordships. For this reason it was accepted and followed by LORD LOREBURN himself in a later case to which I shall refer. It will be observed that the deduction by the tenant is made whether the landlord is trading or not. It is only where he is a trader that there, as here, the computation under Sched. D comes into question. In other words the deduction is made from the annual profits of the owner as owner. LORD ATKINSON says ([1911] A.C. at p. 160):

"Again, it is urged that the landlord pays his contribution as landlord and because of his proprietary interest in the premises, and not as trader, since he would be equally liable to it whether he traded or not. That, no doubt, is so; but in the present case the company have become landlords and thus become liable to pay the charge, for the purpose solely and exclusively of setting up the tied-house system of trading. If the company took under lease a plot of land to enlarge their brewery or took similarly premises in which to establish a depot to sell their beer through an agent, the same criticism might be applied with equal force to the payment of the rent reserved by the lease. They would pay it as lessees, not as brewers. They would pay it whether they continued to brew or not. Yet under the provisions of the very rule relied upon in this case, they would be entitled to deduct the rent from the profits accrued, and that, too, utterly irrespective of whether the receiver of the rent used it to pay for his support or for his pleasure, or even to set up a rival brewery."

LORD ATKINSON's reasoning is expressly approved by LORD HALSBURY ([1911] A.C. at p. 156). It is important I think to notice that the very contention which LORD ATKINSON is combating is adopted by LORD LOREBURN ([1911] A.C. at p. 155), where he says it is only in the character of owners of a house that the brewery company can be called on to pay this levy at all. In the last sentence of the paragraph he says,

"still less, in my opinion, can you claim to take credit, by way of deduction from an assessment upon a trade for moneys paid in respect of ownership of landed property which is assessable under a different schedule altogether."

Great as is the value to be given to any opinion of LORD LOREBURN's, it seems plain that his judgment so expressed must be taken as overruled by the members of the

- A House whose judgment prevailed. If this be so can there be any difference in principle between a statutory burden placed on a landlord qua landlord because the tenant carries on a particular trade and a statutory burden placed on the landlord qua landlord because the premises are occupied and public services rendered to them which have to be paid by rates? I can see none. If the landlord has acquired the premises exclusively for the purposes of his own trade, and is using them accordingly, this decision seems to be authoritative that the statutory burden imposed on him is a trade expense.

- The next case is *Usher's Wiltshire Brewery, Ltd. v. Bruce* (5). The appellants, the brewery company, acquired and owned licensed houses which were let to tied tenants. The tenants under the leases were under covenant to repair and to pay rates; the company in fact did all repairs, and in some cases paid the rates. It was found that such payments were a matter of commercial expediency and necessary to avoid loss of tenants and consequent transfers. The company also paid fire insurance premiums and licence insurance premiums. In consideration of the tie the tenants paid less rent to the company than the true annual value, and in the case of houses which the company held on lease less than the rent paid by the company. The company in their computation of profits deducted the difference between Sched. A valuation and rents received; or in the case of their leasehold houses between rents they paid and rents they received; they also deducted the payments for repairs, for rates, and for fire and licence insurances. All these were disallowed by the Court of Appeal, but were allowed by this House. If the judgments delivered in this House are carefully considered it will appear that they conclude this case. LORD LOREBURN, accepting the principle laid down in the *Lion Brewery Case* (8) in the judgments that prevailed, states ([1915] A.C. at p. 444) that there the compensation levy

- "was held to be a proper debit in estimating the balance of profits of the brewery business, because it was paid to keep going another business the success of which was essential to their own. That was the principle of the decision, and not the narrow point that compensation was payable by statute. Whether the necessity to pay arises by statute or from business considerations seems to me immaterial, in view of that decision."

- In the present case owner's rates are legally payable: in the *Wiltshire Brewery Case* (5) the expenses were payable under commercial necessity. The last sentence of LORD LOREBURN seems to indicate that there is no difference on that score. LORD ATKINSON ([1915] A.C. at p. 448) states the principle laid down in the *Lion Brewery Case* (8):

- "Stated broadly, I think that doctrine amounts to this, that where a trader bona fide creates in himself, or acquires a particular estate or interest in premises, wholly and exclusively for the purpose of using that interest to secure a better market for the commodities which in his trade he vends [applying to the present case I would substitute to secure a site for the manufacture of the commodities, &c.], the money devoted by him to discharge a liability imposed by statute on that estate or interest, or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purposes of this trade."

- That passage might well have been delivered by the learned Lord in a judgment dismissing the present appeal. I am unable to see how the present point could be ruled in favour of the appellants without expressly overruling the law as there laid down. LORD SUMNER says ([1915] A.C. at p. 469):

"Next as to the rent. A trader who utilises for the purposes of his trade something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is *primâ facie* what he would

have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt. In principle, therefore, I think that in the present case rent foregone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack-rent in the open market, or by letting houses in the same way, which they hire and then re-let at a loss, is money expended within the first rule applying to both the first two cases of Sched. D, and that upon the findings of the Special Case which are conclusive, it is 'wholly and exclusively expended for the purposes of such trade.' "

The findings have already been set out in the earlier part of the present judgment. There is no express finding of "wholly and exclusively expended"; on the contrary, the commissioners rejected the deductions. The noble Lord's view of the law is therefore the weightier. His Lordship continued (*ibid.*):

"It is said that such expenditure is not 'wholly and exclusively expended.' In so far as any questions of law arise here—and it is not clear that there are any—I think that the decision in *Smith v. Lion Brewery Co., Ltd.* (8) disposes of them. Where the sole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

LORD PARMOOR says ([1915] A.C. at p. 473):

"In the present case the commissioners have found that the possession and employment of the tied houses are necessary to enable the appellants to earn the profits on which they pay income tax. I think it follows that expenditure reasonably incurred on or in connection with such houses is an expenditure incidental to the trade and necessary to earn the profits taxed, and would be set against the receipts of the trade in an ordinary commercial balance sheet. No auditor could properly pass a balance sheet unless such a deduction had been made."

He decides that all the deductions were rightly made.

The result of the cases I have cited is that the owner trader who has acquired premises for the purposes of his trade has been allowed in computing the profits of his trade to deduct the annual value of the premises, rent paid by him for the premises, a statutory deduction from rent due to him made by a tenant to whom he has let for the purposes of his trade, repairs to the premises whether occupied by himself or such a tenant, rates on the premises occupied by such tenant and paid by the owner as a commercial necessity, and finally fire insurance premiums. The question is not whether the expenses would equally have fallen on the owner if he had not acquired or used them for the purposes of his trade. This is made clear by the passages from LORD ATKINSON and LORD SUMNER cited above and from the allowance of rent, repairs and fire insurance. The question is whether the trader has acquired the premises for the purposes of his business, and whether the expenses have been incurred for that purpose. I find it impossible to distinguish the share of owner's rates in the present case, from the expenses allowed in the cases cited. I am in complete agreement with LORD MORISON's expressed view that the amount is a legitimate deduction; but whether I agree with it or not is irrelevant, for in my judgment the matter is concluded by the authority of the cases cited. Reliance was placed on the decision of *Dow v. Merchiston Castle School, Ltd.* (1). I hesitate to express a definite opinion on a matter of Scots law such as a duplicand. I should have thought that the payment in question was of the nature of a capital payment, and quite unlike an annual expense. If, however, it can be

A made analogous to such an annual expense as rent, the decision, with respect, is inconsistent with the principles stated in the *Usher's Wiltshire Brewery Case* (5), and cannot be followed.

The remaining contention is that which seems to have been principally relied on in the Court of Session on which the judges were not unanimous. It is said that as the respondents have had the benefit of an allowance for owner's rates in the computation of the amount collected under Sched. A, the deduction cannot again be made under Sched. D. It will be observed that for the purpose of testing this contention it must be assumed that the deduction would properly be made in computing the profits under Sched. D were it not that a similar deduction had been made under Sched. A. Otherwise, of course, the argument is merely a re-statement of that already discussed. It is said that income tax is one tax on the full profits and gains of the taxpayer: and that if a double deduction of a particular expense is allowed the taxpayer does not pay on his full profits. It has to be admitted that in the events that have happened the taxpayer in this case has been allowed to deduct the owner's rates twice over in computing income tax under the two schedules, and in that respect has been held liable to pay tax on less than his full profits and gains as they might have been computed in different circumstances.

D The only question is whether the deduction under Sched. D is admissible under the Act. I venture to think with respect that the deduction under Sched. D is properly made; the fact that it is a double deduction is due to the voluntary act of the revenue authorities in allowing it by their discretion under Sched. A and whether voluntary or not the allowance under Sched. A has no bearing on the computation of profits under Sched. D. It appears to me that this contention is disposed of by the *Usher's Wiltshire Brewery Case* (5), but before I discuss the bearing of that case it may be useful to say a few words on the general principles applicable. Income tax it is true is one tax; but it is nowhere enforced on one income regarded as a whole. On the contrary, the ruling words of the Income Tax Act, 1918, are to be found in s. 1, which provides:

F "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged on that year in respect of all property, profits or gains respectively, described or comprised in the schedules marked A, B, C, D, and E, contained in the first schedule to this Act and in accordance with the rules respectively applicable to those schedules."

The income chargeable is to be ascertained in accordance with the rules. The result is a conventional sum approximating, no doubt, to the ordinary conception of income, but varying under the rules to the advantage or disadvantage of the taxpayer. The recent decision of this House in *Fry v. Salisbury House Estate, Ltd.* (4) called attention to this feature of the Income Tax Act, and decided that the respective kinds of income dealt with by the schedules would only be assessed under the appropriate schedules by the appropriate assessing authorities. Income tax cannot be levied twice on the same income. This is well established and is a principle deducible from the nature of the Act, and from the express provisions of Sched. D in its residual clause 1 (6). But there is in no part of the Act any provision that the conventional income accurately assessed under one schedule in accordance with the rules is to be increased because other conventional income correctly assessed under another schedule has been diminished by some item in the computation common to both. The fact that repairs are expressly allowed in both Sched. A, which is charged on the property in hereditaments, and in Sched. D, which is charged on the annual profits arising from any trade, seems to me in itself to negative any implication of a provision against double deductions if any such question of construction arose. But in a taxing Act I venture to think that it would be contrary to all principle to seek for an implication against a taxpayer. The emphasis laid on the proposition that income tax is one tax in *L.C.C. v. A.-G.* (9), seems with great respect to the opinion of LORD MORISON to avail the Crown little in the present case. There the London County Council, who deducted income

tax from the dividends they paid on their consolidated stock, had the right to retain the tax so deducted if the dividends were paid out of profits or gains brought into charge. The Crown said that meant brought into charge under Sched. D. The London County Council said brought into charge under the Income Tax Act, whether Sched. A or D. Part of the dividend was in fact paid out of rents and profits assessed under Sched. A. The argument for the Crown was that there were five separate taxes under the several schedules, and that as the deduction from dividend was made under the particular tax D, so the retention could only be justified if made from profits charged under that tax. The House of Lords said that there were not five taxes but one tax, and that "brought into charge" meant brought into charge by the one tax under any of its schedules. I cannot think that the "one tax" decision helps to elucidate the present problem.

If, therefore, Sched. A, in computing the annual charge on hereditaments, provides that the annual value brought into charge may be diminished by the amount of owner's rates, that fact with all respect has no bearing upon the provisions of Sched. D which computes business profits more or less on business principles and ex hypothesi allows the deduction of owner's rates as a business expense. But in expressing this opinion I venture to think that I am merely following the decision in the *Usher's Wiltshire Brewery Case* (5), which even if I differed from it binds me. In that case one of the deductions claimed was for repairs of the tied houses owned by the appellant company and occupied by the tied tenants. The contention for the Crown was that the deduction for repairs was by Sched. D, Case I, r. 3, limited to premises occupied by the person assessed, and those premises were not occupied by the brewery company, and that as the owners had received one-sixth deduction for repairs under Sched. A they were getting a double deduction. It will be found that LORD LOREBURN, LORD ATKINSON and LORD PARMOUR took the view that the repairs were not covered by the rule, but, nevertheless, they allowed them on the general principles I have mentioned in the first part of this judgment. This is important as it indicates that the double deduction in part allowed was not based on the express terms of the rules. LORD ATKINSON deals thus with the question of double deduction. After stating the contention that to allow the landlord to deduct the expenditure on repairs from the receipts of the trade would in reality amount to enabling him to withdraw from liability to the tax the sum twice over, at least to the amount of one-sixth of the assessment, and that the statute was obviously intended to limit the landlords' relief from taxation in respect of repairs to the fractional reduction of the assessment, he proceeds ([1915] A.C. at p. 454):

"I own I am entirely unconvinced by this reasoning. I think the plain object of the statute was to limit the assessment (namely, under Sched. A) to the benefit enjoyed. . . . I am, however, quite unable to see that there is any necessary connection between the assessments under Sched. A and those under Sched. D in this regard, or to discover upon what principle, if an owner is relieved from taxation under Sched. A which would be excessive or unjust, the balance of his profits and gains is for the purposes of Sched. D to be inflated to a sum it never in fact reached, and he is to be assessed upon profits he never, in fact, made."

LORD PARKER says ([1915] A.C. at p. 462):

"The Attorney-General argued that inasmuch as there is only one income tax, under whatever schedule it be assessed, and inasmuch as a deduction for repairs is allowed under Sched. A, no similar deduction ought to be allowed under Sched. D, for if it were there would be a double deduction for the same thing. I cannot accept this argument. The fact that the owner of land receives a partial exemption from the tax which would otherwise be payable under Sched. A can have, in my opinion, no possible relevance in ascertaining what as a matter of fact is the balance of his profits and gains for the purpose of Sched. D."

A LORD SUMNER says ([1915] A.C. at p. 470):

"The respondent's argument, based on the fact that rent, as rent, is chargeable to income tax under Sched. A, and that repairs, as such, form the subject of a conventional deduction under that schedule, is one which I find it difficult to answer only because I find it difficult to understand. As an argument 'the scheme of the Act' is all very well, but I think it is pressed too far. The notion seems to be that if a trader chanced to be a landlord his liabilities and his rights in connection with income tax so far as his houses are concerned are to be exclusively dealt with under Sched. A, as though Sched. D did not exist. The effect is that having paid duty under A in respect of the houses, he has also to pay duty under D on profits which really he has not earned. . . . The two things, repairs for allowance under A, and expenses for the purposes of trade as an item in finding out what profits there are to be taxed under D, though they chance to be for repairs, are not in *pari materia*."

In *Usher's Case* (5) the present contention for the Crown on double deduction was expressly argued and expressly negatived by this House. I cannot see how it is possible consistently with our duty to be bound by previous decisions to give effect to the same argument. I can quite see that the taxpayer in the present case may be said to be receiving an undue advantage. But this is entirely due to the fact that the revenue authorities have in the exercise of this discretion allowed the deduction under Sched. A. In that schedule this allowance is discretionary: in Sched. D it appears to be compulsory. The authorities have only to disallow it under Sched. A on the ground that the taxpayer is entitled to it under Sched. D, and any mischief is remedied. This seems to me to be a simpler and more satisfactory solution than to seek to displace well-established practice and authority. For the above reasons I am of opinion that this appeal should be dismissed.

F LORD THANKERTON.—This appeal relates to two assessments totalling £44,673 less £16,390 for wear and tear made on the respondents under Sched. D of the Income Tax Acts for the year ended April 5, 1928. These assessments were made on the basis of the company's accounts for their trading year ending Dec. 31, 1926.

G The company own and occupy for the purposes of their business lands and heritages, among which are included "mills, factories and other similar premises" within the meaning of the proviso to sub-r. (2) of r. 5 of Cases I and II of Sched. D of the Income Tax Act, 1918. All the company's lands and heritages, including the mills and factories, were assessed to income tax under Sched. A for the year in question and the company received relief by way of abatement from that assessment in respect of the owner's rates paid by them by virtue of r. 4 of No. V of Sched. A, which is as follows:

H "(1) Where it is shown to the satisfaction of the Commissioners of Inland Revenue that the landlord of lands in Scotland is by law (a) charged with any public rates, taxes, or assessments which in England are by law a charge on the occupiers of lands; or (b) charged with any public rates or taxes or other public burdens, the like whereof are not chargeable on lands in England, the said commissioners shall cause such relief to be given in respect of tax as is just and reasonable having regard to the additional burden on the landlord; (2) Relief under this rule may be given in accordance with such regulations as the said commissioners may prescribe, either by abatement from the assessment, or by repayment of tax."

I In the present case, the relief so given was equivalent to the amount of the owner's rates actually paid, of which the owner's rates on the company's mills and factories amounted to £1,752.

Turning now to Sched. D, r. 5 of Cases I and II of that schedule (as amended by s. 36 (1) and Sched. 4 of the Finance Act, 1926) is as follows:

"(1) The computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments or heritages occupied for the purpose of the

trade or profession, and separately assessed and charged under Sched. A. Where any lands, tenements, hereditaments, or other premises of whatsoever description used for the purpose of any trade, profession, employment or vocation, are situate outside the United Kingdom, no deduction or set-off shall, in estimating the amount of annual profits or gains arising or accruing from that trade, profession, employment or vocation, in any manner be allowed on account or in respect of the annual value of those premises. (2) Where, in estimating the amount of annual profits or gains arising or accruing from any trade, profession, employment or vocation and chargeable to tax under this schedule, any sum is deducted on account of the annual value of the premises used for the purpose of such trade, profession, employment or vocation, the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of tax under Sched. A as reduced for the purpose of collection: provided that this provision shall not apply in the case of any premises being mills, factories or other similar premises."

The company's accounts for the trading year 1926 showed a balance of profits and gains amounting to £48,897, which was exclusive of any provision for wear and tear of machinery and plant, such provision being calculated separately, as to which no question arises. But that balance is arrived at after deduction of all expenses, including the owner's rates and cost of repair and maintenance in respect of all the lands and heritages owned and occupied by the company, and also the amount of the annual value—in terms of r. 5 of Cases I and II—of these lands and heritages other than the mills and factories. The annual value of the mills and factories was £5,976, and in arriving at the assessments here in question this sum was deducted from the above balance, leaving a sum of £42,921, and thereafter the sum of £1,752, being the portion of the owner's rates debited in the accounts which was referable to the mills and factories, was added back, and the assessment of £44,673 was thus arrived at. The effect of adding back the sum of £1,752 was to render nugatory the debit entry of owner's rates so far as that entry related to the mills and factories, and the respondents appealed to the Special Commissioners against the addition of this sum of £1,752 in the assessments. The appeal was successful and the Special Commissioners reduced the assessments by £1,752 on the ground that the point was ruled by the decision of the Court of Session on an appeal by the company against the previous year's assessments under Sched. D, to which I will refer later. The appellants thereupon appealed by way of stated Case to the Court of Session as the Court of Exchequer in Scotland, which by interlocutor dated Dec. 13, 1929, affirmed the determination of the commissioners, and the present appeal is taken against that interlocutor.

It will be convenient at this stage to refer to the previous case, which is reported in 1929 S.C. 260, and which also was only concerned with the owner's rates paid by the company in respect of their mills and factories. In the assessments under Sched. D for the year ended April 5, 1927, the amount of the relief obtained by the company in respect of owner's rates under r. 4 of No. V of Sched. A was deducted from the annual value of the mills and factories and the net amount thus arrived at was treated as the amount to be deducted in computing the tax under Sched. D in terms of r. 5 of Cases I and II of that schedule. No attempt was then made by the Revenue to exclude the debit item in the company's accounts in respect of these owner's rates. The company appealed to the Special Commissioners, who allowed the company's claim for deduction of the whole annual value under Sched. A in computing the tax under Sched. D, and, on appeal by way of stated Case, the First Division of the Court of Session affirmed the determination of the Special Commissioners. The appellants accepted that decision, and in the assessments for the following year, which are here in question, the whole annual value has been deducted in terms of r. 5 of Cases I and II of Sched. D.

The question of law stated by the Special Commissioners in the present Case is "Whether the company are entitled to deduct the said sum of £1,752 in arriving at

A the balance of the profits and gains of their trade." It was maintained for the Crown (i) that the sum of £1,752 so expended in payment of owner's rates was expended by the company qua owner of the heritable property and not qua trader, and was therefore not a proper debit item in the accounts of the trade, and further that it was not money wholly and exclusively laid out or expended for the purposes of the trade and was therefore prohibited by r. 3 (a) of Cases I and II of Sched. D and by s. 209 of the Act of 1918; and (ii) alternatively that, having been allowed as a deduction in assessing the respondents' income chargeable under Sched. A, it could not be deducted a second time in assessing another compartment of the same income under Sched. D.

C It is unfortunate that the first argument of the Crown has not been dealt with in the court below, except in so far as LORD BLACKBURN assumed that it was not maintained, and LORD MORISON, who dissented, stated:

"It is, I think, clear that the said sums paid as owner's rates are disbursements made for the purposes of the business and that their amount is a legitimate deduction in arriving at the amount of the assessable profits and gains."

D On the other hand, this is the only contention recorded in the stated Case as having been made for the Crown, and in the official report (1930 S.C. 226 at p. 228) it is recorded as the main argument for the Crown in the Court of Session.

E The nature of the income tax and its relation to the various schedules has on several occasions been the subject of consideration and decision in this House and the recent decision in the case of *Fry v. Salisbury House Estate, Ltd.* (4) affords an important exposition of this matter. In that case LORD DUNEDIN says ([1930] A.C. at p. 439):

F "Now, the cardinal consideration in my judgment is that the income tax is only one tax, a tax on the income of the person whom it is sought to assess, and that the different schedules are the modes in which the statute directs this to be levied. In other words, there are not five taxes which you might call income tax A, B, C, D and E, but only one tax. That tax is to be levied on the income of the individual whom it is proposed to assess, but then you have to consider the nature, the constituent parts of his income to see which schedule you are to apply. Now, if the income of the assessee consist in part of real property you are, under the statute, bound to apply Sched. A. Schedule A may, so to speak, get in touch with the assessee in different ways according to the condition of affairs. It may touch property in occupation which actually brings in no money return. A good example will be found in the case decided within the last few weeks in this House, *I.R. Comrs. v. Miller* (10). There a lady enjoyed the use of a mansion house under the provisions of the will of her deceased husband, which was feudally vested in trustees. The mansion house brought her in no money, but she was reckoned as for income tax in order to arrive at supertax on the yearly value of the house. In this matter it differs from all the other schedules, all of which only deal with actual return. When, as in the present case, a subject is let, the rent, if it represents a fair bargain, is taken as the measure of that part of the income of the lessor, and he suffers the tax by way of deduction by his tenant from the rent due or as in the present case by paying it himself. The result is that, by the operation of the assessment under Sched. A, which is made imperative by the statute, and was in fact applied here, the income of the assessee is so far dealt with and cannot be dealt with again. Of course, that does not mean that the assessee may not be liable in respect of other income under other schedules."

If, then, the company's heritable property, as a source of income, is to be separated from the income derived from trading carried on in the property, and to be separately dealt with under Sched. A, it equally follows, in my opinion, that a burden, which is imposed on the company as owners of the property and for which they are liable, whether they are carrying on their trade in the property or not, is expenditure which they solely incur as owners and not as traders. While it may

he said commercially that it is expenditure made for the purposes of their business, that argument is fully as applicable to the property itself. I agree with LORD PRESIDENT CLYDE's statement in the previous case (1928 S.C. at p. 264):

"It follows that, in the case of a trading company which owns its own trading premises, the tax under Sched. D must be computed apart altogether from the profits or gains arising from the trading premises owned by it. In other words, income of the description appropriate to Sched. A must not be mixed up with, but on the contrary must be kept apart from, income of the description appropriate to Sched. D; and the only way in which the trading premises can come into the account of the profits and gains of a trade is as a deduction from the gross trading returns in respect of the annual cost of providing such premises."

It is true that the expression in r. 5 (1) was then "the profits and gains arising from lands" and is now "the annual value of lands," but this makes no difference as

"it is a tax on 'profits and gains' in the case of duties chargeable under Sched. A and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge"

(per LORD MACNAGHTEN in *L.C.C. v. A.-G.* (9), [1901] A.C. at p. 36).

In my opinion the present case falls within the decision of the Court of Session in the *Merchiston Castle School Case* (1), with which I agree. In that case the company which owned the school property and carried on the school sought unsuccessfully to deduct in its accounts of profits and gains under Sched. D the amount of a duplicand due to the superior in respect of the playing fields. In LORD PRESIDENT CLYDE's opinion he states (1921 S.C. at p. 856):

"It appears plain that a casualty, payable in terms of the feu-charter by which a piece of property is held, is something which is paid as a condition of the ownership which that title confers, and not as an expense of carrying on business in those premises. In short, the payment of this casualty is a payment which is made by the company as owner of the premises, because it is a condition imposed upon its ownership, and is not a payment incurred in carrying on the business of a school in the premises. It is therefore a payment which is referable to their assessability under Sched. A, and not to their assessability under Sched. D."

LORD CULLEN says (1921 S.C. at p. 857):

"The obligation for feu-duty with recurring duplicand is incurred to enable the feuar to be the owner of the property irrespective of how he may use it. If he chooses to occupy it for the purposes of his trade or business, he is entitled, under Sched. D, to deduction of the annual value but to no further deduction."

I am unable to distinguish a statutory burden of rates imposed on the owner in respect of his ownership and which remains the same irrespective of the purpose to which he turns the property, from the burdens in gremio of the conventional title on which he holds the property. This is in accordance with the principles laid down in this House in *Strong & Co., Ltd. v. Woodfield* (3). In that case LORD DAVEY says ([1906] A.C. at p. 453):

"It is not enough that the disbursement is made in the course of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

The payment of owner's rates and of feu-duty is purely for the purposes of ownership of the property, though the ownership of the property may have been acquired by the particular taxpayer to enable him to use the premises for carrying on a trade.

The *Merchiston Castle School Case* (1) may be contrasted with *Smith v. Lion*

A *Brewery Co., Ltd.* (8), in which the brewery company were held entitled, in computing their profits under Sched. D, to deduct the proportion of the compensation charges under s. 3 of the Licensing Act, 1904, which, as owners of licensed premises, they had to bear by way of deduction from the rents paid by the licence-holders. This House was equally divided in opinion and the decision of the Court of Appeal was therefore affirmed. The statutory liability for these charges only becomes

B exigible from owners who, either themselves or through tenants, use their premises or let them for use as licensed premises, and such charges are not deductible in assessment under Sched. A. LORD ATKINSON, who agreed with the Court of Appeal, and with whose judgment LORD HALSBURY agreed, says ([1911] A.C. at p. 159):

“In the present case the respondents cannot set up the system of trading through tied houses unless they first acquire these premises as owners in fee or lessees and, secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation attaches. The impost must, therefore, necessarily be paid, in order to set up the system which it is found vital to their trade prospects to set up. And if the substance of the transaction be looked at, this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a

D particular trade or business such as that of an auctioneer, or a pawnbroker, or a publican.”

This case was followed in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (5), in which the expenditure in dispute was all incurred by the brewers voluntarily, though it was commercially necessary in the interests of their tied-house business. LORD LOREBURN, referring to the compensation levy in the *Lion Brewery Co. Case* (8),

E said ([1915] A.C. at p. 444):

“It was held to be a proper debit in estimating the balance of profits of the brewery business, because it was paid to keep going another business the success of which was essential to their own. That was the principle of the decision, and not the narrow point that the compensation was payable by statute. Whether the necessity to pay arises by statute or from business considerations seems to me immaterial, in view of that decision.”

F

It seems clear to me from this passage and from the opinions of the other noble Lords in that case that they had only in view expenditure which was incurred because of the particular use to which the premises were put, and that their opinions in no way relate to expenditure which is compulsorily incurred by the owners irrespective of the use, if any, to which the premises are put. It may well be noted that the expenditure on rates referred to in that case was expenditure on occupier's rates. Further, in my opinion, the matter is put beyond doubt by the special provision for an abatement in respect of owner's rates under Sched. A, No. V, r. 4, of the Income Tax Act, 1918, which treats them as a burden falling on the landlord of lands in Scotland, and deals with them in arriving at the artificial

G standard of “profits and gains” under Sched. A.

In the present case the Crown has confined its contention to the rates paid in respect of mills and factories, but I see no ground for this limitation, as r. 5 of Cases I and II of Sched. D does not affect the contention. I desire to add, however, on the question of construction of that rule, that I am not satisfied that the abatement granted under Sched. A, No. V, r. 4, is a reduction of the tax under that

I schedule “for the purpose of collection” within the meaning of sub-r. (2) of r. 5 of Cases I and II of Sched. D, and I desire to reserve my opinion on that point.

Accordingly I am of opinion that the first contention of the Crown is well founded and that the expenditure on owner's rates is not a proper debit in the accounts submitted by the company under Sched. D.

This would render it unnecessary to consider the alternative contention for the Crown, but I desire to express my concurrence in its rejection by the majority of the learned judges of the Court of Session. It must be assumed, for the purpose of this contention, that the expenditure on owner's rates is a proper debit in the

accounts of the company under Sched. D, but the Crown claims that it should be withdrawn from the accounts, as otherwise the company will receive the benefit of a double deduction, in respect that they have also received an abatement in respect of the same owners' rates under Sched. A, No. V, r. 4. In my opinion, even if the two deductions are strictly comparable—which is open to question—once it has to be conceded that the debit is a proper one in the accounts under Sched. D, the fact that a similar deduction is authorised by the statute under another schedule is irrelevant.

We are not concerned with the question of expenditure on repairs in this case, but they do not appear to fall necessarily into the same category as owner's rates, and I express no opinion as regards them. It need only be pointed out that r. 3 (d) of Cases I and II of Sched. D contains a prohibition of any deduction of sums expended for repairs of premises occupied beyond the sum actually expended, and that in regard to this provision LORD PARKER states in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (5) ([1915] A.C. at p. 459):

"This is a prohibition which, in my opinion, goes to the quantum only. It assumes that money spent in repairs or for the other purposes mentioned would be a proper item of deduction."

There is no such provision under Sched. D affecting owner's rates.

It follows that the appeal should be sustained and that the question of law in the stated Case should be answered in the negative.

LORD MACMILLAN.—The question of law in this case is whether the respondents, who carry on business in Scotland, are entitled, in arriving at the balance of their profits and gains for the year ending April 5, 1928, to deduct for the purpose of assessment under Sched. D of the Income Tax Act, 1918, a sum of £1,752, being the amount of the owner's rates paid by them as proprietors of certain premises of the nature of "mills, factories, and other similar premises" occupied by them for the purposes of their trade.

In computing for the purposes of Sched. D the amount of the profits or gains of a trade carried on by a trader in premises which he occupies but does not own, the rent which he pays to his landlord is clearly a disbursement or expense "wholly and exclusively laid out or expended for the purposes of the trade," and is consequently a legitimate debit item in the computation. So also are the local rates which he pays as occupier of the premises. The landlord on the other hand is assessed under Sched. A in respect of his property in the premises for every 20s. of the annual value thereof estimated in the manner prescribed by the Act which in general means the rent at which the premises are let less certain statutory deductions. No general provision is made in the case of property in England for the deduction of local rates from the landlord's assessment under Sched. A for the reason that they are there ordinarily charged upon the occupier. If, however, the English landlord is under agreement to pay or satisfy out of the rent reserved any public local rates, taxes or assessments which by law are charged upon the occupier, these are excluded from the estimation of the annual value of the property for the purpose of assessing him under Sched. A. Presumably the assumption of this burden by the landlord is reflected in the rent paid by the tenant. Provision is also made for the deduction of such charges for rates as do fall on the landlord in certain instances. Consequently in England the whole local rates on premises occupied for trade purposes form a deduction from assessment to income tax either in favour of the tenant under Sched. D or in favour of the landlord under Sched. A according as they have been paid by the one or by the other.

In Scotland, on the other hand, many local rates are by law charged on both the owner and the occupier, roughly in the proportion of one-half each, though there are many variations. The system is highly complicated and is exhibited in minute detail in Appendix III to the Report of the Departmental Committee on Local Taxation in Scotland presided over by LORD DUNEDIN (1922 Cmd. 1674). To meet this situation the Income Tax Act, 1918, does not provide in terms that the

A local rates paid by the Scottish landlord shall form a deduction from his assessment under Sched. A, but has dealt with it in No. V (4) of the rules applicable to that schedule as follows :

“(1) Where it is shown to the satisfaction of the Commissioners of Inland Revenue that the landlord of lands in Scotland is by law (a) charged with any public rates, taxes, or assessments which in England are by law a charge on the occupiers of lands; or (b) charged with any public rates or taxes or other public burdens the like whereof are not chargeable on lands in England; the said commissioners shall cause such relief to be given in respect of tax as is just and reasonable having regard to the additional burden on the landlord; (2) relief under this rule may be given in accordance with such regulations as the said commissioners may prescribe, either by abatement from the assessment or by repayment of tax.”

The practice is understood to be that the landlord receives relief to the extent of the owner's rates paid by him, by way of deduction from his assessment. That is what has taken place in the present instance.

If, then, the respondent company had been only the occupiers of the premises in question and not also the owners, the rent and occupier's rates payable by them would have been proper deductions in the computation of their profits or gains under Sched. D while the landlord in his assessment under Sched. A in respect of the rent received by him would have been accorded relief by way of deduction as regards the owner's rates paid by him. But your Lordships are concerned with the case of an owner-occupier. Now where a trader is the owner of the premises in which he conducts his trade the Act prescribes that there shall be excluded from the computation of his profits or gains for the purposes of Sched. D the annual value of such premises which are separately assessed and charged under Sched. A. His position as a trader liable to be assessed under Sched. D is clearly discriminated from his position as a landlord liable to be assessed under Sched. A. The two sources of revenue are relegated each to its appropriate schedule. In the words of the Lord President in the previous case of *Inland Revenue v. Scottish Central Electric Power Co.* (11) (1928 S.C. 260 at p. 264),

“in the case of a trading company which owns its own trading premises the tax under Sched. D must be computed apart altogether from the profits or gains arising from the trading premises owned by it. In other words, income of the description appropriate to Sched. A must not be mixed up with, but on the contrary must be kept apart from, income of the description appropriate to Sched. D.”

The distinction between the various schedules and the necessity of relegating each source of income to its appropriate schedule with its appropriate scheme of deductions and allowances was strongly emphasised in the recent case of *Fry v. Salisbury House Estate, Ltd.* (4). As LORD DUNEDIN said ([1930] A.C. at p. 442):

“When income is dealt with in the proper schedule the same income cannot be dealt with again under another schedule.”

The respondent company being both owners and occupiers of the premises in question which they occupy for the purpose of their trade are assessed as traders under Sched. D on the balance of their profits or gains from which the annual value of these premises has been excluded or deducted and are also assessed as landlords under Sched. A on the annual value so deducted. From the assessment under Sched. A they have received relief under the rule above quoted to the extent of the owner's rates amounting to £1,752 paid by them. But in computing their profits or gains for the purposes of assessment under Sched. D they have deducted this same sum of £1,752, as being a disbursement or expense “wholly and exclusively laid out or expended for the purposes of the trade,” under r. 3 (a) of Cases I and II.

I am satisfied that this is not permissible. The respondent company as owners of the premises must make up a return under Sched. A. They have duly done so

and have claimed and received relief in their assessment under that schedule in respect of the owner's rates paid by them. That relief has been accorded to them because they are landlords and the owner's rates are by the statute treated as a burden on the respondent company as such landlords and not as traders at all. When the respondent company address themselves in turn to the preparation of their return under Sched. D and to the computation of their profits or gains as traders, what right have they to deduct as a trade outlay the owner's rates in respect of which in their assessment as landlords under Sched. A they have expressly claimed relief as a burden imposed on them as landlords? No doubt if the statute expressly permitted the taxpayer to claim a deduction twice over in respect of the same expenditure the taxpayer would be entitled to this benefit. But I find nothing in the statute which compels your Lordships to sanction the claim which the respondent company make here, namely, to receive relief under Sched. A in respect of the owner's rates paid by them and to deduct under Sched. D the same owner's rates as a payment made wholly and exclusively for the purposes of their trade. The statute itself indicates under which schedule owner's rates in Scotland are to be dealt with. They are treated as a charge on property not on trade. And this is quite reasonable. The profits of a trade do not depend on the ownership but on the occupation of the premises in which it is conducted. If the trader finds it convenient or desirable to be his own landlord, that circumstance does not entitle him to debit his trading account in a question with the inland revenue with the charges which his ownership of the premises entails. There may no doubt be cases in which the ownership of land or property is so essentially a factor in the conduct of the trade itself as to render disbursements on landlord's account appropriate deductions in computing the profits of the trade for the purpose of Sched. D. An instance is afforded by *Smith v. Lion Brewery Co., Ltd.* (8). In the present case there are no such findings of fact as those set out by LORD ATKINSON in that case.

I confess that I do not quite understand the manner in which the case has been dealt with by the learned judges of the First Division of the Court of Session. The question stated by the Special Commissioners is "whether the company is entitled to deduct the said sum of £1,752 in arriving at the balance of the profits and gains of its trade." The report of the argument for the Inland Revenue as appearing in 1930 S.C., p. 228, opens thus:

"The question for decision was whether a business which owned its trading premises was entitled in estimating its profits assessable to income tax under Sched. D, to deduct the owner's rates paid by it for those premises."

Further passages in the reported argument show that the only question argued for the Crown was whether owner's rates were a legitimate deduction under r. 3 (a) seeing that they were paid by the company not qua traders but qua landlords. Yet the learned Lord President says (1930 S.C. at p. 231):

"The question in this year's case has—strictly speaking—nothing to do with the permissibility of any of the deductions made from gross returns."

LORD BLACKBURN says (1930 S.C. at p. 237):

"As I understand the case, the Revenue do not maintain that the deduction made by the respondents for landlord's rates in their return under Sched. D is an illegitimate deduction in order to ascertain the value of that portion of their total income assessable to tax under Sched. D."

And LORD MORISON, who dissented, says (1930 S.C. at p. 238):

"It is, I think, clear that the sums paid as owner's rates are disbursements made for the purposes of the business, and that their amount is a legitimate deduction in arriving at the amount of the assessable profits and gains."

The real question stated for decision by the Special Commissioners is thus said either not to arise or not to have been argued or is disposed of without discussion.

A The result is that in deciding the important question presented by the Crown for determination your Lordships are without the advantage of the assistance of the reasoned views on it of the learned judges of the Court of Session.

It would rather appear that the present case has been allowed to become unduly entangled with the previous and quite distinct case between the same parties two years ago (*Inland Revenue v. Scottish Central Power Co.* (11)). In that case the Crown did not challenge the deduction of owner's rates by the company from their profits or gains for the purpose of its Sched. D assessment. Owner's rates were allowed to be treated by the company as a disbursement or expense wholly and exclusively laid out or expended for the purposes of their trade. The question there was what could be legitimately excluded under Cases I and II, r. 5, from the computation of the company's trading income in respect of the annual value of certain premises of the nature of "mills, factories, or other similar premises" owned by it and occupied for the purposes of its trade. The company claimed that the "annual value" to be excluded or deducted was what may be termed the gross annual value, undiminished either by the reductions made "for the purpose of collection" under Sched. A, No. V, r. 7 (being the statutory allowances in respect of maintenance, repairs, insurance and management) or by the relief accorded under Sched. A, No. V, r. 4 (being the relief received in respect of owner's rates). The Crown, in view of the terms of the proviso to Sched. D, Cases I and II, r. 5 (2), conceded that the premises being of the nature of "mills, factories, or other similar premises," the company were not required before excluding the annual value thereof from their Sched. D assessment to deduct from the annual value the reductions allowed under Sched. A, No. V, r. 7, "for the purpose of collection," but the deduction of the relief granted under r. 4 in respect of owner's rates was contested by the Crown. The decision of the court was in favour of the company, and as between the parties is now *res judicata*. But the question whether owner's rates are a proper deduction under Sched. D, Cases I and II, r. 3 (a), as being money wholly and exclusively laid out or expended for the purposes of the trade, the question now submitted, was not before the court at all. LORD SANDS said (1928 S.C. F at p. 268):

"I think it right to point out that the question of the propriety or of the nature of this deduction was not before us."

It is obviously a question quite distinct from the question whether under Sched. D, Cases I and II, r. 5, owner's rates should be deducted from annual value in excluding from the assessment the annual value of "mills, factories and other similar premises" occupied for the purposes of the trade, the question decided in the negative in the previous case. The present case has also been unnecessarily confused by referring to the claim of the Crown as a claim to add back the sum of £1,752 to the company's assessment, whereas it would be more properly described as a claim to disallow the deduction of £1,752.

H A consideration of the nature of owner's rates, as I have already said, leads, in my opinion, clearly to the conclusion that they are a landlord's charge and not a trader's charge. The owner's rates are no doubt payable by a trader who is an owner-occupier of the premises in which he conducts his trade, but

I "it is not enough that the disbursement is made in the course of or arises out of or is connected with the trade. It must be made for the purpose of earning the profits"

(per LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (3) ([1906] A.C. at p. 453). The owner's rates in the present case would be payable by the company whether it carried on any trade in the premises or not or if it chose to let them. The justification for the relief given in respect of them by r. 4 of Sched. A, No. V, is that "the landlord of lands in Scotland is by law charged" with them. The distinction between disbursements which are attributable to the ownership of premises and those which are attributable to the trade carried on in the premises is well

illustrated in *Dow v. Merchiston Castle School, Ltd.* (1). It was there held, to A quote the headnote (1921 S.C. at p. 853), that

"where land is owned and occupied for the purposes of a business, duplicands payable to the superior, being payments incidental to the ownership of land and not expenses of carrying on the business, cannot be deducted from the profits of the business chargeable to income tax under Sched. D."

As LORD CULLEN says (1921 S.C. at p. 857):

"The obligation for feu-duty with recurring duplicand is incurred to enable the feuar to be the owner of the property irrespective of how he may use it."

The obligation to pay owner's rates is similarly incidental to the ownership of the property, irrespective of how he may use it. Accordingly as a matter of general principle, and in the absence of any speciality affecting the particular trade, I am of opinion that the owner's rates payable by a trader who owns the premises in which he conducts his trade are not a permissible deduction in the computation of his profits and gains for the purpose of assessment under Sched. D, whether or not the premises are of the nature of "mills, factories, or other similar premises." C

The attention of your Lordships was drawn to the fact that it is apparently permissible to deduct the allowance for repairs both in computing the annual value for the purposes of Sched. A and in computing the balance of profits and gains for the purposes of Sched. D in the case of a trade carried on in premises of the nature of "mills, factories, or other similar premises" owned by the trader. But if this be the effect of the statute as regards the allowance for repairs I see no justification in that circumstance for the extension of the anomaly to owner's rates. Your Lordships are not called on in the present case to decide whether the relief granted in respect of owner's rates in Scotland is a reduction of the assessment under Sched. A "for the purpose of collection." Primâ facie it would appear not to be so, for the language is obviously related to that of r. 7 of Sched. A, No. V, which deals with allowances for repairs. I concur in the motion that the question stated by the Special Commissioners be answered in the negative and the appeal of the Crown allowed with costs here and below. D E F

Appeal allowed.

Solicitors: *Solicitor for Scotland of the Board of Inland Revenue*, for *Solicitor for England of the Board of Inland Revenue*; *Linklaters & Paines*, for *Shepherd & Wedderburn*, W.S., Edinburgh.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.] G

A

Re UNION OF BENEFICES OF GREAT MASSINGHAM AND LITTLE MASSINGHAM, NORFOLK

[PRIVY COUNCIL (Lord Blanesburgh, Lord Tomlin and Sir Lancelot Sanderson),
January 22, 23, February 23, 1931]

B

[Reported [1931] A.C. 328; 100 L.J.P.C. 93; 144 L.T. 654;
47 T.L.R. 294]

*Ecclesiastical Law—Union of benefices—Interests to be considered—Union of
Benefices Measure, 1923 (14 & 15 Geo. 5, No. 2), s. 2 (6).*

C

To justify a union of benefices it is not enough to show that one incumbent could serve the benefices affected, and that a union would, therefore, save "man-power" and might also produce surplus income available for other benefices. The circumstances and interests of the benefices themselves must be regarded.

*Re Parishes of Gussage All Saints and Gussage St. Michael, Dorset (1)
(1925), 69 Sol. Jo. 493, applied.*

D

Per **Curiam**: The question of the diversion of surplus revenue seems to be for the consideration of the Ecclesiastical Commissioners, not as one of the factors for determining whether there shall be union, but as a point for examination after a conclusion in favour of union has been reached.

Notes. Applied: *Re Union of Benefices of Thelnetham and Hinderclay*, [1933] All E.R.Rep. 936. Considered: *Re Union of Benefices of Westoe and South Shields St. Hilda*, [1939] 1 All E.R. 282; *Re Union of Benefices of Whippingham and East Cowes, Derham v. Church Comrs. of England*, [1954] 2 All E.R. 22. Referred to: *Re Benefices of Bolton le Moors, St. Paul, Christ Church and Emmanuel*, [1933] All E.R.Rep. 822.

E

As to the matters as to which the commissioners of inquiry into a union of benefices must have regard, see 13 HALSBURY'S LAWS (3rd Edn.) 300, para. 672, text and notes (p)–(r); and for the Union of Benefices Measure, 1923, see 7 HALSBURY'S STATUTES (2nd Edn.) 500.

F

Case referred to:

(1) *Re Parishes of Gussage All Saints and Gussage St. Michael, Dorset (1925)*, 69 Sol. Jo. 493, P.C.; Digest Supp.

G

Appeal against a scheme framed by the Ecclesiastical Commissioners under the Union of Benefices Measure, 1923, for the union of the benefices of Great Massingham and Little Massingham, in the diocese of Norwich, Norfolk, referred to the Judicial Committee under s. 10 (5) of the Measure. By s. 2 (6) of the Union of Benefices Measure, 1923:

H

"The Commissioners . . . shall in making any report under this Measure, have full regard to the circumstances and interests of the parishes affected by their inquiry, and it shall be the duty of each and every of the commissioners to consider the matters under inquiry in relation to such circumstances and interests, and to the interests of religion in England generally."

The facts appear from the judgment.

H. St. J. Raikes, K.C., and *H. V. A. Raikes* for the appellants.

F. H. L. Errington for the respondents.

I

Their Lordships took time for consideration.

Feb. 23. The opinion of their Lordships was read by

LORD TOMLIN.—This is an appeal to His Majesty in Council against a scheme framed by the Ecclesiastical Commissioners under the powers of the Union of Benefices Measure, 1923, for the union of the benefices of Great Massingham and Little Massingham, in the county of Norfolk and in the diocese of Norwich.

The appellants are (i) the Rector of Little Massingham, who is also the patron of

the living; (ii) the Parochial Church Council of the Parish of Little Massingham; A
(iii) the patron of the living of Great Massingham; and (iv) a landowner who represents the tithe payers in the two parishes of Great Massingham and Little Massingham.

The parishes in question are situate in West Norfolk, some eight or nine miles to the south-west of Fakenham. The district in which they lie is sparsely populated but singularly rich in churches.

The parish of Great Massingham covers an area of 4,242 acres and contains somewhat more than 726 inhabitants.

The church has sittings for 350 persons. The parsonage house is of substantial size, containing four living rooms and fourteen bedrooms. The present incumbent has held the living since 1896.

The net annual income of the living is approximately £900.

The parish of Little Massingham covers an area of 2,289 acres and contains somewhat more than 235 inhabitants.

The church, which is situate about a mile to the north of the church of Great Massingham, has sittings for 150 persons.

The parsonage house is a large house of eighteen bedrooms, in which the present incumbent carries on a boarding school. The living has been held in succession by three generations of the family of the present incumbent. He succeeded his father in 1924, and his grandfather had been his father's predecessor. The school was carried on under the present incumbent's predecessors. The net income of Little Massingham is about £540.

In both churches there has been in the past ample provision of services, and in both parishes there appears to be active religious life.

In pursuance of the powers of the Union of Benefices Measure the Lord Bishop of Norwich required a body of four commissioners, nominated in accordance with the provisions of the Measure, to inquire into all the facts and circumstances of the two benefices relevant to the question of their union, and to report accordingly.

The commissioners held a public inquiry at Great Massingham on Dec. 15, 1928, and subsequently presented an unanimous report making the following recommendations, that is to say: (i) That the benefices be united. (ii) That the name of the united benefice be Great with Little Massingham. (iii) That the parishes be not united. (iv) That the Great Massingham house be the parsonage house of the united benefice. (v) That the union take effect on the first avoidance of Little Massingham. (vi) That as regards patronage the first turn after union belong to the patron of Little Massingham, and the second and third turn to the patron of Great Massingham, and similarly in the case of every three turns thereafter. (vii) That an endowment of £1,200 per annum net be appropriated to the united benefice out of the endowments of the separate benefices.

The Lord Bishop of Norwich, on receiving the report, transmitted it to the Ecclesiastical Commissioners, and signified in writing his approval of the report, and thereupon the Ecclesiastical Commissioners prepared a draft scheme for the union of the benefices in question and published the same.

The draft scheme gave effect to the recommendation of the report, except that it provided for a charge upon the endowments of the livings of £500 per annum in favour of certain other benefices in the diocese of Norwich, leaving, therefore, only about £940 per annum, instead of £1,200 per annum, as the endowment of the united benefice. It also provided for the sale of the parsonage house of Little Massingham, and for the proceeds of sale to be added to the expenses fund established pursuant to s. 32 of the Measure.

From the first the proposal to unite the benefices aroused great opposition. At the public inquiry the Rector of Great Massingham declared (and it is said with truth) that he was the only parishioner of either parish who recommended the proposed union. The opposition within the parishes has been throughout, and is, practically unanimous, and the proposal has been severely criticised by a number of persons and bodies within the diocese but outside the parishes.

A After the lodging of objections to the draft scheme, the Ecclesiastical Commissioners amended the draft scheme by cutting down the amount to be charged in favour of other parishes to £250 per annum, and by inserting a provision to the effect that such sum as might be necessary, not exceeding £150 per annum, of the income of the united benefice should be set aside for the provision of clerical or lay assistance in the performance of the duties of the united benefice.

B These alterations, though perhaps not unwelcome as signs of weakness, did nothing to appease the objectors. The opposition continued undiminished, and this appeal is the result. In their Lordships' view the case raises a question of principle. The Measure provides in sub-s. (6) of s. 2 as follows:

C "The Commissioners [i.e., the Commissioners appointed to inquire and report] shall in making any report under this Measure have full regard to the circumstances and interests of the parishes affected by their inquiry, and it shall be the duty of each and every of the Commissioners to consider the matters under inquiry in their relation to such circumstances and interests and to the interests of religion in England generally."

D It is to be observed that, except so far as it is to be found in this subsection, there is no statement in the Measure of the principles which are to govern the union of benefices. Further, it is notable (i) that there is no power to divert to other purposes any part of the endowments of any benefice except on the occasion of a scheme of union; (ii) that where a union of benefices is proposed the question of the diversion of surplus revenue seems, under s. 15 of this Measure, to be for the consideration of the Ecclesiastical Commissioners, not as one of the factors for determining whether there shall be union, but as a point for examination after a conclusion in favour of union has been reached; and (iii) that in any case there can be no diversion of revenue except for the benefit of other benefices in the same diocese.

E Now the matters to which reference has been made point, in their Lordships' judgment, to the conclusion that to justify a union it is not enough to show that one incumbent could serve the parishes affected, and that a union would therefore save man-power and might also produce surplus income available for other benefices. The circumstances and interests of the parishes themselves must be regarded.

F In the present case the matter stands thus. Each of the parishes concerned is a complete unit, fully equipped with all that is necessary for parochial church life, including adequate emoluments for the incumbent, nor has there been in either parish any change of circumstances calling for a re-adjustment of conditions. It is admitted that the union must result in a measure of loss to the parishioners, and no advantage from union can be indicated as likely to accrue to them.

G Further, if the saving of man-power and the diversion of surplus revenue are invoked to justify union, the amended scheme is open to two criticisms, namely: (i) that it proceeds upon the footing that it is uncertain whether one incumbent can, unassisted, do the work of the united benefice, and (ii) that it leaves the incumbent of the united benefice with emoluments so large as to be out of scale with the normal emoluments of such an office.

H In these circumstances ought union to be effected to the disadvantage and against the wishes of the parishioners?

I In their Lordships' judgment the principles already indicated were recognised and applied by their Lordships' Board in *Re Parishes of Gussage All Saints and Gussage St. Michael* (1) and require, in the present case, a conclusion unfavourable to the scheme.

Their Lordships will accordingly report to His Majesty in Council recommending that the scheme be dismissed.

Solicitors: Peacock & Goddard; Milles, Jennings, White, & Foster.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

STRADLING v. HIGGINS

[CHANCERY DIVISION (Maugham, J.), July 22, 1931]

[Reported [1932] 1 Ch. 143; 101 L.J.Ch. 119; 146 L.T. 383]

Ecclesiastical Law—Place used for purposes of public worship—Enfranchisement of lease—Premises to which only section of public invited—Minor parts not used for public worship—Places of Worship (Enfranchisement) Act, 1920 (10 & 11 Geo. 5, c. 56), ss. 1, 3, 4, and 5.

A place of public worship within the meaning of the Places of Worship (Enfranchisement) Act, 1920, is none the less so because the public invited there are a particular section, e.g., children, or men, or women. Premises may be held upon trust to be used for the purposes of a place of worship within the meaning of the Act, notwithstanding that some of the minor or less important parts of those premises are not used for public worship.

Notes. Distinguished: *Rogers v. Lewisham Borough Council*, [1951] 2 All E.R. 718.

As to the statutory provisions for the enfranchisement of leaseholds held on trust to be used as a place of worship, see 13 HALSBURY'S LAWS (3rd Edn.) 382, para. 862. For the Places of Worship (Enfranchisement) Act, 1920, s. 1, s. 3, s. 4, s. 5, see 7 HALSBURY'S STATUTES (2nd Edn.) 1803.

Action by the owners of the freehold reversion to a lease against the trustees in whom the lease was vested for a declaration that the defendant trustees were not entitled to acquire the freehold reversion under the Places of Worship (Enfranchisement) Act, 1920, and for an injunction to restrain the defendants from proceeding to do so under a notice purporting to be given under that Act.

By a lease, dated Sept. 29, 1881, between Edward Ulvidale Corbett Bond, as lessor, and William Booth, general of the Salvation Army, as lessee, land and premises in Carlton Street, Weston-super-Mare, were demised to General Booth for fifty years from Sept. 29, 1881, at the yearly rent of £40, and subject to the covenants and conditions therein contained, including a clause by which the lessor gave full powers to General Booth, his executors, administrators or assigns, to build a room to be used entirely for the services of the Salvation Army, but without any obligation on General Booth to build or use any such room. In 1930 the premises comprised in the lease were two separate and distinct parcels, which included a building known as "The Salvation Army Hall," or as "The Citadel of the Salvation Army in Weston-super Mare," and another known as "The Young People's Hall." "The Salvation Army Hall" was used for the purposes of the Salvation Army in the sense of religious purposes. There were, however, certain rooms in the upper part of "The Young People's Hall" which were used for purposes other than religious, namely, for teaching. The plaintiffs were the personal representatives and executors of the will of Ernest Samuel Stradling, through whom the freehold reversion expectant on the lease was vested in them on July 3, 1930. On the same day, the defendants, Edward John Higgins, Henry William Mapp, and John Beaully Lawrie, signed a notice addressed to the plaintiffs, as personal representatives of Ernest Samuel Stradling, reciting the lease and that the premises comprised in it, being a place of worship within the Places of Worship (Enfranchisement) Act, 1920, were then, by virtue of a deed dated June 23, 1930, vested in the defendants as trustees under the deed, subject to rents, covenants and conditions upon trust to be used as a place of worship, and reciting that they were being used in accordance with the terms of that trust; and the defendants, in pursuance of the powers conferred on them by the Act, and of all other powers, gave notice to the plaintiffs that they, as such trustees, wished to exercise the right incident to the leasehold interest in the premises comprised in the lease to enlarge that interest into a fee simple, and for that purpose wished to acquire the freehold. The deed of June 23, 1930. recited

- A the lease, that the demised premises were vested in Edward John Higgins, as general of the Salvation Army, and were required for, and were at the time in use and occupation as a place of worship, and that Edward John Higgins was desirous of appropriating them for that purpose and declaring trusts of them accordingly. The deed then witnessed that in pursuance of that desire and in exercise of the powers vested in him for that purpose as general of the Salvation Army by virtue
- B of a deed poll dated Aug. 7, 1878, known as "the Constitution Deed," and the other deeds constituting the Salvation Army, and of all other powers enabling him in that behalf, Edward John Higgins thereby assigned to the defendants all the premises comprised in the lease for the term thereby granted, and, subject to the covenants and conditions, upon trust at all times to cause or permit them to be used as and occupied for the purposes of a place of worship by and in accordance with the
- C practice and doctrines of the Salvation Army and for such other purposes of the Salvation Army, not inconsistent with that use and occupation, as the general of the Salvation Army should from time to time determine. Further, the deed provided that, notwithstanding the trusts thereinbefore contained, the premises should remain subject to all powers of selling, mortgaging, and leasing vested in the general of the Salvation Army in relation to the Salvation Army's property under
- D the Constitution Deed and the other deeds constituting the Salvation Army, and to be exercised by the trustees at the direction of the general for the time being of the Salvation Army.

The plaintiffs contended that, under the deed of June 23, 1930, the premises demised by the lease were not held in trust for the purposes of a place of worship within the Act, and were not so held, either at the date of the notice or at the date

E of the Act, and by the writ, issued upon their application on Jan. 9, 1931, they claimed a declaration that the defendants, as trustees of the deed, or otherwise as trustees or officers of the Salvation Army, were not entitled, under the Act or otherwise, to acquire the freehold reversion in all or any part of the premises demised by the lease, and an injunction to restrain them from proceeding under that notice and from serving or proceeding under any other notice purporting to

F be given under the Act. It was contended by the defendants that the premises were held in trust for the purposes of a place of worship within the Act, and that they had been acquired by General Booth in 1881 for use as a place of worship and had ever since been so used. Moreover the defendants stated that it was their intention that the premises should continue so to be used as long as there was a congregation to worship there.

- G The Places of Worship (Enfranchisement) Act, 1920, provides:

Section 1 (1): "Where premises held under a lease to which this Act applies are held upon trust to be used for the purposes of a place of worship, whether in conjunction with other purposes or not, and the premises are being used in accordance with the terms of the trust, the trustees, notwithstanding any agreement to the contrary (not being an agreement against the enlargement of

H the leasehold interest into a freehold contained in a lease granted or made before the passing of this Act), shall have the right as incident to their leasehold interest to enlarge that interest into a fee simple, and for that purpose to acquire the freehold and all intermediate reversions: Provided that—(a) if the premises exceed two acres in extent, the trustees shall not be entitled to exercise the right in respect of more than two acres thereof. . . ." Sub-

I section (2): "The leases to which this Act applies are leases (including underleases and agreements for leases or underleases), whether granted or made before or after the passing of this Act, for lives or a life, or for a term of years where the term as originally created was a term of not less than twenty-one years, whether determinable on a life or lives or not."

Section 3:

"The estate in fee simple acquired by the trustees shall be held by them upon the same trusts as those upon which the leasehold interest would have been

held by them if it had not been enlarged into a fee simple, and shall be subject to all the same covenants and provisions relating to user and enjoyment and to all the same obligations of every kind other than the payment of rent as those to which the leasehold interest would have been subject if it had not been so enlarged, and all such covenants, provisions, and obligations shall be enforceable against the trustees and their successors in title by the persons who, but for the enlargement of the leasehold interest under this Act, would for the time being have been entitled to enforce such covenants, provisions, or obligations: . . .”

Section 4:

“If the person who was entitled to the freehold reversion in the lands at the time when the interest of the trustees in the lands was enlarged into a fee simple, or the successor in title of that person, proves to the satisfaction of the Charity Commissioners that any premises the estate in fee simple in which has been acquired by the trustees under this Act, or any part thereof, are let or are habitually used for any purpose or purposes other than those specified in the trusts upon which the estate in fee simple is held, the commissioners shall, unless it appears to them that such use was due to inadvertence and will be discontinued, by order determine such letting or user, and for this purpose may declare void any contract for, and may prohibit by injunction the continuance of, any such letting or user, or may order that the premises or that part thereof shall be sold, and any order so made shall be enforceable by the same means and be subject to the same provisions as are applicable under the Charitable Trusts Acts, 1853 to 1894, to any orders made thereunder.”

Section 5:

“In this Act, unless the context otherwise requires, the expression ‘place of worship’ means any church, chapel, or other building used for public religious worship, and includes a burial ground, Sunday or Sabbath School, caretaker’s house or minister’s house attached to or used in connection with and held upon the same trusts as a place of worship.”

Vaisey, K.C., and *H. P. Chapman* for the plaintiffs, the freeholders.

J. H. Stamp for the defendants, the trustees in whom the lease was vested.

Vaisey, K.C., replied.

MAUGHAM, J., [after stating the facts as set out above, continued:] I will begin by stating shortly the effect of the Places of Worship (Enfranchisement) Act, 1920, so far as it is material for the present purpose. The Act is intituled: “An Act to authorise the enfranchisement of the sites of places of worship held under lease.” Section 1 (1) provides as follows: [His Lordship read the subsection, and continued:] There are three provisos, of which the first only need be noted. It is [His Lordship read the proviso, and continued:] The second subsection defines the leases to which the Act applies, which for this purpose may be stated to be leases which were created for a term of not less than twenty-one years. The second section of the Act provides procedure for the acquisition of the reversionary interests by the incorporation of the sections of the Lands Clauses Act or the Railways Clauses Consolidation Act, 1845, subject to certain modifications. The third section of the Act seems to me somewhat important. [His Lordship read the first provision of the section, and continued:] I think that I need not read the rest of that section. Section 4 provides for the case of premises which ex hypothesi are subject to trusts to be used for the purposes of a place of worship ceasing to be so used, and in that case it gives power to the Charity Commissioners to require the trustees to sell the premises. It is in these terms: [His Lordship read it.] Then in s. 5 I find an important definition. [His Lordship read the definition, and continued:] There for the first time I find the word “public” added to the phrase “religious worship,” and the argument in this case has turned largely on the question whether

A I can properly find that the trusts contained in the deed are trusts which render it necessary for the premises to be used for public religious worship.

Counsel for the plaintiffs stressed the point that the Act may be used, very improperly, for the purpose of enabling astute persons to acquire the reversion on leasehold premises. It is suggested that shortly before the lease comes to an end, or at some other period, they might execute a trust deed which causes the premises to be held temporarily for the purposes of a place of public worship, and, having thus complied with that part of the Act, they may then serve a notice to treat, acquire the freehold reversion, and then revert to the old condition of things, or in some way cause the premises to be used for some purpose other than that of public religious worship. I am far from saying that this Act of Parliament, like many other Acts of Parliament, cannot be abused, but on the whole I am not greatly impressed with the danger in question, because I think that it is, in the great majority of possible cases, avoided by the provisions of s. 4 of the Act. The result of such a case as has been suggested to me would, or might be in most cases, that the persons who had become entitled to the freehold reversion would apply to the commissioners, and in such a case the commissioners might well exercise their rights and order the premises to be sold; and then, by virtue of cl. 3 of the schedule, the persons entitled to the freehold reversion, or their successors, would have a right of pre-emption. In other words, I think that anyone who attempted to use this Act in the way suggested would probably find his nefarious designs likely to be defeated.

However that may be, I have to construe the Act as I apprehend that it ought to be construed, and the first question that arises is whether, on the true construction of the deed, I am justified in saying that the premises comprised in the lease are held upon trust to be used for the purposes of a place of public religious worship. That is, of course, a question of construction, but I am entitled to be informed as to the practice and doctrines of the Salvation Army, inasmuch as the phrase in the deed incorporates that practice and those doctrines in the phrase "as and for the purpose of a place of worship by and in accordance with the practice and doctrines of the Salvation Army." Evidence has been given by experienced officers of the Salvation Army to inform me as to those doctrines and that practice. It is sufficient to say that I am perfectly satisfied that the Salvation Army Hall is used for the purpose of holding, among other things, religious services which are open to all, and that it has never been the practice of the Salvation Army to possess or own places of worship which are not places of public worship in the sense that the public are not admitted. It is true, as will appear in one moment, that sometimes there are buildings used for the purposes of children, but to my mind a place is none the less a place of public worship because the public who are invited to that place are a particular section of the public, such as either children or men or women. That seems to me to be clear as a matter of common sense. It has been rightly said that "public" is a word of very elastic meaning, and I cannot conceive that, within the true meaning of the definition as contained in this Act, worship is any the less public worship because on a particular occasion a section only of the public is invited to attend. In my opinion, therefore, the trusts of the deed are trusts for the purposes of a building to be used for public religious worship, and that is the main object of the deed.

It is true that there are included in the lease two separate and distinct premises: I one of them is known as the Salvation Army Hall, or as the Citadel of the Salvation Army in Weston-super-Mare; the other of them, which is separated by a yard, is described in the deeds as Carlton House. It has, however, upon it in large letters the inscription "Young People's Hall," and I am told that that is the general name by which it is known. The Salvation Army Hall, as its name implies, contains nothing more than a large meeting-place, with a number of benches and a raised platform at the end of the hall, which is just what one would expect a Salvation Army Hall to contain; and I do not think that it is suggested that in relation to the hall there are any premises that are used otherwise than for the purposes of the

Salvation Army in the sense of religious purposes in the ordinary meaning of the words. But with regard to the adjoining building, Carlton House, or the Young People's Hall, there are a number of rooms upstairs which are not, *primâ facie*, rooms used for the purposes of hymns or religious services or addresses, but are used for the purposes of instruction. A good deal of reliance has been placed on that, but it is to be remembered that in the Act the expression "place of worship" includes a "Sunday or Sabbath school . . . used in connection with and held upon the same trusts as a place of worship." I should therefore imagine that these rooms, so far as they are used for the purposes of anything in the nature of a Sunday school, are clearly within the definition. A
B

I wish to add this, that I do not consider in a case of this sort that the premises are the less held upon trust for the purposes of a place of worship because there are included in the premises certain rooms which may be used for secular objects. I do not suppose that any living human being would doubt that St. Paul's Cathedral was a place used for the purposes of a place of public worship, but those who know it know that it includes, amongst a number of other rooms to which the public are not generally admitted, an excellent and interesting library, in which prayers do not take place, and I doubt whether there is any big cathedral in England of which the same might not be said. There might also be rooms for caretakers. In the old days in connection with many churches there was a priest's room, and I could suggest other rooms to which visitors to buildings of this kind are often admitted which are not used for the purposes of public worship. It occurs to me to mention as examples chapter-houses, places where vestments are kept, and places where books are kept. In other words, to put it in another way, I have come to the conclusion that premises are held upon trust to be used for the purposes of public religious worship none the less because some of the minor or less important parts of those premises are not used for public worship. C
D
E

The next question to be considered is whether the premises are being used for those purposes at the present time. That is the other condition contained in s. 1 of the Act, and as to that I think that it cannot be disputed, having regard to the evidence, that the whole of the premises are being so used, with the exception, perhaps, of the upstairs rooms, or some of the upstairs rooms, in Carlton House. With regard to those I have already expressed my opinion. Accordingly, I think the provisions of s. 1 are complied with. The action must fail, and must be dismissed, with the usual consequences. F

Solicitors: *Rider, Heaton, Meredith & Mills*, for *Baker & Co.*, Weston-super-Mare; *Ranger, Burton & Frost*. G

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

Re WOODS (BRISTOL), LTD.

[CHANCERY DIVISION (Eve and Maugham, JJ.), June 9, 1931]

[Reported [1931] 2 Ch. 320; 100 L.J.Ch. 335; 145 L.T. 444;

47 T.L.R. 464; 75 Sol. Jo. 458; [1931] B. & C.R. 17]

Execution—Company—Execution not completed until after winding-up—Notice of appointment of provisional liquidator served on sheriff—“Costs of the execution” a first charge on proceeds—Judgment creditor’s solicitors’ costs of fi. fa. not included—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 269 (1).

The provision of s. 269 (1) of the Companies Act, 1929 (now s. 326 (1) of the Act of 1948) that, where goods of a company have been taken in execution but before their sale or the completion of the execution notice of the appointment of a provisional liquidator is served on the sheriff and the sheriff accordingly has to deliver the goods and any money seized or received to the liquidator, “the costs of the execution shall be a first charge on the goods or money so delivered” to the liquidator, applies only to costs which the sheriff himself has incurred. The costs of the judgment creditor’s solicitor of issuing a fi. fa. are, therefore, not “costs of the execution” for the purposes of s. 269 (1). *Re Rogers* (1) ([1911] 1 K.B. 641), applied.

Notes. The Companies Act, 1929, has been repealed: s. 269 (1) and (2) is now the Companies Act, 1948, s. 326 (1) and (3). Applications for costs of a proceeding by a person who has not applied at the time of the proceeding are now covered by the Bankruptcy Rules, 1952, r. 113.

As to what the costs of the execution include, see 6 HALSBURY’S LAWS (3rd Edn.) 691, para. 1378, note (g), and 2 *ibid.* 545, para. 1080, text and note (t); and as to applications for such costs, see *ibid.* 606, para. 1210.

Case referred to:

(1) *Re Rogers*, [1911] 1 K.B. 641; sub nom. *Re Rogers, Ex parte Sheriff of Sussex*, 80 L.J.K.B. 418; 103 L.T. 883; 55 Sol. Jo. 219; 18 Mans. 22; sub nom. *Re Rogers, Ex parte Official Receiver*, 27 T.L.R. 199, C.A.; 21 Digest 606, 1955.

Appeal from the Bristol County Court.

Textiles Français, Ltd. (the judgment creditor) had obtained judgment against Woods (Bristol), Ltd., for goods sold and delivered for £14 7s. 2d. and £6 4s. 6d. costs on Sept. 30, 1930. The judgment creditor caused a writ of fi. fa. to issue thereon on Oct. 31, which was directed to the Sheriff of Bristol. The Official Receiver of Bristol served notice on the Sheriff of Bristol on Nov. 7 that a petition to wind-up the defendant company had been presented in the county court at Bristol, and that he had been appointed provisional liquidator thereof, and required the sheriff, under s. 269 of the Companies Act, 1929, to deliver the goods taken in execution and pay any money seized or received in part satisfaction thereof or the proceeds of sale, if any, received by the sheriff or his officer after deducting his costs of the execution. In accordance therewith the goods seized were delivered to the official receiver. The judgment creditor’s solicitor then applied to him for payment of the sum of £2 2s., their costs of the execution, which was refused. The solicitor then moved, on April 30, 1931, for a declaration that these costs were a first charge on the goods or money seized or received by the sheriff and delivered to the official receiver, and for an order on him to pay accordingly. The county court judge held that the question was one of general importance, on which there was no authority. He came to the conclusion, though not without considerable doubt, that “costs of the execution” in s. 269 (1) meant the sheriff’s costs only. He distinguished *Re Rogers* (1), and dismissed the motion with costs.

The judgment creditor’s solicitor appealed.

A. E. Woodgate for the appellant.
R. Burrows for the official receiver.

EVE, J.—The short point raised on this appeal is whether the costs incurred by the judgment creditor's solicitor in issuing a writ of *fi. fa.* addressed to the sheriff are costs of the execution within the meaning of s. 269 of the Companies Act, 1929. It is not necessary for us, I think, to determine whether or not the two guineas, which is the amount involved, constitute costs of the execution. I should be inclined to say that, speaking generally, they do. The question is whether they are included in those costs of the execution which are covered by the provisions of s. 269. That section is directed to defining the duties of the sheriff relative to goods which he has taken in execution. The first subsection of it provides:

"Where any goods of a company are taken in execution and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a provisional liquidator has been appointed [I need not go further than that because that is what took place in this case] the sheriff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered."

The question is whether the solicitor for the judgment creditor is entitled to the benefit of this charge to the extent of the two guineas or whatever be the proper amount allowed on taxation for the issue of the writ of *fi. fa.*

The learned county court judge has held that those two guineas do not constitute part of the costs of execution which are entitled to a charge, and he has done so upon these lines. He reads first of all the provisions of s. 268 introduced into company law for the first time in this Act, which assimilates in similar circumstances the practice in dealing with insolvent companies to that followed in the case of an insolvent debtor under the Bankruptcy Act, 1914, that is, to allow the execution creditor no advantage unless the execution has been completed before the commencement of the winding-up. It deprives the judgment creditor of any advantage which he could claim by reason merely that he has put the sheriff into possession unless the possession has been followed by the complete execution of the writ. Section 269 makes one exception in favour of the execution creditor; he is relieved from paying the costs of the execution which are to be a first charge on the goods or money handed over by the sheriff to the liquidator. Counsel for the judgment creditor's solicitor says that the costs of the execution mean all the costs, not merely the sheriff's costs, and that they include the costs of the solicitor for the judgment creditor in issuing the writ. One has to examine the section to see whether in fact that is so. Some light is thrown on the point by sub-s. (2), which provides that,

"where under an execution in respect of a judgment for a sum exceeding £20 the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid";

he shall retain the balance for fourteen days and in the events therein mentioned pay over the balance to the liquidator. There is one small word in that subsection which is different from the word which is used in the same collocation in a similar subsection of the Bankruptcy Act, 1914, s. 41 (1). Under the Bankruptcy Act, 1914, s. 41 (1), the sheriff shall deduct "his costs of the execution." In *Re Rogers* (1), where a question was raised whether interpleader proceedings initiated by the sheriff were included in his costs of the execution, the late Master of the Rolls, LORD COZENS-HARDY, in dealing with the two subsections of the section of the Bankruptcy Act, apparently treated the language "the costs of the execution" and "his costs of the execution" as referring to the same subject-matter. It was not, as counsel for the judgment creditor's solicitors has pointed out, necessary to

- A determine that point in *Re Rogers* (1), but I cannot help thinking that the Master of the Rolls would not have made those observations without noting that there was a difference between the language in the two subsections. However that may be, I think sub-s. (2) clearly limits the right of retention to the costs which the sheriff himself has incurred. It does not extend in my view to costs which he would be retaining for the benefit of somebody else. He might have deducted them, but he could not have retained them. He ought to have been directed by this subsection, if it was intended to apply to the costs of others, to retain his costs and to pay to the solicitor the costs of issuing the writ. We do not find that, and in my view the conclusion at which the learned county court judge arrived was right. Although these two guineas may for some purposes well be described as costs of the execution, the amount is not comprised in the costs for which a charge is reserved by this
- C s. 269. The appeal will be dismissed with costs.

MAUGHAM, J.—I concur and have nothing to add.

Appeal dismissed.

Solicitors: *F. W. Perkins; Solicitor to the Board of Trade.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

RICHARDS v. PRICE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 30, 1931]

[Reported [1931] 2 K.B. 204; 100 L.J.K.B. 526; 145 L.T. 189;
95 J.P. 151; 47 T.L.R. 411; 75 Sol. Jo. 345; 29 L.G.R. 396;
29 Cox, C.C. 301]

Gaming—Street betting—Football pool—Persons loitering in street to distribute football pool coupons for pool promoter—Whether promoter a “bookmaker”—Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 1, sub-s. (1).

Section 1 (1) of the Street Betting Act, 1906, provides penalties in the case of “any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet, or wager, or paying or receiving or settling bets.”

The defendants loitered in a street for the purpose of distributing football pool coupons on behalf of the pool promoter, inviting the recipients to forecast the results of listed football matches, to stake money thereon, and to send the money staked to the promoter after the matches had been played. The promoter retained his expenses and 10 per cent. of the money staked, and distributed the balance to the most successful forecasters.

Held: the defendants were guilty of an offence under s. 1 (1) because, even if the coupons did not constitute an invitation to the recipients to bet with the promoter or the defendants, but only with each other, nevertheless, the promoter was carrying on the business of receiving or negotiating bets, and so was a bookmaker, and the defendants were “loitering . . . for the purpose of bookmaking.”

Per LORD HEWART, C.J., and AVORY, J. (HUMPHREYS, J., dubitante): The defendants were “loitering . . . for the purpose of . . . betting” even though the “betting” was not with them or their principal, the promoter.

Notes. Section 18 of the Finance Act, 1926, has been repealed by s. 53, Sched. 3 of the Finance Act, 1930. A

As to football pools being bets, and their organisers bookmakers, see 18 HALSBURY'S LAWS (3rd Edn.) 169, para. 337, text and notes (k) and (l). As to frequenting or loitering in streets, etc., for purposes of betting, see *ibid.* 196, para. 388; and for cases on the subject, see 25 DIGEST 434, 317-319. For the Street Betting Act, 1906, s. 1 (1), see 10 HALSBURY'S STATUTES (2nd Edn.) 778. B

Case referred to:

- (1) *Dunning v. Sweetman*, [1909] 1 K.B. 774; 78 L.J.K.B. 359; 100 L.T. 604; 73 J.P. 191; 25 T.L.R. 302; 22 Cox, C.C. 93, D.C.; 25 Digest 434, 318.

Case Stated by the Bristol justices on the application of a prosecutor.

Informations were preferred by William Richards, a superintendent of the Bristol police force, against the defendants, Price and Mitchell, charging them with loitering in streets for a purpose contrary to the Street Betting Act, 1906. The following facts were proved or admitted. On Nov. 5, 1930, at about 5 p.m., Price loitered in a place called St. John's Square, Bristol, near the entrance to a factory of the Imperial Tobacco Co., Ltd., and there distributed to persons leaving the factory envelopes addressed to "The London Football Totalisator (Henry Newton), 92-94, Gray's Inn Road, W.C.1." Each envelope contained printed forms, one on white paper and the other on yellow paper. Ninety-one such envelopes were found on Price when he was searched. On the same date at about 4.25 p.m., Mitchell loitered in Lombard Street, Bristol, and there distributed to persons passing him similar envelopes and printed forms. One hundred and forty-two such envelopes were found on him. C

Price was employed by Henry Newton for the purpose of distributing the envelopes and forms, and Mitchell was employed by Price to assist him in distributing them. The white form was an invitation by Newton to the persons to whom such forms were distributed to forecast the results of certain football matches to be played on Saturday, Nov. 8, 1930, and to stake money on the correctness of the forecast. The form contained the names of various football teams, and six columns called pools, in which the banker could insert the names of such of the teams as would, in his opinion, win or draw their matches, and the amount which he was prepared to stake in respect of each pool. The form stated that credit accounts only were accepted, that ready money would not be received with the forms, and that, further, the backers were to post their money after the matches had been played, so as to reach Newton by Monday, Nov. 10, 1930, but on no account earlier. D

By r. 3 of the rules printed on the back of the white form, letters containing the white form were to be postmarked to reach Newton not later than Saturday noon, Nov. 8, 1930. By r. 5 the form was to bear the correct signature and address of the sender. The space in which those particulars were to be entered contained an undertaking in the form of an I.O.U. to pay the stake by Nov. 10, 1930. By r. 6 the minimum stake was to be 1s. and the maximum £1 on any one pool. By r. 10 the total amount staked in respect of each pool by all the backers in that pool was to be divided between the winners in proportion to the sums staked by the winners, less a sum to be deducted and retained by Newton for himself, such sum consisting of his expenses and 10 per cent. of the amount in the pool. A note on the white form stated: E

"Warning. The publishers desire to warn investors against betting on coupons other than those bearing the imprint of the Bancroft Press, Hitchin, which was established in 1873 and supplies printing and football coupons to reliable book-makers only." F

The yellow form was a form addressed to Newton, to accompany the stake when posted to him, specifying the amount of the stake and the name and address of the sender. G

- A It was contended for the respondents that the scheme proposed by the white form was not a scheme for bets to be made between Newton and the persons who took part in each pool and that, since no bets were made or agreed to be made by the respondents either on their own behalf or on behalf of Newton, neither respondent was loitering for the purpose of betting within the meaning of the Act of 1906. It was contended for the appellant that, whether the scheme was or was not a scheme for betting with Newton, it was certainly a scheme for betting to be carried on inter se between the persons who took part in the pools; that the respondents were using the street for the purpose of informing the persons to whom they distributed the forms of the means whereby and the terms on which they could bet with each other through the agency of Newton; and that by so doing the respondents were loitering in the street for the purpose of betting, contrary to the Act of 1906. The justices dismissed the informations. The prosecutor appealed.
- B
- C

L. Collins for the appellant.

W. J. M. Dennis for the respondents.

- LORD HEWART, C.J.**—In my opinion this appeal ought to be allowed. It is not necessary to read the case again, but, when one looks at s. 1 of the Street Betting Act, 1906, I think that there were materials which were sufficient to support a conviction of the respondents on the ground that they were loitering in the streets on behalf of Newton for the purpose of betting, that betting being not—unless in exceptional cases—with Newton himself, but among the various members of the public who were minded to accept the invitation to take part in some one or other of the pools. Apart altogether from that ground, I think that it is tolerably obvious that these persons were loitering on behalf of Newton for the purpose of bookmaking. It is true that the Act of 1906 does not itself contain a definition of bookmaking, although the word is used there, but I think that, when s. 18 of the Finance Act, 1926, defined the expression “bookmaker,” it was not in any degree altering the nature and meaning of that expression, but that it was merely stating in clear terms what a bookmaker undoubtedly is. The definition is as follows:
- D
- E

- F “The expression ‘bookmaker’ means any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets.”

- G I am satisfied, on the argument of counsel for the appellant and on the documents and parts of documents to which he has directed our attention, that, in one aspect of the matter, Newton was playing the part of a bookmaker and that these present respondents were loitering in streets or public places on his behalf for the purpose of bookmaking. I refrain from entering into other and more debatable matters, but I think that on these grounds this appeal should be allowed.
- H

- AVORY, J.**—I am of the same opinion. I think that it is possible that a conviction might have been recorded on the ground contended for by the appellant, namely, that there was certainly a scheme for betting to be carried on inter se between persons who took part in the pools and that the respondents were using the street for the purpose of informing the persons to whom they distributed the forms of the means whereby, and the terms on which, they could bet with each other through the agency of Newton. Although *Dunning v. Swetman* (1) may be distinguished on the ground that in that case the papers contained an offer to give certain odds, and that the judgment proceeded on the ground that the persons were being invited to bet and were being given information as to the terms on which the principal Morton would bet with them, I think that, in principle at all events, that case applies here, once it has been found that there was by these pamphlets an invitation to any persons to bet, whether with each other, or with Newton, who was the principal employing the distributors. It is, however, clear that a con-
- I

viction should have been recorded on the ground on which my Lord has based his judgment—that the defendants were loitering for the purpose of bookmaking, for Newton has by his own documents described himself, impliedly at any rate, as a bookmaker, and the definition of bookmaker in the Finance Act, 1926, clearly makes him a bookmaker. I agree that the appeal should be allowed. A

HUMPHREYS, J.—I also think that the appeal should be allowed. I was myself attracted by the argument of counsel for the respondents that the words “on behalf of himself or any other person” in s. 1 of the Street Betting Act, 1906, indicate that the betting or the purpose for which there is loitering in streets must be betting with the loiterer himself or with the person on whose behalf he is loitering. I give no final opinion on that question, because it is unnecessary. On the other point, I certainly agree with what was said by brother AVORY, that the respondents have brought themselves within the direct language of the section as loitering in the streets on behalf of Newton for the purpose of bookmaking by Newton. B
C

Case remitted.

Solicitors: *Robins, Hay & Waters*, for the Town Clerk, Bristol; *Church, Adams, Tatham & Co.*, for *Meade-King & Co.*, Bristol. D

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

Re TURNER. HUDSON v. TURNER E

[CHANCERY DIVISION (Maugham, J.), February 27, 1931]

[Reported [1932] 1 Ch. 31; 101 L.J.Ch. 49; 146 L.T. 209]

Power of Appointment—Power to appoint between two named objects—Gift equally between objects in default of appointment—One object pre-deceasing testator—Appointment of whole to survivor. F
G

Power of Appointment—Exercise—Excessive exercise—Power to appoint half fund—Appointment of whole.

Where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any one of the objects in the lifetime of the testator will pro tanto defeat the power and devise over, so that the power and devise will only remain as to the shares of the survivors. H

When the donee of a power of appointment has purported to exercise the power for an amount greater than that over which it is exercisable the appointment is good with regard to the correct amount.

A testator by his will gave his widow power to appoint his trust estate “to my two children in such proportions as she shall think fit, and in default of such appointment, and so far as such shall not extend, I direct that the same shall be equally divided between my said two children.” The testator had only two children, one of whom died after the date of the will but before the testator, and the other of whom survived both the testator and the widow. By her will, made after the death of the testator, the widow purported to appoint the whole of the trust estate to the surviving child. I

A **Held:** the widow had power to appoint only one-half of the estate, and the appointment was effective as to that half only.

Reade v. Reade (1) (1801, 5 Ves. 744) followed.

Boyle v. Bishop of Peterborough (2) (1791, 1 Ves. 299) considered.

B **Notes.** As to the effect of the death of a member of a class among whom property can be appointed under a power, see 25 HALSBURY'S LAWS (2nd Edn.) 538, para. 971; and for cases on the subject, see 37 DIGEST 427-429, 352-366. As to excessive execution of a power being good where the excess is distinguishable, see 25 HALSBURY'S LAWS (2nd Edn.) 570, para. 1019; and for a case on the subject, see 37 DIGEST 490, 846.

Cases referred to:

- C** (1) *Reade v. Reade* (1801), 5 Ves. 744; 31 E.R. 836, L.C.; 37 Digest 428, 362.
 (2) *Boyle v. Bishop of Peterborough* (1791), 1 Ves. 299; 3 Bro.C.C. 243; 30 E.R. 353, L.C.; 37 Digest 427, 352.
 (3) *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch.D. 269; 59 L.J.Ch. 717; 63 L.T. 52; 38 W.R. 767; 6 T.L.R. 388; 37 Digest 428, 360.

D **Adjourned Summons** as to the validity of the exercise of a power of appointment given by a will.

The above-named testator died on Nov. 24, 1914, having by his will dated Oct. 31, 1880, appointed his wife sole executrix, and devised and bequeathed all his real and personal estate to her upon trust for conversion and investment of the residue and to receive the income during her life. He empowered her

E "to appoint my said trust estate to my two children in such proportions as she shall think fit, and in default of such appointment, and so far as such shall not extend, I direct that the same shall be equally divided between my said two children."

F He had two children only: a daughter, the plaintiff, Annie Matilda Hudson, and a son, Frederick James Turner, who died on Nov. 19, 1914, having by his will appointed as sole executrix his wife, the defendant, Valentina Annie Turner. Frederick left one child only, who was still alive. Dorothy Turner, the testator's widow, appointed the plaintiff sole executrix of her will dated Sept. 9, 1926. It recited the power of appointment contained in the testator's will and the death of Frederick, and continued:

G "Now therefore under such circumstances and in exercise of such power of appointment vested in me as aforesaid I hereby give devise and appoint my husband's estate unto my said daughter Annie Matilda Hudson absolutely and it is my earnest wish that my said daughter shall give and convey unto my daughter-in-law Valentina Annie Turner of High Street Eccleshall aforesaid for her own absolute use and benefit so much of my husband's estate (so devised and appointed by me to my said daughter as aforesaid) as my said daughter in her own absolute discretion shall think fit. But I declare that such wish or desire of mine shall not create any trust whatsoever either implied or constructive in respect of my husband's estate or under this my will and it shall not be compulsory or obligatory on the part of my said daughter to carry out my said wish unless she in her own absolute discretion wholly thinks fit to do so."

I This summons was taken out to determine the questions: (i) Whether the power of appointment contained in the will of the testator was at the date of his death a valid subsisting power, or whether by reason of the death of Frederick James Turner, one of the two objects of the power, during the lifetime of the testator, it was wholly, or partly, and if so to what extent, destroyed; and (ii) Whether the appointment contained in the will of Dorothy Turner was valid as regarded half of the husband's estate.

Copping, for the plaintiff, the surviving daughter, cited *Reade v. Reade* (1), *Boyle v. Bishop of Peterborough* (2), *Re Ware*, *Cumberlege v. Cumberlege-Ware* (3), and FARWELL ON POWERS (3rd Edn.), p. 187.

Fawell, for the defendant, the executrix of the deceased son, referred to FARWELL ON POWERS (3rd Edn.), p. 365.

MAUGHAM, J., stated the facts, and continued :

The question of law which arises in the present case has been debated many times during the last hundred years or more. It is discussed in *Boyle v. Bishop of Peterborough* (2), *Reade v. Reade* (1), *Re Ware*, *Cumberlege v. Cumberlege-Ware* (3), and in several other cases; also in SUGDEN ON POWERS (8th Edn.) at pp. 416-423; in FARWELL ON POWERS (3rd Edn.) at p. 187; and in JARMAN ON WILLS (7th Edn.) vol. 3, at pp. 1778 et seq. I must accept the rule which is to be found in SUGDEN ON POWERS (8th Edn.) at p. 421, namely:

"Where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects in the life of the testator will, pro tanto, defeat the power and devise over, so that the power and devise will only remain as to the shares of the survivors."

LORD ST. LEONARDS derived that rule from *Reade v. Reade* (1) as pointed out in FARWELL ON POWERS (3rd Edn.) at p. 187, and JARMAN ON WILLS (7th Edn.) vol. 3, at p. 1779. The following comments by Mr. Jarman, the learned editor of POWELL ON DEVISES (7th Edn.), are to be found at pp. 374 and 375 :

"Where a power is given by a will to appoint property among several objects, and the subject, in default of appointment, is given to them as tenants in common, a question sometimes arises whether, by the death of any of the objects in the life of the testator, by which their shares under the devise lapse, the power is defeated in respect of those shares. The learned author of the treatise on powers has advanced an opinion in the affirmative, and that the power remains only as to the shares of the survivors. That opinion, however, it is conceived, cannot be sustained. The case of *Boyle v. Bishop of Peterborough* (2) decided that the death of any of the objects, after the period of vesting, does not prevent the entire subject from being appointed to the survivors; . . . If, therefore, the decease of an object whose share has vested does not take that share out of the operation of the power, it seems to follow, par ratione, that the decease of an object, the gift of whose share by that event lapses, does not, pro tanto, defeat it. It is impossible to find any solid principle of distinction between the cases. The case of *Reade v. Reade* (1), on which Mr. Sugden rests his position for the failure, pro tanto, of the power (and which he admits to be not very intelligible), seems to be much too blind a case to be relied upon as establishing a doctrine so entirely new and discrepant to the principles of analogous cases. The admission of the claim of the heir-at-law of the object who died in the lifetime of the testator, unless he was also heir-at-law of the testator (in which case the reference to the other character was absurd), is quite unaccountable."

LORD ST. LEONARDS re-considered the whole point [see SUGDEN ON POWERS (8th Edn.) at p. 421, which contains the following] :

"In some early editions of this work the author did not state the facts or judgment in *Reade v. Reade* (1) or give any opinion of his own upon the point, but extracted from it, not without some consideration, the following rule or principle, namely [he then states the rule, and continues] : He sees no reason whatever to amend the text; but he has investigated the point fully, because it is one of considerable importance, and the law, as before stated, has been questioned. It is said that the point was decided by *Boyle v. Bishop of Peterborough* (2).

A The learned author then sets out in substance the passage from POWELL ON DEVISES, and adds this, which I think to be of some importance:

“The question simply is, what did LORD ROSSLYN decide? And that I have endeavoured to show. The distinction, however, between the case before him and *Boyle v. Bishop of Peterborough* (2), appears to be an obvious one. Where the objects are once living, and the power may be exercised in their favour, it operates as it was intended, and subsequent events will not defeat it, although they may vary its application; but where the power as to an object never arose, and the share of the estate itself, which that object, if living, would have taken in default of appointment, lapses, it is reasonable that the power over that share should also lapse, if I may be allowed the expression. *Boyle v. Bishop of Peterborough* (2) should not now be disturbed; but it is not necessary to extend the principle to other cases.”

C It was after the expression of that view that there appeared in the third edition of JARMAN ON WILLS a note which appears in the seventh edition, vol. 3, at p. 1779, and which states that in SUGDEN ON POWERS (8th Edn.):

D “Great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to POWELL ON DEVISES (3rd Edn.) p. 374, which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place before and where it takes place after the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favour such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.”

E I shall accordingly follow the rule and decide that by reason of the death of one of the two children before the death of the testator the power was thus far defeated, with the result that the widow had power to appoint one-half of the estate. When the case is one, as here, of a power given by will to appoint between two named persons, and one of them dies during the lifetime of the testator, the power itself is limited, because it can be exercised only in favour of the survivor. It is not unreasonable to hold that where the power relates only to the survivor the will ought to be construed as if the power over the share which might have been appointed to the object had pro tanto lapsed.

G The second question, namely, whether the excessive appointment is wholly inoperative, arises on the will of Dorothy Turner. I do not think that I should be following the proper principle if I were so to decide. When the donee of a power of appointment has purported to exercise the power for an amount greater than that over which it was given, the appointment is good with regard to the correct amount. In a case like the present it ought to be held that the appointment has been properly exercised over one-half of the husband's estate. There is, I think, no authority directly in point as to this matter, but it is a sound principle that such an appointment ought to be allowed to operate.

H Accordingly, the answer to the second question on the summons is that the appointment was valid up to one-half of the husband's estate.

I Declaration accordingly.

Solicitors: Miller & Smiths, for Thomas Bagley, Stone, Staffordshire; Clinton & Co., for Henry Walters & Welch, Stone, Staffordshire.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re WATTS. COFFEY v. WATTS

[CHANCERY DIVISION (Bennett, J.), June 5, 1931]

[Reported [1931] 2 Ch. 302; 100 L.J.Ch. 353; 145 L.T. 520]

Power of Appointment—General and special powers of appointment—Marriage settlement—Power to revoke trusts and powers contained in settlement and to create other trusts and powers—Power exercisable only during settlor's mother's lifetime and with her consent—Exercise of power contravening perpetuity rules.

A power was given by a settlor under a marriage settlement to herself to revoke all or any of the trusts, powers, and provisions of the settlement during the lifetime of her mother B. and with B.'s consent to declare other trusts, powers, &c. The settlor exercised such power of revocation during the lifetime of B. with B.'s consent, and with her consent declared other trusts. Such other trusts offended the rule against perpetuities.

Held: the trusts were void for perpetuity because, as the power was exercisable only during the lifetime of B. and with her consent, the settlor was not free to deal with the property in any way she pleased, and so the power was special, and not general, and could not be read into the original settlement for the purpose of determining the validity of the trusts.

Notes. Although this decision was followed in *Re Churston Settled Estates*, [1954] 1 All E.R. 725, not all the reasoning of this decision was accepted in that case.

Referred to: *Fuller v. I.R. Comrs.*, [1950] 2 All E.R. 976.

As to whether a power is general or special, see 25 HALSBURY'S LAWS (2nd Edn.) 511, para. 926.

Cases referred to:

- (1) *Re Dilke, Re Dilke's Settlement Trusts, Verey v. Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 T.L.R. 13, C.A.; 37 Digest 416, 256.
- (2) *Re Phillips, Laurence v. Huxtable*, [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178; Digest Supp.
- (3) *Eland v. Baker* (1861), 29 Beav. 137; 7 Jur.N.S. 956; 9 W.R. 444; 54 E.R. 579; 37 Digest 505, 986.
- (4) *Re Durbar-Buller*, [1928] 2 I.R. 143.

Originating Summons as to the validity of certain trusts declared under a power of appointment contained in a marriage settlement.

By an indenture of marriage settlement made in 1904, Ellen Dorothy Abbott settled certain property upon trusts so that she should receive the income thereof during her life, and after her death the property was to be held in trust for her children as therein mentioned. The settlement contained a clause whereby it was provided that the settlor during the lifetime of her mother, Mary Abbott, with Mary Abbott's consent in writing, was entitled by deed to revoke all or any of the trusts, powers, and provisions of the settlement, and to declare other trusts, powers, &c., in the place thereof. In 1913 the settlor exercised the above-mentioned power of revocation with the consent of her mother Mary Abbott, and with her consent declared other trusts of the property; but the trusts so declared offended the rule against perpetuities. The settlor died in 1926, and her mother, Mary Abbott, died in 1928.

A summons was taken out by the trustees of the settlement to determine the question of the validity of the new trusts and incidentally whether the new appointment was a general or a special power.

R. J. T. Gibson, for the plaintiffs, the trustees of the settlement, referred to GRAY ON PERPETUITIES (3rd Edn.) ss. (526), (527).

A *Christie*, for the defendant, Imlay Newbegin Watts, the only child of the settlor, referred to *Re Dilke* (1), *Re Phillips*, *Laurence v. Huxtable* (2), *Eland v. Baker* (3), and *Re Durbar-Buller* (4).

B **BENNETT, J.**—By a marriage settlement made on Sept. 24, 1904, certain property was settled by Miss Ellen Dorothy Abbott on trusts, under which, so far as material for the purposes of the question which I have to decide, she was to receive the income during her life, and after her death the settled property was to be held in trust for all the children of the said Ellen Dorothy Abbott who, either before or after her decease being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age, in equal shares, but if there should be but one such child, then the whole to be in trust for such one child. Then, after certain provisions which are not material, the settlement contains a clause in the following terms: [His Lordship read the clause in which the power of revocation and new appointment was set out, and continued:] On Dec. 12, 1913, Ellen Dorothy Abbott (then Ellen Dorothy Watts), with the consent of the said Mary Abbott, exercised the power of revocation and new appointment contained in the marriage settlement. At the date of the revocation and new appointment there was in existence one child, the defendant Imlay Newbegin Watts, then and now the only child of the marriage of Ellen Dorothy Abbott with her husband Malcolm Newbegin Watts. The defendant I. N. Watts at the date of the revocation and new appointment was eight years old, and the new appointment declared certain trusts for the benefit of the defendant, his wife and children which, if the appointment is to be read into the original settlement, are, it is conceded by counsel for the trustees of the settlement, void on the ground that they infringe the rule against perpetuities, and the question whether they are void on that ground depends on whether the power of revocation and new appointment contained in the marriage settlement is a special power, in which case the trusts contained in the deed of new appointment have to be read into the marriage settlement, and their validity has to be determined on the footing that they were originally written into the marriage settlement, or whether the power of new appointment contained in the settlement is a general power—i.e., general in the sense that the person to whom the power was given was the person who was thereby made the absolute owner of the settled property over which the power extended.

E Counsel for the trustees argues, in the interests of unborn persons, in favour of the validity of the trusts contained in the deed of Dec. 12, 1913, and founds his argument, that the power of appointment is a general power, on two authorities: G *Re Dilke* (1) and *Re Phillips* (2). He says that, according to these two cases, a power of appointment, which may be exercised with the consent of another person, is a general power of appointment, and therefore this power, which is contained in the marriage settlement of 1904 and which is exercisable with the consent of Mary Abbott, is a general power of appointment.

H I think that counsel for the defendant is right in saying that in interpreting the language used in the settlement one must have regard to the fact that it is a settlement made in consideration of marriage. It is also material, in interpreting the language used in the instrument, to have regard to the fact that the power of revocation and new appointment is restricted in point of time to the lifetime of Mary Abbott, and also to her consent in writing being given both to the exercise of the power of revocation and to the exercise of the power of new appointment. I These seem to be facts which afford a real ground of distinction between the construction to be placed on the marriage settlement and the construction placed by the Court of Appeal in *Re Dilke* (1), and by MAUGHAM, J., in *Re Phillips* (2), on the documents which they had to consider. It seems to me that it would not be right to hold that, on the terms of the powers contained in the marriage settlement which I have to construe, Ellen Dorothy Abbott (afterwards Ellen Dorothy Watts) was in substance the owner of the property, and consequently free to deal with it in any way she pleased.

It seems to me that it is essential to arrive at the conclusion that she was free A
to deal with it in any way she pleased before one can say that the instrument by
which the power could be exercised is not to be read into the original settlement
for the purpose of determining the validity of the trusts which the new appointment
creates.

In my judgment, therefore, the power conferred on Ellen Dorothy Watts by the B
marriage settlement was not a general power but a special power, and it follows
from that that the trusts to which I have referred in the deed of revocation and
new appointment are void, as infringing the rule against perpetuities. There will
be a declaration that the defendant is absolutely entitled, and the costs of all parties
will be payable out of the fund.

Declaration accordingly.

Solicitors: *Warren, Murton, Miller & Foster.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL FOR ONTARIO v. NATIONAL TRUST CO., LTD.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Merrivale, Lord Hanworth, Lord Atkin
and Lord Macmillan), July 13, 28, 1931]

[Reported [1931] A.C. 818; 100 L.J.P.C. 215; 145 L.T. 673;
47 T.L.R. 625]

*Canada—Ontario—Succession duty—Gift inter vivos—Shares in company—
Whether value to be assessed at date of gift or at date of death of donor—
Ontario Succession Duty Act R.S.O., 1927, c. 26, ss. 4, 8.*

By s. 8 (1) of the Succession Duty Act, 1927, of Ontario, all property situate
in Ontario and passing on the death of any person domiciled in Ontario was
subject to duty; and by s. 8 (2) property passing on the death was deemed to
include any property taken under a disposition operating as an immediate gift
inter vivos made since July 1, 1892. By s. 4, the fair market value of the
property at the date of the death of the deceased was to be taken as the dutiable
value of the property.

In 1925 a resident in Ontario made a gift to his wife of shares in a company
registered and having its head office in Ontario, and in 1929 he died. At the
date of the gift the value of the shares was \$50,240, while at the date of the
deceased's death their value was \$264,183.50. It was not disputed that the
shares were property chargeable to duty under the Act.

Held: by virtue of s. 4 of the Succession Duty Act, the dutiable value of the
shares was to be determined as at the date of the death of the donor and not as
at the date of the gift.

Lord Strathcona v. Inland Revenue (1) (1929 S.C. 800) applied.

Notes. Section 8 (2) (b) (ii) and s. 4 of the Succession Duty Act of Ontario
correspond respectively with the Finance Act, 1894, s. 2 (1) (c) (so far as it in-
corporates the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as amended
by the Customs and Inland Revenue Act, 1889, s. 11 (1) and s. 7(5). See also the
Finance Act, 1957, s. 38.

As to valuation for estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 71, 72,
paras. 144, 145; and for cases on the subject, see 21 DIGEST 107-109, 797-815.

A Case referred to:

(1) *Lord Strathcona v. Inland Revenue*, 1929 S.C. 800; Digest Supp.

Appeal by the Attorney-General for Ontario from a judgment of the Appellate Division of the Supreme Court of Ontario dated March 9, 1931, affirming a judgment of ORDE, J., dated Aug. 20, 1930. The question raised on the appeal was whether gifts inter vivos, when taxed for purposes of succession duty under the Ontario Succession Duty Act, 1927, were to be taxed on the value of the gift as at the date of the gift or as on the date of the death of the donor.

The respondents were the sole executors and trustees of the will of William Edward Wilder, who died at Toronto on May 28, 1929. On Dec. 30, 1925, the deceased gave to his wife 500 shares of the par value of \$100 each in a private company incorporated under the provisions of the Companies Act (Ontario), having its head office in the Province of Ontario. The value of the shares at the date of the gift was \$50,240, and the value at the date of the death of the deceased was \$264,183.50. This action was brought by the appellant for a declaration that the date as at which the value of the shares in question should be taken for purposes of succession duty, under the Succession Duty Act, was the date of the death of the deceased and not the date of the gift inter vivos, and for a declaration that the Province of Ontario was entitled to recover succession duty under the Act in respect of the value of the 500 shares so calculated.

ORDE, J., the trial judge, declared that the property in question should be valued for the purpose of succession duty at the value as at the date of the gift. That decision was affirmed by the Appellate Division (MULOCK, C.J.O., HODGINS, MIDDLETON and GRANT, JJ.A.; MAGEE, J.A., dissenting). The judgments are reported (1931 O.R. 122).

E. Bayly, K.C., J. T. White, K.C., and M. Alexander for the appellant.

W. N. Tilley, K.C., and J. S. D. Tory for the respondents.

LORD HANWORTH, M.R.—The point to be decided in this appeal can be stated quite shortly: Is the value of property, the subject of a gift inter vivos, to be taken for the purpose of succession duty as on the date of the gift, or as on the date of the death of the donor?

The facts which give rise to the question are admitted. William Edward Wilder, an investment banker, of the city of Toronto, on Dec. 30, 1925, gave to his wife, the second respondent on the record, as an immediate gift inter vivos, within the meaning of s. 8 (2) (b) (ii) of the Succession Duty Act R.S. Ont. 1927, c. 26, and amendments, 500 shares in the capital stock of Picton Securities, Ltd. Picton Securities, Ltd., is a private company incorporated under the Companies Act (Ontario), with its head office in the said province. Its shares are not transferable to any person who is not already a shareholder without the previous consent of the directors of the company. None of its shares have ever been sold or offered for sale.

William Edward Wilder died on May 28, 1929, leaving his widow him surviving, and the first respondent as the sole executor and trustee of his will. No change occurred in the ownership of these 500 shares between the date of the gift and the date of the death of the donor. They remained in the possession of his donee, who did not part with the shares, or charge or in any way deal with them, nor were the shares in any way commuted or altered. The value of the shares at the date of the gift was \$50,240, and the value at the date of W. E. Wilder's death was \$264,183.50. Which of these values is to be taken as subject to succession duty?

The Attorney-General claims a declaration that the true date is May 28, 1929, the date of the death, and the respondents submit that the true date is that of the gift, Dec. 30, 1925. The second declaration asked for in the prayer of the statement of claim was not considered in the court of first instance or in the Court of Appeal, and before the board it was by consent expressly struck out. ORDE, J., who tried the case, decided in favour of the defendants' contention, and made a declaration that the shares were to be valued as at Dec. 30, 1925. The Court of

Appeal by a majority upheld that decision, and hence the Attorney-General appeals. A
The charging section of the Act is:

"8.—(1) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates herein-after imposed. (2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property: . . . (b) (i) Any property taken as a donatio mortis causa; (ii) Any property taken under a disposition operating or purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July 1892." B

By virtue of the terms of sub-s. (2) (b) (ii) above, it would seem that the 500 shares given by the testator on Dec. 30, 1925, are covered by the charge to tax, and must be subject on the very simple facts of the present case to the appropriate duty imposed. C

An argument was addressed to their Lordships on the true meaning of the word "passing." The difficulty or rather the impracticability was insisted on, of including within that word, property which it is to "be deemed to include"; that is property notionally passing, when such a notion may be derived from facts which occurred as far back as July 2, 1892, during which lapse of time assignments, charges, deaths, assignments by operation of law in bankruptcy and in winding up, may have obscured or indeed obliterated the original transaction. But their Lordships are not concerned to consider these problems and difficulties. There is no question raised in the case whether the Act applies to this donation. That is admitted for the purpose of the case and this appeal, though all other rights which the respondents may have are reserved to them. The only submission of the respondents in the case is that Dec. 30, 1925, "the date of the gift thereof," is the date at which the value of the shares is to be taken. D

Whatever may be obscure in this Act it is not easy to raise a doubt on this point. Assuming that there is a liability to the duty, s. 4 seems to lay down in simple plain terms the date at which the value is to be determined. Its terms are as follows: E

"In determining the dutiable value of property or the value of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the deceased." F

The section proceeds to permit certain deductions to be made from the value thus ascertained; but these provisions introduce no obscurity to the principle on which the value is to be determined. It is to be noted, too, that what is to be determined is the dutiable value of the property—not of the original gift as it was made. Section 4 on this point appears to coincide with s. 8 (2), in which property passing on the death is to be deemed to include property passing and taken under a disposition previous to the death. If the date of the disposition were to prevail the terms of sub-s. (2) should have been differently drawn, for at the date of the transfer the property disposed of was the property of the transferor and no such notional inclusion would be called for. G

The attention of their Lordships was called to the Scottish case of *Lord Strathcona v. Inland Revenue* (1). In that case the court had to consider the effect of the provisions of the Imperial Finance Act, 1894, s. 2 (1) (c), and s. 7 (5), which bring into the estate of the deceased, at the value which it would fetch in the open market at the time of the death of the deceased, property which the deceased has within a term of three years anterior to his death made the subject of a gift inter vivos. LORD SANDS'S observations in his judgment are germane to the point under consideration. He says (1929 S.C. at p. 807): H

"The keys to the interpretation of that legislation are the ideas of property passing, and of property being deemed to pass although it does not actually I

- A pass. These ideas have been the subject of much judicial exposition, and are now familiar, so I do not dwell upon them. It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes. One of the classes of property which are deemed to pass on death and so become subject to estate duty is property which is the subject of donation before death as described in the 1881 Act; . . . in order to avoid disappointment of the estate duty the property donated should be treated just as if no donation had been made and the property in question had remained part of the deceased's estate and had actually passed upon his decease."
- B

- Their Lordships are not unmindful of the problems and anomalies to which the statute may give rise. These persuaded ORDE, J.A., to reject the interpretation adopted in this opinion in order to mould the scheme of the Act on to what he thought would be more symmetrical and satisfactory lines. In the Supreme Court of Ontario, Appellate Division, a number of illustrations are suggested which it is claimed are such that the interpretation contended for by the appellant cannot have been intended by the legislature. But it must be remembered that it would not be difficult to suggest analogous illustrations from an opposite point of view. To take one only—suppose on the facts of the present case that the value of the property at the time of the gift had been \$260,000, and that had dwindled down to \$10,000 at the time of the death, there would have been a hardship upon the donee, who would then have been compelled to pay duty as upon a value twenty-six times that to which the property had diminished at the time of the death. The tax would have been payable, but the gift would provide no sufficient resources from which to pay it. Such illustrations are to be found pro and con in any statute which touches so many of the manifold and complex aspects of human life and endeavour, as a taxing Act does. A solution to some of them is to be found, as pointed out by LORD SANDS (see *Lord Strathcona v. Inland Revenue* (1) (ibid. at p. 809)), by directing attention to the terms of the statute which imposed, in that case, as well as in the present, the duty not on the value of the gift, but on the value of the property which is brought into charge.
- D
- E
- F

- While the board fully recognise the difficulties and inequalities that may arise under a statute which looks back over a span of more than a full generation of years, their Lordships find themselves required to construe the words of the sections in relation to the simple facts of this case. A citizen of Toronto gave to his wife shares in a company incorporated under the Ontario Companies Act, which has its head office in the province. His wife retained those shares in her own hands, and held them at the time of his death, when his estate became subject to the Ontario Succession Duty Act. On such facts s. 4 appears unequivocal. The dutiable value of property shall be determined and "taken as at the date of the death of the deceased."
- G

- Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgments of the courts below set aside, and that a declaration should be made in the action as asked in para. (a) of the prayer of the statement of claim. The respondents will be ordered to pay the costs of this appeal, and of all the proceedings in the courts below.
- H

Appeal allowed.

- Solicitors: *Blake & Redden; Lawrence Jones & Co.*
- I

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

DAVIES v. BRAITHWAITE

[KING'S BENCH DIVISION (Rowlatt, J.), June 10, 1931]

[Reported [1931] 2 K.B. 628; 100 L.J.K.B. 619; 145 L.T. 693;
47 T.L.R. 479; 75 Sol. Jo. 526; 18 Tax Cas. 198]

Income Tax—Profession—Actress—“Employment”—Whether assessable under Sched. E or Sched. D—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. E, Sched. D.

An actress carried out engagements of (i) acting in stage plays; (ii) performing for films; (iii) performing on the wireless for the British Broadcasting Corporation; and (iv) performing for gramophone recording purposes.

Held: she was assessable to income tax in respect of her earnings in all four classes of engagements as earnings from a profession or vocation under Sched. D of the Income Tax Act, 1918, and not under Sched. E, because none of her engagements came within the meaning of the expression “employment” as used in Sched. E, which expression meant something analogous to an office.

Notes. The Income Tax Act, 1918, Sched. D and Sched. E, were replaced by the Income Tax Act, 1952, s. 122 and s. 156, respectively.

Referred to: *Bennet v. Marshall* (1938), 158 L.T. 75; *Asher v. London Film Productions, Ltd.*, [1944] 1 All E.R. 77; *Stainer's Executors v. Purchase*, [1952] A.C. 280.

As to income tax in respect of earnings from profession or vocation, see 20 HALSBURY'S LAWS (3rd Edn.) 239–244, paras. 438–446; and for cases on the subject, see 28 DIGEST 61, 62, 310–315. For the Income Tax Act, 1952, ss. 122, 156, see 31 HALSBURY'S STATUTES (2nd Edn.) 112, 149.

Cases referred to:

- (1) *Performing Right Society, Ltd. v. Mitchell and Booker (Palais De Danse), Ltd.*, [1924] 1 K.B. 762; 93 L.J.K.B. 306; 131 L.T. 243; 40 T.L.R. 308; 68 Sol. Jo. 539; 34 Digest 29, 72.
- (2) *Pickles v. Foster*, [1913] 1 K.B. 174; 82 L.J.K.B. 121; 108 L.T. 106; 29 T.L.R. 112; 20 Mans. 106; 6 Tax Cas. 131; 28 Digest 88, 516.
- (3) *Elliott v. Gustavino* (1924), 8 Tax Cas. 632; 28 Digest 62, 312.
- (4) *Barson v. Airey* (1925), 134 L.T. 586; 42 T.L.R. 145; 69 Sol. Jo. 679, C.A.; 28 Digest 87, 500.
- (5) *Great Western Rail. Co. v. Bater*, [1920] 3 K.B. 266; 90 L.J.K.B. 41; 124 L.T. 92; 36 T.L.R. 689; affirmed, [1921] 2 K.B. 128; 90 L.J.K.B. 550; 125 L.T. 321; 37 T.L.R. 388, C.A.; reversed, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 38 T.L.R. 448; 66 Sol. Jo. 365; 8 Tax Cas. 231, H.L.; 28 Digest 85, 486.

Case Stated under s. 149 of the Income Tax Act, 1918, by the General Commissioners of Income Tax for the Division of Kensington in the county of Middlesex for the opinion of the King's Bench Division of the High Court of Justice.

At meetings of the commissioners on June 4, 1928, Dec. 19, 1928, and Feb. 20, 1929, Miss Lilian Braithwaite (hereinafter referred to as the respondent) of No. 2, Pelham Crescent, S.W., appealed against the following assessments made on her:

(i) Under Sched. D of the Income Tax Acts in respect of the profits from her profession or vocation of an actress:

For the year ending April 5, 1926 ...	£979
For the year ending April 5, 1927 ...	£1,293
For the year ending April 5, 1928 ...	£772

- A (ii) Under Sched. E of the Income Tax Acts in respect of the profits from her employment as an actress:

For the year ending April 5, 1926 ...	£1,232
For the year ending April 5, 1927 ...	£2,000
For the year ending April 5, 1928 ...	£2,000

- B The above Sched. D and Sched. E assessments were not intended to be cumulative but were raised as alternative assessments in view of a dispute that had arisen between the parties as to the correct method of assessment.

- C The respondent, who resided in England, was an actress and earned her living by exercising her activities in any way that her professional qualifications fitted her for. During the three years in question (i.e., the three years ending April 5, 1928) she carried on her activities by (a) acting in various stage plays in England and one in the United States of America, (b) performing for the films, (c) performing on the wireless for the British Broadcasting Corporation, (d) giving performances for gramophone companies for reproduction on their records. The appeal against the Sched. D assessments was heard first.

- D It was contended on behalf of the respondent that: (a) The contracts between the theatrical producers and the respondent were contracts of employment, the relation between the producer and the respondent being that of master and servant. *Performing Right Society, Ltd. v. Mitchell* (1) was referred to; (b) The respondent was not assessable under Sched. D in respect of any profession or vocation for any of the years in question, but was assessable only under Sched. E in respect of the various employments exercised by her; (c) As no remittances had been made to this country on account of the respondent's earnings in her employment outside the United Kingdom there was no liability under Case V of Sched. D on the ground of such employment being a foreign possession.

- E On behalf of the Crown it was contended (inter alia) that: (a) The respondent exercised a profession or vocation during the years in question and was assessable therefore under Case II of Sched. D in respect of the whole of her profits whether earned in this country or abroad; (b) The respondent exercising a profession or vocation, the forms of the various contracts by means of which she exercised it were immaterial; (c) The assessments were correct in principle and should be confirmed subject to any necessary adjustment of figures.

- F The commissioners were of opinion that the respondent was assessable for all the years in question under Sched. E and not under Sched. D, and therefore discharged the assessments under Sched. D. Whereupon the inspector of taxes on behalf of the Crown expressed dissatisfaction at the determination of the commissioners as being erroneous in point of law.

- G Immediately after giving the decision as above the commissioners heard the appeal by the respondent against the assessments under Sched. E.

- H (i) It was contended on behalf of the respondent that: (a) Only offices or employments exercised in Great Britain are assessable under Sched. E of the Income Tax Act, 1918; (b) The respondent's employment in America was exercised wholly out of the United Kingdom and the profits arising from such employment were not therefore assessable under Sched. E; the following cases were referred to: *Pickles v. Foster* (2), *Elliott v. Guastavino* (3), *Barson v. Airey* (4).

- I On behalf of the Crown it was contended (inter alia) on the assumption that the respondent was assessable under Sched. E that: (a) The employment of an actress carried on or exercised by the respondent was of the nature described in the Income Tax Act, 1918, Sched. D, but that in accordance with s. 18 of the Finance Act, 1922, the profits were assessable under Sched. E; (b) The total profits arising from the various engagements each year by which such employment was carried on or exercised fell to be treated as profits from an employment in respect of which there should be one assessment and not a separate assessment in respect of the profits of each engagement; (c) Consequently the profits of the respondent each year were

assessable in their full amount whether they arose from engagements in this country A
or abroad.

The commissioners were of opinion that in assessing the respondent under Sched. E, the income received in respect of the American employments must be omitted and confirmed the assessment with the omission of such income. Where- upon the inspector of taxes on behalf of the Crown expressed dissatisfaction at the determination of the commissioners as being erroneous in point of law, and subse- B
quently required the commissioners to state and sign Cases as regards each of such determinations for the opinion of the High Court of Justice.

The Solicitor-General (Sir Stafford Cripps, K.C.) and Reginald P. Hills for the Crown.

Raymond Needham, K.C., and J. S. Scrimgeour for the respondent. C

ROWLATT, J.—The question of principle in this case is whether the respondent ought to be assessed under Sched. D as following her profession of an actress or whether she ought to be assessed under Sched. E as following certain employments under the particular engagements which she makes. The question is one of diffi- D
culty mainly because of the want of precision in the term "employment" as it comes into this controversy. The old scheme of the Act used to be that under Sched. D, Case II, there were professions, employments, or vocations, and it was held, roughly speaking, that that was a full description of people who were carrying on business on their own account. Then under Sched. D there were offices, public offices, and for a comparatively long time it was realised that it was very much better in relation to a person in a permanent situation to assess his salary as the salary of the situation than to go to him personally, so to speak, and assess his E
earnings; and, therefore, a number of people like railway clerks, who were for the time being hired for an indefinite period, and merely hired, were treated as owners of offices. This was a very convenient method and went on for a long time. Then a case arose (*Great Western Rail. Co. v. Bater* (5)) in which I gave effect to that position, but I took the liberty of pointing out that I thought that they were not offices at all, that that sort of thing was not an office which existed by itself and F
had a separate existence, as it was held more by tenure and title than by contract, one holder of the office succeeding another holder as it went on. The House of Lords decided that my view was right, that it was not convenient, and the result was that they wanted to put these people back again into Sched. E, in the way in which they had always been treated. Therefore, it is said that employments fall within Sched. E. When "employment" is used in connection with a profession G
or vocation it refers to the way a man busies himself, and in Sched. E the word is used with a different value and as meaning something analogous to an office and conveniently amenable to the scheme of taxation which is applied to offices as opposed to the earnings of a man who is making what he can.

Now that unhappy word "employment" has to be construed with reference to this case. The respondent is an actress, and the contract which an actor or actress, H
or any person whose livelihood is earned in that sort of way, has is rather different from other contracts, as has been pointed out, because it involves that the employer under the contract is bound to let them appear. But what is the criterion? The Solicitor-General has said a good deal as to the skill and the degree of attain- I
ment which was required of a lady who was in a position to make agreements of this kind. I do not think that this question turns on the degree of skill. It seems to me that the most skilful and distinguished persons whose qualifications are very rare in art or medicine, or any other profession where distinction is difficult to obtain, might well enter an "employment" if they took a situation for years and made that their life occupation, and it would be no answer to a claim to assess them under Sched. E to say that they were very skilled and distinguished people, because they would be employed in the sense of this schedule as much as anybody else. If it happened to be a very humble person who takes a series of jobs for an hour or so each, he cannot be said to follow a profession which is an employment for

A this purpose, so I should not think that that enters into it. Nor is it a mere question of duration. One might possibly draw a line and say what amount of duration makes the employment incidental to the exercise of the profession, but I do not think that that matters.

It seems to me quite clear that one can have both an employment and a profession at the same time. Quite clearly one can have it in different categories. A man might have the steadiest employment in the world by day, and he might do something else entirely different in the evening and make some more money by way of a professional vocation. I cannot doubt that that would be so, but even if it were in the same line, I do not see why he should not have both. I do not see why a man who is a musician, for instance, and holds an office could not do that and hold an employment in respect of some permanent engagement which he has and at the same time pursue his profession at large. I do not think there is any difficulty about doing both things at once.

I have to formulate some line of cleavage, and it seems to me that what I must glean my inspiration from is the purpose of the change. We are here for the purpose of considering the effect of the change which was made in the different methods of raising income tax. It seems to me that "employments" in Sched. E alongside "offices" must relate to employments which are something like offices, and I thought of the expression "posts." When a person occupies a post resting on a contract, and if then that is an employment as opposed to a mere engagement in the course of carrying on a profession, I do not think that is a very difficult term of distinction, though in general perhaps it is a little difficult to apply to all cases, as every distinction is. But I would go further than that, for it seems to me that a method of earning a livelihood which does not contemplate the obtaining of a post and staying in it, but essentially contemplates a series of engagements and moving from one to the other—and in the case of an actor it certainly involves going from one to the other and not playing one part for the rest of his life—then each of those engagements cannot be considered an employment but a mere engagement in the course of exercising a profession. Every profession and every trade involves the making of successive engagements and successive contracts and, in one sense of the word, employments. That is the line which I draw on that principle.

In this case it is quite clear that the respondent must fall under Sched. D, because she does not make a contract with a producer for a post. She makes a contract with a producer for the next thing she is going to do, and then with another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film if she likes. I think essentially whatever she does or whatever contracts she makes for the running of a play are nothing but incidents in the conduct of her professional career. Therefore, I think that she is taxable under Sched. D, but I am not going finally to deal with this case, and I do not think I can justly under Sched. D. I do not discuss the question whether she ought to be charged on her American receipts. I have no decision on that from the commissioners, but the point was raised, because I see under para. 4 of the Case it was contended on her behalf on the appeal against the Sched. D assessments that as no remittances had been made to this country she could not be assessed under Case V of Sched. D. She sought to raise that point. I shall allow this appeal with costs. I am obliged to do that, but I shall send it back to the commissioners at the option of the respondent to have a decision by them whether she is taxable under Sched. D on the whole of her earnings or not. If she does not like to go back to the commissioners it will not be necessary to exercise that option.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Theodore Goddard & Co.*

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

ANDERTON AND HALSTEAD, LTD. v. BIRRELL

[KING'S BENCH DIVISION (Rowlatt, J.), June 2, 16, 1931]

[Reported [1932] 1 K.B. 271; 101 L.J.K.B. 219; 146 L.T. 139;
16 Tax Cas. 200]

Income Tax—Assessment—Additional assessment—"Discovers"—Bad or doubtful debt—Amount written down—Subsequent conduct of debtor—Payment off of other debts—Estimate of extent to which debt bad—Jurisdiction to re-consider estimate after lapse of years—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 125 (1), Sched. D, Rules applicable to Cases I and II, r. 3 (i).

A company was assessed to income tax for 1921-2 and 1922-3 on the basis that a debt owed to it by a subsidiary company would only be partially recovered and was, therefore, "bad" within the Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 3 (i). Subsequently, the company continued to supply goods to the subsidiary company and the debt due to the company increased while other creditors of the subsidiary company received payments in respect of the debts due to them. In 1929 the inspector of taxes made additional first assessments under s. 125 of the Act of 1918, disallowing the amounts by which the bad debt was written down in the two relevant years. The company appealed.

Held: there was no jurisdiction to make the additional assessments because

(a) the inspector had not discovered an undercharge in the original assessments within s. 125 (1), because "discovers" implied more than a mere change of opinion on the facts presented, and involved the ascertainment of some new fact, which, if it had been known at the time of the original assessment, would have resulted in a higher assessment; and

(b) rule 3 (i) required to be made an estimate of the extent to which a debt was bad, the soundness of which would be judged by the then facts and probabilities, and that estimate could not be overthrown by a conclusion reached years later that the debt was not shown to be bad.

Notes. The Income Tax Act, 1918, s. 125, and Sched. D, Rules applicable to Cases I and II, r. 3 (1), were replaced by the Income Tax Act, 1952, s. 41 and s. 137, respectively.

Considered: *Commercial Structures, Ltd. v. Briggs*, [1948] 2 All E.R. 1041. Referred to: *Williams v. Grundy Trustees*, [1933] All E.R. Rep. 875; *Dodworth v. Dale*, [1936] 2 All E.R. 440; *Absalom v. Talbot*, [1944] 1 All E.R. 642; *Multipar Syndicate, Ltd. v. Devitt*, [1945] 1 All E.R. 298; *Bristow v. William Dickinson & Co.*, [1946] 1 All E.R. 448.

As to valuation and subsequent treatment of debts, see 20 HALSBURY'S LAWS (3rd Edn.) 178, para. 308; and for cases on the subject, see 28 DIGEST 49, 50, 253-254. For the Income Tax Act, 1952, s. 41 and s. 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 49, 134.

Cases referred to:

- (1) *R. v. Kensington Income Tax Comrs.*, [1913] 3 K.B. 870; 83 L.J.K.B. 364; 109 L.T. 708; 6 Tax Cas. 279; reversed, [1914] 3 K.B. 429; 83 L.J.K.B. 1439; 111 L.T. 393; 6 Tax Cas. 613; 30 T.L.R. 574, C.A.; affirmed sub nom. *Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215; 84 L.J.K.B. 2169; 113 L.T. 1083; 31 T.L.R. 606; 59 Sol. Jo. 715; sub nom. *R. v. Kensington Income Tax Comrs., Ex parte Aramayo*, 6 Tax Cas. 621, H.L.; 38 Digest 121, 888.
- (2) *R. v. Kingsland Parish Inspector of Taxes, Ex parte Pearson, Kingsland Estate, R. v. Income Tax Comrs. and Kingsland Parish Inspector of Taxes* (1922), 8 Tax Cas. 327; Digest Supp.

A **Case Stated** under the Income Tax Act, 1918, s. 149, by the General Commissioners of Income Tax for the division of Blackburn in the county of Lancaster, for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners, held at Rawtenstall, in the said county, on March 26, 1930, Anderton and Halstead, Ltd. (hereinafter called "the appellant company"), appealed against the following additional assessments made on them

B under Sched. D by the Additional Commissioners of Income Tax :

1922-3	...	...	...	...	£6,449
1923-4	...	...	...	...	£6,448
1924-5	...	...	...	...	£7,738
1925-6	...	...	...	...	£1,290
1926-7	...	...	...	...	£1,289

C The question before the commissioners was whether a sum of £29,019 12s. 6d., or any part thereof, was a bad debt within the meaning of r. 3 (i) of the Rules applicable to Cases I and II, Sched. D, Income Tax Act, 1918, in the circumstances hereinafter appearing.

The appellant company carried on business as cotton manufacturers at Holden Vale, Haslingden, Lancashire. Between 30 per cent. and 40 per cent. of their cloth was sold to Haworth & Co., Ltd., merchants, of Manchester. The total issued capital of Haworth & Co., Ltd., was £4,204 in £1 shares, of which the appellant company owned £4,000. The directorate of each company was the same. Haworth & Co., Ltd., took cloth from other manufacturers than the appellant company.

D The appellant company made up their accounts to June 30 and Dec. 31 in each year. In the accounts to June 30, 1921, the appellant company wrote off £19,346 8s. 4d., this sum being part of a total debt of £29,019 12s. 6d., then owing by Haworth & Co., Ltd., to the appellant company, which was estimated to be bad to that extent. The accounts of the appellant company and of Haworth & Co., Ltd., were audited by the same firm of chartered accountants. In connection with the writing-off of the said sum of £19,346 8s. 4d., the latter wrote to the inspector of taxes on May 5, 1922, as follows :

"This arises entirely in connection with the debt owing by Messrs. Haworth & Co., Ltd. The debt amounts to £29,019 12s. 6d., and was not considered to be worth more than 6s. 8d. in the pound; 13s. 4d. was therefore written off. We are inclined to agree that for excess profits duty purposes this item will have to be written back, although the matter is not entirely free from doubt.

G For income tax and corporation profits tax the item is clearly allowable. If you will refer to the balance sheet of Messrs. Haworth & Co., Ltd., of April 30, 1921, you will find that the assets amount to £39,873 12s. 1d., and the liabilities to creditors is £84,762 8s. 9d., all the share capital having been lost. It was on these figures that Messrs. Anderton and Halstead, Ltd., valued the debt at 6s. 8d. in the pound. The trade since April, 1921, had been practically at a standstill, and the indebtedness to Messrs. Anderton and Halstead, Ltd., has not been reduced. It is impossible to say what may happen to Messrs. Haworth & Co., Ltd. It may be necessary to wind the company up, as you will see there are creditors' claims outside that of Messrs. Anderton and Halstead, Ltd., of over £50,000."

H The inspector of taxes allowed the said sum of £19,346 8s. 4d. as a deduction in computing the profits of the year ending Dec. 31, 1921, which were brought into the computation of the average of the company's profits for the years 1922-3, 1923-4, and 1924-5. In the accounts to June 30, 1922, the appellant company wrote off a further sum of £9,673 4s. 2d. as a bad debt, being the balance of the said debt of £29,019 12s. 6d. On Aug. 13, 1923, the inspector of taxes sent the following inquiry to the accountants to the appellant company :

"Bad Debts Haworth & Co., Ltd., £9,673 4s. 2d.—I gather that this represents the balance of a sum of £29,019 12s. 6d., of which £19,346 8s. 4d. was

charged against profit for the half-year ended June 30, 1921. It seems clear that further indebtedness has been incurred by Haworth & Co., Ltd., since the balance stood at £29,019 12s. 6d., as I find that the further amount outstanding and due from the company was £1,539 16s. 6d. at December, 1921, increased to £3,371 7s. 9d. at June, 1922, and reduced again to £2,058 19s. 3d. at December, 1922. If, as appears to be the case, business continues to be conducted with Messrs. Haworth & Co., Ltd., in the ordinary way, I cannot understand how it becomes necessary to write off as a bad debt the sum of £29,019 12s. 6d. Further, I understand from other sources that very considerable sums due from Haworth & Co., Ltd., in respect of differences are actually being paid. This again increases my difficulty in understanding the treatment of the debt of £29,000 odd. Will you please let me hear from you fully on this matter?"

To this inquiry the accountants replied on Sept. 5, 1923 :

"If you will refer to our letter to you of May 5, 1922, you will find that we there drew attention to the balance sheet of Messrs. Haworth & Co., Ltd., and that, on the most favourable view, the creditors' debts were not worth more than 6s. 8d. in the pound. 13s. 4d. was, therefore, properly written off, leaving a balance of £9,673 4s. 2d., which has been written off in the accounts to June 30, 1922. Having regard to the relationship between Messrs. Anderton and Halstead, Ltd., and Messrs. Haworth & Co., Ltd., the former owning practically the whole of the share capital of the latter company, the balance of this debt will perhaps require special consideration, and we are glad you have drawn attention to it. We are disposed to think that if Messrs. Anderton and Halstead, Ltd., stand by while the other creditors are receiving payments on account, they would hardly be entitled to consider the balance of the debt as bad. Trade, however, is so bad that we think it quite likely that Messrs. Haworth & Co., Ltd., may be wound-up, in which case Messrs. Anderton and Halstead, Ltd., would realise considerably less than the amount of their debt, £9,673 4s. 2d. How would it be if this balance were treated as a suspense item for the time being and the allowance to be made left over until the value of the debt could be more accurately ascertained?"

To this letter the Inspector of Taxes replied on Nov. 9, 1923, as follows :

"I agree, in the circumstances, that for income tax purposes the only satisfactory method of treatment is to regard the balance of £9,673 as in suspense. I have accordingly written back this further sum in arriving at the Albert Mill adjusted profit for the half-year to June, 1922. When the question of the treatment of this debt is finally settled, we can then allow in the appropriate accounting period any balance which Messrs. Anderton and Halstead, Ltd., fail to recover in excess of £19,346 8s. 4d., which they have already been allowed in arriving at the adjusted Albert Mill profit for the half-year ended June, 1921."

On July 7, 1924, the appellant company's accountants sent a letter to the inspector of taxes saying (inter alia) :

"On reference to the correspondence relating to the 1922 accounts you will find that it was agreed to re-consider at December, 1923, the treatment of the balance of Haworth & Co.'s debt £9,673 written back in the 1923-4 income tax computation. We are enclosing the last balance sheet of Haworth & Co., Ltd., which discloses a very serious financial position. The debit balance on profit and loss account is £51,620 as against £49,907 in October, 1922, an increase of £1,713. Our clients cannot afford to let Haworth & Co., Ltd., go down, but it is quite certain that they will ultimately make a big loss, and until the exact position is known we would suggest that the balance of the old debt (£9,673) should now be written off. We may say our clients would be only too glad if they could get out with anything like so small a loss."

A To this letter the inspector of taxes replied :

"With reference to the debt of Haworth & Co., Ltd., the balance sheet at October, 1923, does not suggest that the debt was of no value at that date. I am, however, prepared to agree that the present valuation of 6s. 8d. in the pound is excessive and suggest that for the purposes of your clients' account to Dec. 31, 1923, the debt be written down to 4s. in the pound."

B Accordingly in the computation of the company's profits for income tax purposes for the year ended Dec. 31, 1923, a further sum of £3,869 was allowed, so that of the total debt of £29,019 12s. 6d. the amount actually allowed as representing the extent to which the said debt was estimated to be bad was £23,215 8s. 4d., made up of the said two sums of £19,346 8s. 4d. and £3,869. The profits of the company as computed for income tax purposes for the year ended Dec. 31, 1923, were brought into the computation of the average of the company's profits for the years 1924-5, 1925-6, and 1926-7.

C Subsequent to June 30, 1922, the date when the balance of £29,019 12s. 6d. was written off in the company's accounts, the appellant company continued to sell cloth to Haworth & Co., Ltd., as shown in the following statement :

D

		Value of cloth sold.	
July 1, 1922, to Dec. 31, 1923	...	£6,796	3 8
Jan. 1, 1924, to Dec. 31, 1924	...	£9,994	12 8
Jan. 1, 1925, to Dec. 31, 1925	...	£25,393	1 10
Jan. 1, 1926, to Dec. 31, 1926	...	£27,454	1 7
Jan. 1, 1927, to Dec. 31, 1927	...	£21,738	4 0

E The balance sheets of Haworth & Co., Ltd., show the following liabilities to the appellant company and to other trade creditors :

F

Date of Balance Sheet.	Sundry Trade Creditors.	Anderton and Halstead Ltd.	A. & H. Ltd. Special Account.	A. & H. Ltd. Loan and Interest.
30.4.1920	2,544	15,252	—	—
30.4.1921	54,757	30,778	—	—
30.4.1922	37,888	5,902	30,019	—
30.4.1923	20,486	7,136	30,019	3,054
30.4.1924	6,652	10,130	30,019	8,295
30.4.1925	4,309	1,779	45,872	8,583
30.4.1926	1,711	1,877	44,308	8,417
30.4.1927	2,355	655	44,308	8,628

G

H The facts stated in the last two paragraphs having come to the knowledge of the inspector of taxes, the additional assessments appealed against were made on March 27, 1929, under s. 125 of the Income Tax Act, 1918, on the ground that the inspector had discovered that the company had been allowed from and in first assessments for the years 1922-3 to 1926-7 inclusive deductions not authorised by the said Act, namely, the deduction of the sums of £19,346 8s. 4d. and £3,869 as aforesaid.

I Mr. Richard Halstead (a director of the appellant company) and Mr. W. Clifford Bolton (chartered accountant) appeared before the commissioners and stated that it would have been against the interests of the appellant company if Haworth & Co., Ltd., were at any time forced into liquidation.

On behalf of the appellant company it was contended inter alia : (i) that the said debt was a trading debt incurred in the ordinary course of the appellant company's business ; (ii) the said debt of £29,019 12s. 6d. had been estimated by the appellant company and the inspector of taxes to be bad at the relevant date to the extent of £19,346 8s. 4d. and £23,215 8s. 4d. respectively ; that the sum of £19,346 8s. 4d. and £3,869 respectively had been accordingly properly allowed for the relevant year

in computing the profits of the appellant company and that no grounds existed upon which the question could be re-opened; (iii) there was no jurisdiction to make the additional assessments appealed against; (iv) that the additional assessments should be discharged.

On behalf of the Crown it was contended (*inter alia*): (i) that the company had been allowed deductions of £19,346 8s. 4d. and £3,869 in respect of bad debts in the computation of its profits for income tax purposes for the years ending Dec. 31, 1921, and Dec. 31, 1923, respectively; (ii) that the profits of the company as computed for income tax purposes for the year ended Dec. 31, 1921, were brought into the computation of the average of the company's profits for the years 1922-3, 1923-4, and 1924-5, and that the profits of the company as computed for income tax purposes for the year ended Dec. 31, 1923, were brought into the computation of the average of the company's profits for the years 1924-5, 1925-6, and 1926-7; (iii) that neither the said sum of £19,346 8s. 4d. nor the said sum of £3,869 nor any part of either of the said sums was a bad debt; (iv) that the deduction of the said sum of £19,346 8s. 4d. and £3,869 in the computation of the profits of the company for the years ending Dec. 31, 1921, and Dec. 31, 1923, respectively, or of any part of either of the said sums was not authorised by the Income Tax Acts; (v) that the respondents had discovered that the company had been allowed from and in first assessments for the years 1922-3 to 1926-7 inclusive deductions not authorised by the Income Tax Acts, namely, the deduction of the sums of £19,346 8s. 4d. and £3,869 as aforesaid; (vi) that the additional assessments appealed against were correct and should be confirmed.

Having heard the evidence and considered the arguments of the parties, the commissioners who heard the appeal were not satisfied that the debt of £29,019 12s. 6d. or any part thereof had been proved to be a bad debt within the meaning of r. 3 (i) of the Rules applicable to Cases I and II, Sched. D, Income Tax Act, 1918, and they accordingly confirmed the assessments appealed against. The appellants, immediately on the determination of the appeal, expressed their dissatisfaction therewith as being erroneous in point of law, and in due course required the commissioners to state a Case for the opinion of the High Court pursuant to s. 149 of the Income Tax Act, 1918, which Case they stated.

The question for the opinion of the court was whether the commissioners were entitled, on the evidence before them, to hold that the said debt, or any part thereof, was not a bad debt within the meaning of the statute.

A. M. Latter, K.C., and Cyril L. King for the appellants.

The Attorney-General (Sir William Jowitt, K.C.) and R. P. Hills for the Crown.

Cur. adv. vult.

June 16. **ROWLATT, J.**, read the following judgment.—In this case the appellants were assessed under Sched. D for the years 1921-2 and 1922-3 on the basis of a writing down in two years successively of a doubtful debt. This was done by agreement with the inspector of taxes, who had all the facts before him. The appellants have since, by additional first assessments, been charged anew by way of disallowance of that writing down, and on this appeal they challenge the validity of these additional assessments.

There is no question of the Crown having been bound by the first action of the inspector, by way of mere contract. No officer has power to do that. The question is, first, whether by virtue of the statutory provisions the original assessments closed the door to additional assessments altogether, and if not then, secondly, whether the additional assessments, though possible in a proper case, can be supported in the circumstances of this case. The machinery under which assessments under Sched. D are made in the first instance is broadly as follows, though modern practice has, I believe, somewhat simplified the formalities. The taxpayer is required by the Income Tax Act, 1918, s. 100, to deliver to the assessor a statement of his profits and gains, estimated according to the Act. By s. 121 these are to be laid before the additional commissioners, who, subject to provisions for (*inter alia*)

A objections by the surveyor, are to direct assessments to be made. By s. 122 these are to be signed by the additional commissioners and delivered to the general commissioners who, by sub-s. (3), are to allow and confirm them after the time for hearing appeals has expired. The assessments then become binding: *Kensington Income Tax Comrs. v. Aramayo* (1).

B In the present case there was no appeal. If there had been, then by s. 133 (2), after the determination thereof, the assessments made thereon could not have been altered, and if on the appeal an objection by the surveyor to the assessment had been dealt with the surveyor would, by sub-s. (3), have been barred from making any further charge for the same year in respect of the same subject-matter. Additional first assessments are provided for by s. 125, and may be made if the surveyor discovers, putting it shortly, an undercharge. Additional first assessments by C s. 136 are subject to the same appeal in every way as a first assessment.

The first point made by counsel for the appellants was that if there had been an appeal determined as regards the first assessment, an additional first assessment would have been barred by s. 133 (2), and a first assessment unappealed should be equally conclusive. I cannot agree. Even if there had been an appeal, I do not think that s. 133 (2) would affect an additional first assessment. It only stereotypes D the assessment under appeal. An additional assessment is a new process altogether. Counsel's argument would destroy the power to make additional assessments altogether, for, as already pointed out, the circumstance that the surveyor assented to the first assessment with full knowledge of the facts does not, by introducing the element of agreement, add anything to its effect.

E The real question is whether, within the meaning of s. 125, the inspector has "discovered" an undercharge in the first assessment. The word "discover" does not, in my view, include a mere change of opinion on the same facts and figures on the same question of accountancy. The meaning of the word was considered in *R. v. Kensington Income Tax Comrs.* (1), where it was held that it did not mean "Ascertained by legal evidence." But the mere fact of such a discussion of the means of ascertainment indicates an assumption that there was something to be F ascertained somehow. How greatly it would have simplified the problem if it could have been said that the inspector makes a "discovery" if he merely changes his opinion, without any new information at all? Moreover, it is to be remembered the income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years one is led to expect machinery, not for a mere revision, but for the bringing in of something G which had been overlooked.

In *R. v. Kensington Income Tax Comrs.* (1) the "discovery" was challenged on prohibition, and the Attorney-General suggested that that was the procedure to raise the question now before me. It is quite clear, however, that the commissioners must consider and decide whether there has been a "discovery," and on H that state a Case if required on a point of law arising: compare *R. v. Kingsland Parish Inspector of Taxes* (2).

I The question for me is whether there was any evidence on which they could find in favour of the Crown on the whole matter. The surveyor made these additional assessments simply because it came to his knowledge, as stated in the Case, that in the years since the two successive writings down of this debt were allowed, the appellants permitted the debtors to increase their indebtedness to them while they reduced that of other creditors. The finding of the commissioners on the appeal was that they were not satisfied that the debt or any part thereof had been proved to be a bad debt within the meaning of r. 3 (i) of Cases I and II.

In my judgment the commissioners have not considered the right question, and there was no evidence which would have supported the decision for the Crown if they had. Rule 3 provides:

"In computing the amount of the profits or gains to be charged no sum shall be deducted in respect of . . . (i) Any debts except bad debts proved to be such

to the commissioners, and doubtful debts to the extent that they are respectively estimated to be bad."

What the statute requires, therefore, is an estimate to what extent a debt is bad, and this is for the purpose of a profit and loss account. Such an estimate is not a prophecy to be judged as to its truth by after events, but a valuation of an asset de presenti on an uncertain future to be judged as to its soundness as an estimate on the then facts and probabilities. It is not overthrown as an estimate in 1923 and 1924 by coming to the conclusion, as the commissioners have done, that in 1930 it had not been proved that the debts were to any extent bad. Supposing, however, instead of making an irrelevant pronouncement, the commissioners had addressed themselves to the true points, namely, the criticism of the estimate as in 1923 and 1924, what material had they before them to justify first the intervention at all of the inspector on the ground of a "discovery," and, secondly, their own action in upholding the assessment made in pursuance of that intervention? The only way in which it could be put would be that the subsequent growth of the indebtedness indicated that there must have been some fact in 1923 and 1924 which (a) was not taken into account in the estimate, and (b) would have made the estimate as an estimate in 1922 and 1923 higher. It may indicate that the appellants in 1923 and 1924 were willing to contemplate that the debt should or might increase, but I think it is merely guesswork under the circumstances of this case to infer that that was because there was then reason to think the existing debt good. Perhaps it may be said, loosely, that people who act as the appellants have done do not deserve to be allowed depreciation, and that is really the only basis on which it seems to me that the re-consideration of the estimate can be explained, but that is not a justification for these additional assessments.

My conclusion is, therefore, that at the best the case will have to go back to the commissioners for them to consider the proper question, but that, inasmuch as in that case the only result would be a disallowance of the additional assessments, the appeal ought to be allowed simpliciter, the appellants having the costs.

Appeal allowed.

Solicitors : *Gregory, Rowcliffe & Co.*; Solicitor of Inland Revenue.

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

A

BALLS BROS., LTD. v. SINCLAIR

[CHANCERY DIVISION (Luxmoore, J.), May 13, 14, 1931]

[Reported [1931] 2 Ch. 325; 100 L.J.Ch. 377; 146 L.T. 300]

B

Landlord and Tenant—Covenant—Covenant against alteration without consent—Unreasonable withholding of consent—Introduction of statutory qualification of covenant—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), s. 19 (2).

C

The landlords demised premises to the tenant for a term of twenty-one years, the tenant covenanting (a) that he would not make any alteration or addition to the premises (save with the landlords' written authorisation), nor cut, maim or injure any of the walls or timbers thereof or permit any of those things to be done, and further (b) that he would not assign, underlet or part with possession of the premises or any part thereof without the written consent of the landlords. The tenant applied to the landlords for their licence to sub-let part of the premises and to make structural alterations which would be necessary for the convenience of his proposed sub-tenant. The landlords refused to grant the licence. The tenant offered to make a certain contribution to the cost of alterations which the landlords themselves wished to make to the premises, if they would agree to grant the licence to make the alterations which he required. The landlords refused unless the contribution offered were increased. The tenant thereupon indicated that he intended to proceed with the alterations without the licence, and the landlords commenced an action for an injunction to restrain him. Questions arose whether the Landlord and Tenant Act, 1927, s. 19 (2), applied and whether the landlords had unreasonably withheld their consent.

D

E

Held: (i) section 19 (2) applied, and, therefore, the consent of the landlords could not be unreasonably withheld providing that the alterations proposed were improvements; and whether or not they were improvements should be judged from the point of view of the tenant, since the landlords were adequately protected by their right in an appropriate case to require an undertaking by the tenant to reinstate the premises in their former condition.

F

(ii) the consent of the landlords was (on the facts) unreasonably withheld.

Notes. Considered: *Woolworth & Co. v. Lambert*, [1936] 2 All E.R. 1523; *Lambert v. Woolworth & Co. (No. 2)*, [1938] 2 All E.R. 664.

G

As to withholding consent to an alteration of demised premises, see 20 HALSBURY'S LAWS (2nd Edn.) 212, 213, para. 231; and for cases on the subject, see 31 DIGEST (Repl.) 178-180, 3119-3125. For the Landlord and Tenant Act, 1927, s. 19, see 13 HALSBURY'S STATUTES (2nd Edn.) 904.

Cases referred to:

H

(1) *Lilley and Skinner, Ltd. v. Crump* (1929), 73 Sol. Jo. 366; 31 Digest (Repl.) 178, 3120.

(2) *Re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7; 90 L.J.Ch. 417; 125 L.T. 159; 37 T.L.R. 428; 65 Sol. Jo. 379; 31 Digest (Repl.) 430, 5572.

(3) *Houlder Bros. & Co. v. Gibbs*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487; 69 Sol. Jo. 541, C.A.; 31 Digest (Repl.) 425, 5523.

I

Action.

By an indenture of lease dated April 2, 1930, the plaintiffs demised to the defendant for twenty-one years from March 25, 1930, the ground-floor shop, No. 38A, The Town, Enfield, and the two flats on the first floor over the two shops, No. 38 and No. 38A. The defendant covenanted by cl. 2:

"(iii) Within four months from the commencement of the term hereby created to expend £200 in the cost of labour and materials in making the alteration of and additions to the demised premises according to plans and specifications to be approved and signed by the parties hereto, and if so required to produce to

the landlord's surveyor proper vouchers for such expenditure. (iv) Not to make any alteration or addition to the premises (save as aforesaid and except such as may from time to time have been authorised by the landlord in writing) nor to cut maim or injure any of the walls or timbers thereof nor to permit any of the aforesaid things to be done . . . (14) Not to assign, underlet or part with the possession of the demised premises or any part thereof without the written consent of the landlords."

Negotiations took place between the parties' surveyors as to the alterations and additions provided for in sub-cl. (3) above mentioned. The defendant submitted plans and specifications to the plaintiffs' surveyors, which were not approved by them. They said that their surveyors had no authority to approve on their behalf, and warned the defendant not to proceed with the work. The defendant, however, completed it in July, 1930.

In October, 1930, he told the plaintiffs that he wished to sub-let the first floor of No. 38A to an optician, and asked consent, and to the making of certain structural alterations, which included the alteration of the staircase, and forwarded a plan and specification. This was refused. After some correspondence, in December, 1930, the defendant offered to make a payment towards the cost of certain alterations which the plaintiffs themselves wished to carry out, if they would at once grant the licence required to alter the staircase. The plaintiffs declined unless he increased his offer, and paid their legal charges and expenses of the preparation and completion of the licence. The defendant replied that they had no right to withhold the licence, and unless it was given he would proceed with the work, but he would pay for the plaintiffs' costs of the licence. This action was then begun seeking an injunction to restrain him from making any alteration or addition to the demised premises in breach of the covenants in the lease, and damages for breach of covenant.

Landlord and Tenant Act, 1927, s. 19 (2), provides :

"In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."

Sir Gerald Hurst, K.C., and *R. W. Turnbull* for the plaintiffs.—No consent of the landlords was obtained in accordance with the terms of the covenant. One important question was what improvements were included in the Landlord and Tenant Act, 1927, s. 19 (2). (They referred to *WOODFALL ON LANDLORD AND TENANT*, I 22nd Edn., p. 996.)

Daynes, K.C., and *H. L. Williams* for the defendant.—Part I of that Act did not apply, but *Lilley and Skinner, Ltd. v. Crump* (1) applied. [They cited *Re Winfrey and Chatterton's Agreement* (2) and *Houlder Bros. & Co. v. Gibbs* (3).]

LUXMOORE, J. [after stating the facts and that the claim for damages for the alleged breach in July, 1930, had been withdrawn, continued:] In October, 1930, the defendant was minded to underlet one of the first-floor flats. For this purpose

A he required the consent of the plaintiffs to the underletting and also to certain alterations in the structure to adapt it to the business of the proposed sub-tenant, who was an optician. Formal application for consent was made. The proposed alteration, which included the provision of a new staircase, was obviously an alteration within the covenant contained in cl. 2 (4) of the lease. The answer to the application was that the plaintiffs were not prepared to grant the licence. Some discussion and correspondence took place, and in the result the licence was refused. Owing to the delay arising from the correspondence with regard to the licence, the proposed sub-tenant of the defendant no longer required the premises, and the question therefore whether the alterations could be made or not was of no moment. The real question was, who should pay the costs of the action?

The legal position, if it rested solely on the covenants of the lease, was that the defendant, having covenanted not to make alterations without the consent of the landlord, would commit a breach of that covenant if he made any alteration without that consent being obtained. But it does not rest there. Counsel for the defendant relied on the provisions of the Landlord and Tenant Act, 1927, s. 19 (2). He argued that this subsection is applicable to, and must be read into, any lease where there is a covenant which would have the effect of preventing the making of any improvement, if improvement were required to be made. It is obvious that the phrase "covenants against improvements" is not a technical description usually accepted as describing covenants of a particular class. Personally I have never heard of "a covenant against making improvements" totidem verbis, nor have counsel engaged in the case. Counsel for the plaintiffs argued that the subsection must be read strictly as being applicable only to "covenants against improvements" in express terms on the ground that the subsection was inserted as ancillary to the provisions with regard to contracting out of the Act contained in the first part of the Act.

I cannot think that this is the right construction. Part I of the Act deals with compensation for improvements and goodwill in respect of a particular class of property. Part II deals with general amendments of the law of landlord and tenant. Subsection (1) of s. 19—which is in Part II of the Act—provides for a particular class of covenants generally described as and well recognised under the description of "repairing covenants," and sub-s. (2) of that section appears to me to be intended to provide for another class, which is described in the subsection as "covenants against making improvements." In my view, the subsection deals with a particular class of covenants which were in existence at the time of the passing of the Act, and which would in fact restrict the making of improvements. An alteration or addition may be an improvement, or the reverse. If the alteration or addition sought to be made effects an improvement, it comes within the subsection.

I have thought it convenient to state my own view of the construction of the subsection apart from any authority on the point. I find, however, that my own view is supported by the decision of ROWLATT, J., in *Lilley and Skinner, Ltd. v. Crump* (1). The action was brought by the tenants of certain premises in Oxford Street and Stratford Place, against their landlord for a declaration that the landlord was not entitled unreasonably to withhold consent to the making of openings in a party-wall between the premises in Oxford Street and Stratford Place. There was a covenant in the lease against making alterations and additions without the consent of the landlord, and there was also an absolute covenant against the cutting or maiming of any main walls. The plaintiffs contended first that the Landlord and Tenant Act, 1927, s. 19 (2), in effect inserted a proviso into the lease that the consent to the making of alterations and additions which constituted improvements could not be unreasonably withheld; and, secondly, that the defendant must in the circumstances be taken to have unreasonably withheld consent. Counsel for the defendant contended (i) that the plaintiffs were not entitled to the declaration, because what was sought to be done was within the absolute covenant not to cut or maim the main walls; and (ii) that on its strict construction s. 19 (2) of the Act

did not apply. That means, I think, that there was no covenant in actual words "against making improvements." ROWLATT, J., said that the two openings would be of special advantage to the plaintiffs, and could not, if they undertook to reinstate, be a disadvantage to the defendant. The point was whether the work proposed was merely an alteration not to be done without consent, or a cutting and maiming not to be done on any account. He considered that the matter did not fall within the scope of the absolute covenant, but was an alteration which could be made with consent. He held that the plaintiffs were entitled to the declaration sought. That decision involves the construction of the subsection, and is binding on me. The view which I have already expressed as to construction agrees with the decision of ROWLATT, J. In these circumstances I hold that on the true construction of the Landlord and Tenant Act, 1927, I must read the provision contained in s. 19 (2) into the covenant contained in cl. 2 (4) of the lease, and consequently the landlord cannot withhold consent unreasonably to the making of an alteration or addition which constitutes an improvement.

First, however, I must be satisfied that the matter required to be done is in fact an improvement. From what point of view am I to consider this? From the point of view of the tenant, or of the landlord, or of both? I think the answer to the question will be found in the subsection itself. The subsection provides in effect that the landlord may say to the tenant, who asks for leave to make an improvement: "I shall not give my consent to the alteration you are making unless and until you give an undertaking to reinstate at the end of the term." That shows that the question whether it is an improvement or not may be considered from the point of view of the tenant alone. I have heard a considerable amount of expert evidence which is in agreement to this extent that, so far as the tenant is concerned, what he sought to do would be an obvious improvement. The expert opinion so far as the landlords are concerned is also in agreement that the alteration proposed would not necessarily be for the benefit of the landlords. In these circumstances if it is plain that, so far as the tenant is concerned, what is suggested will constitute an improvement, then, although it is not, or may not be, so from the landlords' point of view, the landlords will be amply protected by the undertaking of the tenant to reinstate at the end of the term. The refusal of the landlords, when requested to consent to the alterations, was, it was said, not unreasonable, because there was no explanation by the tenant of the purpose for which he wanted to make the alteration or that it would be an improvement from his point of view; nor did he refer to the Act of 1927, or offer to reinstate at the end of the term. I do not think it was incumbent on the tenant to point out that what was proposed would be an improvement, nor was it necessary for him to call attention to the Act, because the landlords must be presumed to have known of it. Nor was it necessary for the tenant to make an offer to reinstate, because the subsection provides that this is something which the landlords can insist on as a term of their consent without running the risk of being held to have acted unreasonably.

In the present case, for the reasons I have stated, I am satisfied that the withholding of consent of the plaintiffs was unreasonable. Further, I should point out that Mr. Balls, a director of the plaintiffs, in the course of his evidence, said that if the £25 referred to in the correspondence had in fact been paid, the consent would have been given. I think the defendant's contention is correct. It follows that, in my judgment, the alteration could, in the circumstances, have been made without any further application to the plaintiffs. If that is so, the plaintiffs' claim to an injunction could not succeed. The action therefore must be dismissed with the usual consequences.

Order accordingly.

Solicitors: Robinson & Blaber; Geo. Brown, Son & Vardy.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

A

R. v. SURREY JUSTICES. Ex parte WITHERICK

[KING'S BENCH DIVISION (Avory, Swift and Humphreys, JJ.), November 12, 1931]

[Reported [1932] 1 K.B. 450; 101 L.J.K.B. 203; 146 L.T. 164;
95 J.P. 219; 48 T.L.R. 67; 75 Sol. Jo. 853; 29 L.G.R. 667;
29 Cox, C.C. 414]

B

Road Traffic—Careless driving—Driving without reasonable consideration for others—Information charging offences in the alternative—Conviction bad for duplicity—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 12 (1).

C

Section 12 (1) of the Road Traffic Act, 1930, creates two separate offences, (1) driving without due care and attention, and (2) driving without reasonable consideration for other persons using the road, and, therefore, a conviction following on an information charging these two offences in the alternative is bad for duplicity.

R. v. Wells, etc., JJ., Ex parte Clifford (1) (1904), 91 L.T. 98, applied.

R. v. Jones, Ex parte Thomas (2), [1921] 1 K.B. 632, distinguished.

D

Notes. Section 10 of the Summary Jurisdiction Act, 1848, has now been repealed; the like provision is now made by r. 14 of the Magistrates Courts Rules, 1952.

As to the prohibition of a summary information including more than one offence, see 25 HALSBURY'S LAWS (2nd Edn.) 187, para. 339; and for cases on the subject, see 33 DIGEST 354, 640–643. As to careless driving, see 31 *ibid.* 672, para. 987; and as to certiorari to quash justices' orders, see 11 *ibid.* (3rd Edn.) 130, para. 239, text and notes (k), (l). For the Road Traffic Act, 1930, s. 12 (1), see 24 HALSBURY'S LAWS (2nd Edn.) 569; and for the Magistrates' Courts Rules, 1952, r. 14, see 13 HALSBURY'S STATUTORY INSTRUMENTS.

E

Cases referred to :

F

(1) *R. v. Wells, etc., JJ., Ex parte Clifford* (1904), 91 L.T. 98; 68 J.P. 392; 20 T.L.R. 549; 2 L.G.R. 913; 20 Cox, C.C. 671, D.C.; 42 Digest 873, 216.

(2) *R. v. Jones, Ex parte Thomas*, [1921] 1 K.B. 632; 90 L.J.K.B. 543; 124 L.T. 668; 85 J.P. 112; 37 T.L.R. 299; 19 L.G.R. 354; 26 Cox, C.C. 706, D.C.; 42 Digest 873, 217.

G

(3) *Mayhew v. Sutton* (1901), 71 L.J.K.B. 46; 86 L.T. 18; 50 W.R. 216; 18 T.L.R. 52; 46 Sol. Jo. 51; 20 Cox, C.C. 146, D.C.; 42 Digest 872, 210.

Rule nisi for certiorari.

By s. 12 (1) of the Road Traffic Act, 1930 :

"If any person drives a motor vehicle on any road without due care and attention or without reasonable consideration for other persons using the road he shall be guilty of an offence."

H

A police superintendent at Godalming charged one Witherick on an information which followed the language of the above section, and a conviction, which also followed the language of the section, was recorded against him. On the application of Witherick, the court directed a rule nisi for certiorari to the Surrey justices, calling on them to show cause why the conviction should not be quashed on the ground that two offences appeared in the information and conviction. Section 10 of the Summary Jurisdiction Act, 1848, provided that every information should be for one offence only.

I

Robert Fortune showing cause.

Laurence Vine in support of the rule.

[As well as the cases referred to in the judgment, *Mayhew v. Sutton* (3) was referred to in argument.]

AVORY, J.—This is an application for a writ of certiorari to bring up a conviction to be quashed on the grounds that two offences appear in the information and in the conviction under s. 12 of the Road Traffic Act, 1930; and that the justices were wrong in law in acting contrary to the terms of s. 10 of the Summary Jurisdiction Act, 1848, which provides that every information shall be for one offence only, and not for two or more offences. A

It is clear law, provided by statute, that an information for a summary offence shall be for one offence only and not for two or more offences. B

This conviction was in the form :

“Edward Lionel Witherick is this day convicted before this court for that he on the 12th day of May, 1931, at High Street, in the Borough of Godalming, did drive a motor car without due care and attention or without reasonable consideration for other persons using the road, contrary to s. 12 of the Road Traffic Act, 1930.” C

The whole question in this case is whether s. 12 should be read as comprising two separate offences, or whether it creates only one. In other words, counsel for the defendant has invited the court to say that the section means “Any person who drives a motor vehicle on any road without due care and attention and without reasonable consideration for other persons using the road shall be guilty of an offence,” and he contends that it is not possible for a person to drive without due care and attention without at the same time driving without reasonable consideration for other persons using the road. If that could be established, and if this conviction had been in the form “without due care and attention and without reasonable consideration” I think that no objection could be taken to it. D

However, on consideration of the section I have come to the conclusion that it contemplates two separate offences: (i) driving without due care and attention; (ii) driving without reasonable consideration. E

It is not necessary to give illustrations of how a person may be driving with due care and attention so far as his own safety is concerned, and yet driving without reasonable consideration for other persons. If it is possible to contemplate that a person may do one without the other, it follows as a matter of law that a conviction or information which charges him in the alternative is bad. It is an elementary principle that a conviction must not be for offences in the alternative, since if it were the defendant could not know with precision of what he was convicted and might be prevented in the future from pleading *autrefois* convict. F

R. v. Jones, Ex parte Thomas (2) and *R. v. Wells, etc., JJ., Ex parte Clifford* (1) clearly illustrate the distinction which is to be drawn between charging offences in the alternative and charging that a man might by one act have committed two offences. In *R. v. Jones, Ex parte Thomas* (2) it was held that a man might properly be convicted of driving recklessly and at a speed dangerous to the public; since the driving was one indivisible act, it was held that the conviction was not bad for duplicity. But the charge there was driving recklessly and at a dangerous speed. On the other hand, in *R. v. Wells, etc., JJ., Ex parte Clifford* (1) the defendant was charged with driving “at a speed or in a manner dangerous, &c.” That conviction was held bad for duplicity, because it charged him in the alternative. G

In the result, though the case was well worthy of argument, I have come to the conclusion that this conviction was bad on the face of it, and that the rule must be made absolute. H

The justices have taken the unusual course of appearing by counsel; there is a convenient and inexpensive course open to justices against whom a rule is granted of filing an affidavit, which has not even to be stamped, and leaving the prosecutor I

A to show cause by counsel, if he thinks fit. It is not usual to grant costs against justices, and the present rule will be made absolute with costs against the prosecutor, who was served with the rule, but has not appeared.

SWIFT, J.—I agree, and I have nothing to add.

HUMPHREYS, J.—I agree.

B

Rule absolute.

Solicitors: *Taylor, Jelf & Co.*, for *A. P. V. Moon*, Godalming; *Amery, Parkes & Co.*

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

C

D

Re STIMPSON'S TRUSTS. STIMPSON v. STIMPSON

[CHANCERY DIVISION (Luxmoore, J.), October 17, 21, 1930, February 16, 1931]

[Reported [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249]

E

Settlement—Advancement—Land held on trust for sale—No express power in settlement—Applicability of statutory power—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 32.

The proceeds of sale of land which is held on a plain trust for sale "are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925," within s. 32 (2) of the Trustee Act, 1925, and are, therefore, applicable, under s. 32 (1) of the Act, for the advancement of a beneficiary.

F

Notes. There could have been no forfeiture in this case if the settlement had incorporated or followed the statutory form of a protective trust provided for by s. 33 (1) of the Trustee Act, 1925.

Considered: *Re Wellsted's Will Trusts*, *Wellsted v. Hanson*, [1948] 2 All E.R. 209. Distinguished: *Re Shaw's Settlement Trusts*, *Shaw v. Shaw*; *Re Wiseley's Settlement Trusts*, *Wiseley v. Public Trustee*, [1951] Ch. 833; *Re Rees' Will Trusts*, *Lloyds Bank, Ltd. v. Rees*, [1954] 1 All E.R. 7.

G

As to property to which the statutory power of advancement applies, and as to limitations on the power, see 21 HALSBURY'S LAWS (3rd Edn.) 179, para. 389 and para. 388 respectively. As to the power itself, see 29 HALSBURY'S LAWS (2nd Edn.) 776, para. 1083; as to the statutory form of limitation of a protected life interest, see *ibid.* 599, para. 870, text and note (a); and as to the necessity for strict observance of every requirement for the exercise of a power, see 25 HALSBURY'S LAWS (2nd Edn.) 530, para. 958. For the Trustee Act, 1925, s. 32, s. 33 (1), see 26 HALSBURY'S STATUTES (2nd Edn.) 50.

H

Adjourned Summons to determine whether the proceeds of sale of land held on trust for sale would be applicable for the advancement of an infant beneficiary.

I

On June 27, 1874, lands in Yorkshire were settled on trust to pay the income to Mary Stimpson for life, then to Thomas Stimpson, her husband, if he should survive, for his life, and after the death of the survivor for such persons and for such purposes as Mary Stimpson—notwithstanding her marriage—should by will appoint, with a gift over in default of appointment.

Thomas Stimpson, the husband, died on Aug. 7, 1904. By her will, dated Aug. 18, 1906, Mary Stimpson appointed the defendant Dodsworth sole executor and trustee. Having recited the settlement and power of appointment she appointed all the real and leasehold estate or the purchase-money thereof, if sold, or the

investments representing the same, to be held by the trustees of the settlement on trust for sale, and to stand possessed of the proceeds thereof, to invest in securities authorised by law for investment of trust funds, and to pay the dividends and income to her son, the plaintiff, Llewellyn Stimpson, for his life subject to the proviso hereinafter mentioned, and then upon trust for all his children who should attain the age of twenty-one years, or being daughters should marry under that age, in equal shares, with a gift over in case he should die without leaving issue. A discretionary trust followed in favour of the plaintiff or his issue in the event of his bankruptcy or assigning his life interest. The residuary estate was given to the plaintiff absolutely. There was no power of advancement in the will. She died on Feb. 24, 1929, no part of the property having been sold. The gross income of the property was about £69 per annum.

The plaintiff married and his wife was still living. The defendant, T. E. Stimpson, was their only child, twenty-three years old. The plaintiff wishing to make an advancement of £300 to £350 out of the property to him, this summons was issued asking whether such an advancement could be made in the manner and subject to the conditions contained in s. 32 of the Trustee Act, 1925, and whether, if the plaintiff as tenant for life consented to the exercise by himself as sole trustee now of the settlement of the statutory power, he would incur a forfeiture.

LUXMOORE, J., decided this last question in the affirmative. The summons then stood over and the plaintiff agreed to consent to the advancement whether his life interest were forfeited or not. The first question was then argued.

C. R. R. Romer, for the plaintiff, referred to the note to the Trustee Act, s. 32 (2), in *WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES* (11th Edn.), p. 399.

R. F. Roxburgh for the defendant T. E. Stimpson.

W. F. Waite for the defendant Dodsworth.

LUXMOORE, J.—The question I have to determine in this case is, quite shortly, whether the proceeds of the sale of land which is held on trust for sale are applicable for the advancement of a beneficiary under s. 32 of the Trustee Act, 1925.

I need not state the actual facts with regard to the property, because it is admitted that in the events that have happened the plaintiff holds on trust for sale certain freehold and leasehold property under a settlement dated June 27, 1874, and under the trusts of the will of Mrs. Mary Stimpson, dated Aug. 18, 1906. The plaintiff is the sole trustee under the settlement and also the tenant for life. The first defendant, Thomas Edwin Stimpson, is a son of the plaintiff. He is now aged twenty-three, and is interested in the trust property. The summons, in addition to asking whether the power of advancement of the defendant Thomas Edwin Stimpson is applicable in the manner provided by and subject to the conditions contained in s. 32 of the Trustee Act, 1925, also asks a further question, whether, on the true construction of the will of Mary Stimpson, in the event of the plaintiff consenting to any advancement being made to the son, he forfeits his life interest. The matter came before me on Oct. 20 last, and I then decided that if this consent was given it would in fact bring about a forfeiture of the life interest of the plaintiff.

On that the summons stood over in order to enable the plaintiff, Llewellyn Stimpson, to consider the position, and he has now agreed to consent to the advancement—whether his life interest is forfeited or not—and he asks the court to make the advancement in favour of the first defendant.

The question therefore arises whether s. 32 of the Trustee Act, 1925, applies to such a case. Section 32 (1) provides as follows:

“Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or

- A** subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion . . . Provided that . . . (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application."
- B** In the circumstances of this case there appears to be no difficulty whatever under that proviso, inasmuch as the plaintiff, Mr. Llewellyn Stimpson, has agreed to consent to the advancement in favour of the first defendant whether his, Mr. Llewellyn Stimpson's, life interest is forfeited or not. Then sub-s. (2) provides:

- C** "This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925."

- It is therefore necessary to see, in the case of property held on trust for sale, whether or not the proceeds of such sale are by statute or in equity considered as
- D** land or applicable as capital money for the purposes of the Settled Land Act, 1925. It is difficult to see exactly what the subsection is aimed at. There is, so far as I can ascertain, no statute at all which says that the proceeds of sale of property held on trust for sale are to be considered as land, and certainly there is no rule in equity to that effect. The rule is entirely to the contrary. The only suggestion that can be made with regard to the existence of some statute which says that the
- E** proceeds of sale of such property are to be considered as land is the reference in s. 28 of the Law of Property Act, 1925, which provides that:

- "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority. . . ."
- F** Pausing there, all it comes to is that the trustees for sale have the right to exercise certain powers under the Settled Land Act, 1925. Then—leaving out the interpolation contained in the Schedule to the Law of Property (Amendment) Act, 1926, which is not material for the purposes of my judgment—it goes on to say:

- G** "and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

- It is not under that section that the money arising under a trust for sale is to be considered as money applicable under the Settled Land Act, 1925, or anything of the kind; the section simply says that all capital money arising under the powers
- H** conferred on the trustees by that section shall, unless paid or applied for any purpose authorised by the Settled Land Act, be "applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale"—showing that there is in the mind of the legislature a clear distinction between money arising under the trust for sale and money arising under the exercise of the powers conferred on the trustees by that section. To my mind, it is impossible to say, under
- I** s. 28 of the Law of Property Act, 1925, that in the case of land which is subject to a trust for sale the proceeds are by statute to be considered as applicable as land.

There is also the reference to s. 75 of the Settled Land Act, 1925, which says, in sub-s. (5):

"Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively,

in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement."

That again only refers to capital money arising under the Settled Land Act, 1925, and does not apply in any way—or, at least, I can find nothing in any section to suggest that it applies—to money arising under a trust for sale.

The only remaining difficulty in sub-s. (2) of s. 32 of the Trustee Act, 1925, is to appreciate exactly the significance of the last words in the subsection, "applicable as capital money for the purposes of the Settled Land Act, 1925." There is, so far as I can see, nothing which says that the proceeds of the sale of land held on a trust for sale are not applicable as capital money. It may well be that the words "applicable as capital money for the purposes of the Settled Land Act, 1925," refer to the other subject-matter of the section where the trust property consists of money or securities. It may be that in some circumstances such money or securities are applicable as capital money for the purposes of the Settled Land Act, 1925, but I do not think that those words have any reference to land held on trust for sale at all.

In my view it is clear that s. 32 applies in a case like the present where the property is held on a plain trust for sale, and I have no doubt that in the events which have happened in this case, the trustee is entitled to make an advancement for the benefit of the defendant Thomas Edwin Stimpson.

Solicitors: *Bell, Brodrick & Gray*, for *Richardson & French*, Thirsk.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

SCHLESINGER AND ANOTHER v. MOSTYN

[KING'S BENCH DIVISION (McCardie, J.), November 23, 1931]

[Reported [1932] 1 K.B. 349; 101 L.J.K.B. 62; 146 L.T. 326;
48 T.L.R. 111]

Settlement—Covenant by settlor with trustees to pay premiums on settled life insurance policy—Breach—Payment of premium by trustee—Right to recover damages from settlor.

By a marriage settlement the husband transferred a policy of insurance on his own life to the trustees and covenanted with the trustees to do everything to keep the policy alive and not allow it to lapse. The trustees were empowered to apply the income of the settled funds to keep the policy on foot, but it was not to be obligatory on them to do so. There was no express covenant by the settlor to reimburse the trustees if they did make any payment to keep the policy alive. The settlor failed to pay a premium on the policy, so the trustees paid it, together with a fine to the insurance company, and now claimed the amount they had paid as a debt due from the husband or alternatively as damages for breach of covenant. The defendant denied liability.

Held: there was an implied covenant by the settlor to reimburse the trustees for the payments made by them to keep the policy on foot, and the trustees could recover the full amount of the sums so paid from the settlor as damages for breach of this covenant but not as a debt: *Warburg v. Tucker* (1) (1858), E.B. & E. 914, followed. *National Insurance and Investment Association v. Best* (2) (1857), 27 L.J.Ex. 19, and *Brown v. Price* (3) (1858), 27 L.J.C.P. 290, distinguished.

A Notes. As to a trustee's right to damages for the settlor's breach of a covenant to pay life insurance premiums, see 29 HALSBURY'S LAWS (2nd Edn.) 553, para. 813, text and note (p); and as to the measure of damages for breach of a contract to pay money, see *ibid.* (3rd Edn.) 244, para. 415.

Cases referred to:

- B** (1) *Warburg v. Tucker* (1858), E.B. & E. 914; 26 L.J.Q.B. 56; 31 L.T.O.S. 316; 4 Jur.N.S. 1142; 6 W.R. 755; 120 E.R. 750, Ex. Ch.; 4 Digest 302, 2829.
(2) *National Assurance and Investment Association v. Best* (1857), 2 H. & N. 605; 27 L.J.Ex. 19; 30 L.T.O.S. 169; 6 W.R. 78; 15 E.R. 249; 3rd Digest Supp.
(3) *Browne v. Price* (1858), 4 C.B.N.S. 598; 27 L.J.C.P. 290; 31 L.T.O.S. 248; 4 Jur.N.S. 882; 6 W.R. 721; 140 E.R. 1225; 29 Digest 361, 2918.
C (4) *Hey v. Wyche* (1842), 2 Gal. & Dav. 569; 12 L.J.Q.B. 83; 6 Jur. 559; 31 Digest (Repl.) 405, 5351.

Action tried by McCARDIE, J.

By a marriage settlement dated June 17, 1919, and made on the occasion of the marriage of the defendant, Sydney Mostyn, with Ruth Bertha Schlesinger, the plaintiffs were appointed the trustees of the settlement. By cl. 14 of the settlement the defendant transferred to the trustees a policy of insurance on his own life for £2,500 in the Scottish Provident Institution, to be held by them upon the trusts of the settlement. He covenanted with the trustees that he would not "by any act or omission cause or allow the policy hereby assigned . . . to become void," and that he would "from time to time duly pay all moneys payable and do all things necessary for keeping on foot the said policy." It was further provided that the trustees might in their absolute discretion apply any of the income of the settled funds in making any payments for keeping on foot the policy, but that it should not be obligatory on them to enforce any covenant in the settlement on the part of the husband in respect of the policy, nor to make any such payments as aforesaid, and any omission to do so was not to constitute a breach of trust. They were also given power in their discretion to sell or surrender the policy. There was no express covenant by the defendant to reimburse the trustees in respect of any payment made by them to keep the policy on foot. The defendant kept up the premiums for some years, but failed to pay the premium of £94 3s. 4d., which became due on May 24, 1930. The trustees, having paid this sum to keep the policy on foot, sued the defendant on a specially endorsed writ, claiming that amount as a debt due from the defendant. The case was entered in the Short Cause List, and came before HAWKE, J., in Oct. 21, 1931. He then gave the plaintiffs leave to amend by adding an alternative claim for damages and transferred the case to the non-jury list. The plaintiffs then delivered a statement of claim, claiming £94 3s. 4d., together with a fine of £4 14s. 1d., which they had had to pay to the insurance company as debt or, alternatively, as damages for breach of covenant. The defendant, while denying liability, paid 1s. into court, and contended that no more than nominal damages were recoverable.

Robert Fortune for the plaintiffs, the trustees.

H. G. Robertson for the defendant, the settlor.

McCARDIE, J.—This action is brought by the trustees of a marriage settlement dated June 17, 1919, which was just before the marriage of the defendant with Miss R. B. Schlesinger. The deed is a long one, and it recites that the defendant had taken out certain life policies, among which is the policy in question, and it provides for the transfer of this policy to the trustees upon the trusts of the settlement. The settlement provides that the trusts shall be for the benefit of the settlor, his wife and children, of whom three were born afterwards. The substantial object of the settlement was to deal with property, and to deal with it for the benefit of the persons I have named, for, of course, the interposition of the trustees was only machinery. The policy was for £2,500, and the premium payable in respect of it

was £94 3s. 4d. per annum. The only clause which bears on the point in issue is cl. 14. By that clause the husband, the defendant, covenanted that he would not by any act or omission allow the policy to become void, that he would pay the premiums and do all things necessary to keep the policy on foot. Then comes a paragraph dealing with the event of the defendant overlooking his obligations, for it provides that the trustees may apply any of the income of the trust fund in making any payments necessary to keep the policy on foot. Finally, the clause provides in substance, first that it shall not be obligatory on the trustees to enforce any covenant in the deed by the defendant with reference to the policy. That enabled the trustees to relieve the defendant of his obligations in special circumstances. Secondly, it provides that if the trustees consider that circumstances render it expedient, they may sell or surrender the policy. It is to be noted that there is no express covenant by the defendant to repay to the trustees any sum which they may have paid under that clause, but it is quite clear to my mind that there is an implied obligation on the defendant to make good to the trustees that which they have done in fulfilling the obligation which he primarily ought to have fulfilled. In fact, the trustees, owing to the defendant's default, paid the premium of £94 3s. 4d. falling due on May 24, 1930, and in this action they seek to recover that sum. They have, therefore, in the exercise of their discretion, considered it their duty to pay what the defendant covenanted to pay but did not pay. In the first instance the trustees claim on a specially endorsed writ as for a debt. HAWKE, J., allowed them to amend by adding a claim for damages, and sent the case to the non-jury list.

Counsel for the defendant has submitted several points. First, he says that this can only take the form of a claim for damages, and that consequently the procedure by a specially endorsed writ was not the proper procedure; secondly, he says that in any event the damages would be nominal only; and thirdly, that in any event the damages should not be the full amount of the premium. With regard to the first contention, it seems to me to rest on a technicality, and I confess that if I was not bound by authority I should wipe out many of the subtleties which exist in English law, for they are often inconsistent with modern conditions. However, the case is not free from authority. Counsel relied in the first place on *Warburg v. Tucker* (1), decided in 1858. That was a case in which, in substance, the court, consisting of WILLIAMS, J., and MARTIN, B., BRAMWELL, B., and WATSON, B. (BYLES, J., concurring), gave a ruling which shows that the claim in the present action must be a claim for damages. In *Warburg v. Tucker* (1) the defendant had assigned by deed to the plaintiff as security for debt an assurance on the life of himself and his wife, and had covenanted to pay the premiums. The defendant did not do so, and the plaintiff had paid them. There was an express covenant by the defendant to repay the sums so paid by the plaintiff. WATSON, B., pointed out (E.B. & E. at p. 928) that:

"The covenant is to keep up the insurance by payments to a third party; not to pay money to the plaintiff at all. The claim of the plaintiff on this breach of covenant would sound only in damages, but these are not necessarily of any particular amount; they might be anything from a farthing upwards. . . . If the plaintiff had paid the premiums on the policy and the defendant had repaid him, then the damages on the first breach might be a farthing. You really may put the possibility fifty ways."

Therefore, as a matter of technicality, the claim here should have been for damages, not for debt. Consequently it follows that this action was not properly one for the procedure under Order 14.

That brings me to the next point, namely, whether the plaintiffs are entitled to nominal damages only. Counsel for the defendant cited first *National Assurance and Investment Association v. Best* (2), a case where the defendant had failed to pay premiums in breach of his covenant to do so. There the court undoubtedly held that, as it did not appear that the plaintiff had sustained any loss by the

- A defendant's neglect to keep up the policies, the measure of damages was not the amount of the premiums but nominal damages only. In my view, that decision turned on the particular circumstances. It was a mere case of an indenture charging insurance policies being given to secure a debt, and it is obvious that in such cases the damages may sometimes be nominal and sometimes not. That case has no application to a case like the present case, where property is concerned.
- B The next case cited was *Browne v. Price* (3). There, again, on the facts, the court held that the plaintiffs were not entitled to more than nominal damages. However, that case, where a debt was secured by a mortgage and by a policy of assurance, was again one of a mere security for a debt, and moreover, it turned, or certainly ought to have turned, on one particular provision in the deed, namely, that in case the defendant should fail to pay the premium it should be lawful for the plaintiff to
- C pay it and charge the amount on the mortgaged property thereby charged. Therefore the court should have held that the deed had provided a special method by which the plaintiff could get repayment of the premium. On reading the judgments in that case I am satisfied that that was the ratio decidendi. In the present case I hold that it is not one for nominal damages at all, but that the damages are substantial, and that, on the facts, the plaintiffs are entitled to recover the full amount
- D of the premium. I think I am justified in holding that in view of the observations of the court in *Hey v. Wyche* (4), and the passages in *MAYNE ON DAMAGES*, 10th Edn., pp. 240 et seq., and in *ARNOLD ON DAMAGES*, 2nd Edn. at p. 58. I therefore give judgment for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

- E Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux; Montagu's & Cox, and Cardale.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

F

CHARLES HUNT, LTD. v. PALMER

- G [CHANCERY DIVISION (Clauson, J.), July 3, 1931]

[Reported [1931] 2 Ch. 287; 100 L.J.Ch. 356; 145 L.T. 630;
75 Sol. Jo. 525]

- H *Specific Performance — Sale of land — Misdescription — "Valuable business premises"—Premises subject to restrictive covenant in lease allowing only one business to be carried out there—Conditions of sale—Purchaser deemed to buy with full knowledge of covenant—No actual knowledge—"No error misstatement or omission in the particulars shall annul the sale"—Discretion to refuse specific performance—Discretion to order return of deposit—Exercise—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 49 (2).*

- I Two leasehold shops were described in the particulars of sale at an auction sale in January, 1931, as valuable business premises. P., a dairyman, having seen the particulars of sale for the first time on the day of sale, purchased the shops at the auction and signed a memorandum whereby he agreed to be bound by the conditions of sale, including the national conditions of sale, which were not set out. One of the national conditions of sale provided that the lease or a copy thereof might be inspected at the office of the vendor's solicitors, and the purchaser whether or not he inspected the same should be deemed to have bought with full notice of the contents thereof. Another of such conditions provided that no error, misstatement, or omission in the particulars should annul the sale. The leases contained restrictive covenants against carrying on any other

business on the premises except that of ladies' outfitter, fancy draper, and the manufacture of ladies' clothing. A week after the sale, P. for the first time became aware of the restrictive covenants, the lessors refused his request to allow him to carry on his business of dairyman upon the premises, whereupon P. refused to complete the purchase. In an action by the vendors for specific performance, P. counter-claimed for the return of the deposit.

Held: a shop which may only be used for one trade cannot be described as "valuable business premises," and to compel the purchaser to carry out the contract would, therefore, be forcing him to take something different from that which he was led by the vendors to expect to get under the contract; as the vendors could not give the purchaser that which they had led him to expect, they could not rely on the conditions; and, accordingly, specific performance must be refused and the return of the deposit ordered: *Re Davis and Cavey's Contract* (1) (1888), 40 Ch.D. 601, applied.

Notes. This decision in effect overrules *Scott v. Alvarez*, [1895] 2 Ch. 603.

Referred to: *Re Russ and Brown's Contract*, [1933] All E.R. Rep. 997; *Bellotti v. Chequers Developments, Ltd.*, [1936] 1 All E.R. 89; *James Macara, Ltd. v. Barclay*, [1944] 2 All E.R. 31.

As to the court's discretion to refuse specific performance on the ground of misdescription, see 31 HALSBURY'S LAWS (2nd Edn.) 330, para. 360, text and note (f); and for cases on the subject, see 40 DIGEST 251 et seq, 2188 et seq. As to the discretion to order repayment of a deposit, see 31 HALSBURY'S LAWS (2nd Edn.) 435, para. 435, text and note (c), and 29 *ibid.* 380, para. 521, text and notes (k) and (l); and for cases on the subject, see 40 DIGEST 218, 1847-1855. For examples of misrepresentation as to the quality of land, see 29 HALSBURY'S LAWS (2nd Edn.) 253-254, para. 338; as to what amounts to a material misrepresentation of fact by a vendor of land, see *ibid.* 384, para. 528, text and note (a); and as to what amounts to a defect of title, see *ibid.* 259, para. 344. For the Law of Property Act, 1925, s. 49 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 541.

Cases referred to:

- (1) *Re Davis and Cavey's Contract* (1888), 40 Ch.D. 601; 58 L.J.Ch. 143; 60 L.T. 100; 53 J.P. 407; 37 W.R. 217; 40 Digest (Repl.) 163, 1269.
- (2) *Re White and Smith's Contract*, [1896] 1 Ch. 637; 65 L.J.Ch. 481; 74 L.T. 377; 44 W.R. 424; 40 Sol. Jo. 373; 40 Digest (Repl.) 144, 1103.
- (3) *Curtis v. French*, [1929] 1 Ch. 253; 98 L.J.Ch. 29; 140 L.T. 133; 45 T.L.R. 15; 72 Sol. Jo. 762; 40 Digest (Repl.) 105, 796.
- (4) *Reeve v. Berridge* (1888), 20 Q.B.D. 523; 57 L.J.Q.B. 265; 58 L.T. 836; 52 J.P. 549; 36 W.R. 517, C.A.; 40 Digest (Repl.) 144, 1102.
- (5) *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; 70 L.J.Ch. 811; 85 L.T. 402; 50 W.R. 20; 17 T.L.R. 772; 45 Sol. Jo. 738; 40 Digest (Repl.) 136, 1073.
- (6) *Molyneux v. Hawtrey*, [1903] 2 K.B. 487; 72 L.J.K.B. 873; 89 L.T. 350; 52 W.R. 23, C.A.; 40 Digest (Repl.) 145, 1112.

Action by vendors for specific performance of a contract for the sale of leaseholds, counter-claim by the purchaser for return of his deposit.

Two leasehold shops in Catford were advertised for sale by public auction to be held on Jan. 21, 1931. The particulars of sale described the shops as "valuable business premises." One of the national conditions of sale to which the sale was subject provided that the lease or underlease or a copy thereof might be examined at the office of the vendors' solicitors during office hours on five working days preceding the day of sale, and that the purchaser (whether or not he inspected the same) should be deemed to have bought with full notice of the contents thereof. The defendant, a dairyman, bid for the shops at the auction, and was declared the highest bidder at £725. He had only heard of the sale on the day of sale, but had viewed the property. He had not seen the lease or underlease. Directly after the sale he signed a printed memorandum whereby he agreed to buy the shops for £725.

- A** He paid a deposit of £72 10s. to the auctioneers as stake-holders and agreed to complete the purchase in accordance with the printed conditions. On Jan. 28, 1931, in the course of investigating the title, the defendant for the first time ascertained that there were restrictive covenants in the leases restricting the lessee from carrying on without the previous consent in writing of the lessors "any other trade or business than that of a ladies' outfitter, fancy draper and the manufacture of ladies' clothing." As the lessors refused to remove the restrictive covenants, or to allow the defendant to carry on his business of dairyman, the defendant refused to complete the purchase. Thereupon the plaintiffs commenced an action for specific performance of the contract. The defendant counter-claimed for the return of the deposit.

- C** By s. 49 (2) of the Law of Property Act, 1925:

"Where the court refuses to grant specific performance of a contract, or in any action for the return of the deposit, the court may, if it thinks fit, order the repayment of any deposit."

A. J. Spencer, for the plaintiffs, the vendors, referred to *Re White and Smith's Contract* (2); *Curtis v. French* (3).

- D** *Myles*, for the defendant, the purchaser, referred to *Reeve v. Berridge* (4); *Re White and Smith's Contract* (2); *Re Haedicke and Lipski's Contract* (5); *Molyneux v. Hawtrey* (6); and *Re Davis and Cavey's Contract* (1).

- CLAUSON, J.** [after stating the facts, continued:] The question is whether, in the particular circumstances which I have stated, the defendant ought to be compelled by this court to complete the contract on his part for the purchase of this property and pay the remainder of the purchase money. The defendant, a willing purchaser, has now discovered that the property is subject to restrictive covenants which have the effect of preventing him from carrying on any trade or business upon the premises except that of a ladies' outfitter, fancy draper and the manufacture of ladies' clothing; and, being a dairyman, and desirous of acquiring the premises for the purposes of his dairy business, the premises would obviously be of little use to him if he is bound to complete the purchase. The plaintiffs contend that he is bound to complete by the terms of his contract, that he must be treated as having, at the time when he contracted to purchase, known of the existence of the restrictive covenants in the leases, notwithstanding the description of the property in the particulars of sale as "valuable business premises."

- G** In my judgment the plaintiffs must fail in their action to force the defendant to complete his contract. The property put up for sale by auction was described in the particulars of sale as "the valuable business premises" (printed in big type) "situate and being Nos. 238 and 240, Crownhill Road, comprising two spacious shops and a large ground-floor factory," and also as "valuable leasehold business premises." In *Re Davis and Cavey's Contract* (1)

- H** "the property was put up for sale as business premises, and upon that it seems to me the purchaser would be entitled to have property conveyed to him on which he could carry on any business, subject only to the restrictions imposed by the general law of the land—for example, so as not to create a nuisance, subject also to the statutory restrictions in force with regard to any particular trade where such restrictions exist. But with these exceptions he would be entitled to expect the property to be conveyed to him free from all restrictions."

I After the passage which I have read, STIRLING, J., goes on to say that it was not necessary to consider, on that application, whether, on the true construction of the covenant in that case, which was not to exercise or carry on in or upon the demised premises any trade or business or occupation, it was an absolute covenant not to carry on "any" trade or business on the property or whether the prohibitive words must be construed as intended to apply to trades or businesses, the carrying on of which involved annoyance, nuisance or damage of the lessors or of the tenants of the adjoining property. Then the learned judge continues (40 Ch.D. at p. 606):

"What are the purchaser's rights? On the one hand, he is bound by the contract not to make any objection in respect of any clause, matter, or thing contained in the original lease, which this objection is. On the other hand, if the vendor seeks specific performance of the contract, a court of equity has a discretionary jurisdiction to say whether it will compel a purchaser to carry out [the word 'take' in the report is obviously a misprint for 'carry out'] a contract under which he will get something different from that which he has been led to expect he will get. Whenever a vendor chooses to put into his conditions of sale anything which misleads the purchaser, the latter may decline to perform the contract, and may say, 'this is not a contract which a court of equity will enforce against me.'"

That is a different thing from saying that the title is not such a title as the vendor contracted to give him. If I were to compel the defendant to carry out his part of the contract I should be forcing him to take something different from that which he was led by the plaintiffs to expect he would get under the contract. In the circumstances of this case it is primarily incumbent on the plaintiffs to show that they are in a position to convey to the defendant the things which by the particulars of sale they led him to believe he was to get under the contract. Until they have shown that, it is irrelevant to consider the sixth of the National Conditions of Sale which, as counsel on behalf of the plaintiffs contended, saddles the defendant with notice of the restrictions in the leases. A shop which may only be used for one trade cannot be described as "valuable business premises." In my judgment, it would be wrong for a court of equity to compel the defendant to complete the purchase. Accordingly the plaintiff's action for specific performance fails and must be dismissed.

With regard to the counter-claim by the defendant for repayment of the deposit, in exercise of the discretionary power conferred on me by s. 49 (2) of the Law of Property Act, 1925, I will declare that the defendant is entitled to give a valid receipt to the auctioneer for the deposit.

Solicitors: *W. B. Wattson; C. M. Brumell.*

[*Reported by J. H. G. BULLER, ESQ., Barrister-at-Law.*]

A

J. H. WETHERALL & CO., LTD. v. LONDON ASSURANCE

[KING'S BENCH DIVISION (Rowlatt, J.), January 26, 1931]

[Reported [1931] 2 K.B. 448; 100 L.J.K.B. 609; 144 L.T. 645;
36 Com. Cas. 181; 18 Asp.M.L.C. 205]

B

Insurance—Marine Insurance—General average loss due to delay for the purpose of executing general average repairs—Recovery from insurers.

Loss due to delay for the purpose of executing general average repairs is not recoverable from insurers as general average. *The Leitrim* (1), [1902] P. 256, explained and followed.

C

Notes. As to when the cost of repairs falls under general average, see 30 HALSBURY'S LAWS (2nd Edn.) 599, para. 756; and for cases on the subject, see 41 DIGEST 599-600, 4249-4268. For the Marine Insurance Act, 1906, s. 66, see 13 HALSBURY'S STATUTES (2nd Edn.) 46; and for the York-Antwerp Rules, 1950 (which replace the Rules of 1924), see 22 HALSBURY'S LAWS (3rd Edn.) 446.

D

Cases referred to:

(1) *The Leitrim*, [1902] P. 256; 71 L.J.P. 108; 87 L.T. 240; 51 W.R. 158; 18 T.L.R. 819; 9 Asp.M.L.C. 317; sub nom. *Hudson v. British and Foreign Marine Insurance Co.*, 8 Com. Cas. 6; 41 Digest 599, 4247.

(2) *Field Steamship Co., Ltd. v. Burr*, [1899] 1 Q.B. 579; 68 L.J.Q.B. 426; 80 L.T. 445; 47 W.R. 341; 15 T.L.R. 193; 43 Sol. Jo. 258; 8 Asp.M.L.C. 529; 4 Com. Cas. 106, C.A.; 29 Digest 212, 1696.

E

(3) *Shelbourne & Co. v. Law Investment and Insurance Corpn.*, [1898] 2 Q.B. 626; 67 L.J.Q.B. 944; 79 L.T. 278; 8 Asp.M.L.C. 445; 3 Com. Cas. 304; 29 Digest 202, 1616.

Action tried before ROWLATT, J., upon an agreed statement of facts.

F

The plaintiffs were the owners of the steamship *Blacktoft*, and as such, fully interested in a policy of marine assurance, dated Feb. 19, 1929, by which the defendants, the London Assurance, insured the shipowners for part of the value of the steamer from Feb. 20, 1929, to Feb. 20, 1930, against the ordinary perils in respect thereof. The policy incorporated cl. 9 of the Institute Time Clauses, Hulls, which provides, inter alia, that where the contract of affreightment so provides, the general average adjustment shall be in accordance with the York-Antwerp Rules,

G

1890 or 1924. In May, 1929, the steamer loaded a cargo of coals at Goole for carriage to Rouen under the following contracts: (a) A time charter dated Nov. 13, 1928, made between the shipowners and W. F. Fenwick & Co., Ltd., as charterers; (b) a voyage charter dated May 23, 1929, made between W. F. Fenwick & Co., Ltd., as owners, and the Humber Coal Co., Ltd., as charterers; (c) a bill of lading dated May 28, 1929, duly signed by the master of the steamer and in which the Humber

H

Coal Co., Ltd., appeared as shippers. Each of these documents provided that general average should be settled in accordance with the York-Antwerp Rules, 1924. The steamer left Goole at 10 a.m. on May 29, 1929, but a quarter of an hour later, in swerving to avoid a collision with another vessel, she took the ground on Goole Ness. She was not refloated until 12.45 p.m. on May 30, 1929. The steamer suffered particular average damage which, together with certain other such damage

I

on June 11, 1929, amounted to £446 5s., and general average damage which amounted to £432 5s. After being refloated, the steamer proceeded to Rouen, where she discharged her cargo on or about June 4, 1929, and on her return carried another cargo from London to Goole. She then went into the Alexandra Dock, Hull, where she remained under repair from June 11 to June 20, 1929, the total period being nine days nine-and-a-half hours. The particular average repairs and the general average repairs were carried out concurrently and completed simultaneously. If the two sets of repairs had been carried out separately each would have occupied substantially the same time as was occupied in doing both together,

namely, nine days nine-and-a-half hours. The plaintiff shipowners estimated their loss by reason of the detention at £145 18s. 7d. made up of loss of time-hire or, alternatively, demurrage or loss of profit, less certain expense saved. An average statement dated Nov. 13, 1929, apportioned the above loss attributing £71 16s. to general average damage, and £74 2s. 7d. to particular average damage. Including certain commission and interest charges, the total amount allowed in general average was £74 14s. 8d. If this amount were correctly allowed then, if the shipowners were entitled to be indemnified by the insurers under the policy, their proportion would be £4 7s. 6d. as for a general average sacrifice, or £3 19s. as for a general average expenditure. The shipowners claimed one or other of these proportions. The insurers pleaded that the delay or detention of the steamer was outside the scope of a general average loss.

Miller, K.C., and W. L. McNair for the shipowners.

Le Quesne, K.C., and Sir Robert Aske for the insurers.

ROWLATT, J.—In this case the question is whether the plaintiff shipowners can recover against the insurers in respect of delay to the ship, while repairs necessitated by a general average act were being executed after the voyage had been completed. The facts are embodied in an agreed written statement upon which the case was argued. I need not here set them out again.

The first point in logical order—for if it succeeds it excludes all other points—taken for the insurers was that the ship was bound to suffer this delay for the purpose of repairs due to a particular average loss incurred before the general average, and that, as the general average repairs were done in the same period, there was no delay attributable to the general average act. In my view it is not clear that the facts were as suggested, and the statement of facts, upon which my decision was invited, was not drawn to bring out this point. It seems to me that some of the particular average damage involved in the casualty of stranding may have occurred after some, at least, of the general average damage happened. If so, the general average loss was not incurred by a vessel already doomed to this delay (if I may use that expression) in respect of a particular average loss, and the point fails.

Another point which was mooted was whether the York-Antwerp Rules were under cl. 9 of the Institute Time Clauses to be interpreted according to the French or English practice. I intimated my opinion that the English practice is the relevant one. The contention that it is the French is open to the shipowners in another court.

The question that remains may be stated thus: Counsel for the shipowners contended that under s. 66 of the Marine Insurance Act, 1906, and the York-Antwerp Rules, as understood in this country, loss by delay for the purpose of executing such repairs as these was in principle recoverable subject to an exception laid down in *The Leitrim* (1) as regards delay during the voyage when other interests were suffering delay also.

Counsel for the insurers, on the other hand, contended that all delay was outside the scope of a general average loss altogether. He supported his argument by a critical examination of r. C of the York-Antwerp Rules and by reference to rr. XI, XVIII and X (d). He also argued that such cases as *Field Steamship Co., Ltd. v. Burr* (2) and *Shelbourne & Co. v. The Law Investment and Insurance Corpn.* (3) show that delay is not for the present purpose a direct consequence of the general average act. In *Field Steamship Co., Ltd. v. Burr* (2) it was held that the cost of discharging a cargo which had become putrid in consequence of a collision was not recoverable by the shipowner under a policy on hull and machinery. In *Shelbourne & Co. v. Law Investment and Insurance Corpn.* (3) a barge owner failed to recover from his underwriters in respect of delay in doing repairs necessitated by a collision. The policy in the present case, said counsel for the insurers, is on hull and machinery, and consequently here, too, loss consequential on the actual damage, but outside the cost of repair, cannot be recovered.

A In the view I take it is not necessary, and therefore not advisable, to discuss the relevance of such cases to claims for a general average loss, a conception derived primarily from the contract of affreightment. The insurers here are entitled to succeed in this court on the direct authority of the judgment of GORELL BARNES, J., in *The Leitrim* (1). The material passage ([1902] P. at p. 268) is as follows:

B "But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in the general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damage by the loss of time may be considered proportionate to the interests and may be left out of consideration."

E It seems to me that, when the learned judge speaks of a "loss of this character" as being hitherto unknown and not introduced by the York-Antwerp Rules, he was speaking of all delay, and when, in pointing out that all interests are involved in the delay and that it is impracticable to work out all the claims, he allows that possibly there may be cases where the delay does not affect them all. He does not mean that in these cases there would exceptionally be a different rule, but is indicating that the possibility of such cases does not affect the practical principle.

F I have not forgotten that the Marine Insurance Act, 1906, was passed after the decision in *The Leitrim* (1), but I cannot read the language of s. 66 as inconsistent with it. Nor do I forget that r. C of the York-Antwerp Rules, 1924, negatives only a claim for delay during the voyage. I cannot, however, accept the view that this rule by the omission expressly to exclude impliedly admits delay after the voyage. From one point of view, as counsel for the insurers said, one would think it was excluded a fortiori, or to put it in another way, a claim in that respect may not have been contemplated as calling for mention.

G In the result, there must be judgment for the defendant insurers with costs.

Judgment for the insurers.

Solicitors: *Botterell & Roche*, for *Botterell, Roche, & Temperley*, Newcastle-upon-Tyne; *Waltons & Co.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

A

RAINOLD v. BROMLEY

[CHANCERY DIVISION (Lawrence, L.J., sitting as an additional judge of the Chancery Division), June 30, July 1, 1931]

[Reported [1931] 2 Ch. 307; 100 L.J.Ch. 377; 145 L.T. 611]

B

Landlord and Tenant—Agreement for lease—Acceptance—“Subject to the terms of a lease”—No concluded bargain until lease signed by lessor.

Solicitor—Authority—Agreement on behalf of lessor to terms of proposed lease.

C

An acceptance “subject to the terms of a lease” of an offer to take premises on a seven, fourteen, or twenty-one years’ lease is not a concluded bargain until the lease has been executed by the person to grant the lease; accordingly, there is no binding contract between the parties even when the negotiations as to the terms to be contained in the lease have been brought to a conclusion by agreement between the solicitors of the parties.

D

Per **Curiam**: The expression “subject to the terms of a lease” is at least as strong as the expression “subject to contract.”

Held, further, on the facts: even if the proposed lessor’s solicitors purported to enter into a contract on behalf of their client, they had no authority to do so.

Notes. Applied: *Berry, Ltd. v. Brighton and Sussex Building Society*, [1939] 3 All E.R. 217.

As to agreements contemplating the execution of a further formal lease, see 20 HALSBURY’S LAWS (2nd Edn.) 42, para. 147; and for cases on the subject, see 30 DIGEST (Repl.) 393–395, 374–386, and *ibid.*, vol. 12, p. 79, 439; as to agreement contemplating a further formal contract generally, see 8 HALSBURY’S LAWS (3rd Edn.) 76, para. 130; as to a solicitor’s authority to make his client chargeable by a memorandum of a contract for a lease, see 29 HALSBURY’S LAWS (2nd Edn.) 241, para. 323, text and note (t), and *ibid.*, vol. 31, pp. 113–114, para. 156, text and note (c).

F

Case referred to:

(1) *Daniels v. Trefusis*, [1914] 1 Ch. 788; 83 L.J.Ch. 579; 109 L.T. 922; 58 Sol. Jo. 271; 12 Digest (Repl.) 177, 1178.

Action by a proposed lessee for specific performance or alternatively damages for breach of an agreement alleged to have been entered into by him with the defendant for a lease of a shop in High Street, Bromley, Kent. The facts are fully set out in the judgment.

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Gover, K.C., and *Danckwerts* for the plaintiff.

G. P. Slade for the defendant.

LAWRENCE, L.J.—In this case the plaintiff claims specific performance or alternatively damages for breach of an agreement alleged to have been entered into by him with the defendant for a lease of a shop in High Street, Bromley, Kent.

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The main question is whether there was in fact a concluded agreement as alleged. The defendant employed certain house agents named Baxter, Payne, and Lepper to find a tenant for the shop in question. In consequence of a circular received from them the plaintiff on Dec. 7, 1930, after having inspected the property, made a verbal offer to them over the telephone for a lease of the shop. After having communicated this offer to the defendant, Baxter, Payne, and Lepper sent to the plaintiff the letter of Dec. 9, 1930, which is relied on as constituting the agreement sued on. This letter is headed “Corner shop, 158, High Street, Bromley,” and is in the following terms:

I

“Referring to our conversation this morning on the telephone, we confirm that subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a seven, fourteen, or twenty-one years’ lease at a

A rental of £350 per annum for the first fourteen years, rising to £375 for the last seven years. . . . We have instructed Mr. Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors, Messrs. Teff and Teff."

Counsel for the plaintiff contended that this letter, either by itself or coupled with the letter of Dec. 29, to which I will refer presently, constituted a concluded agreement to grant a lease of the shop to the plaintiff. The first question which naturally arises is whether Messrs. Baxter, Payne, and Lepper had authority to enter into a binding agreement on behalf of the defendant or whether their authority was confined to finding a tenant and negotiating the terms on which the defendant would be prepared to grant a lease. In the witness-box the defendant admitted that the offer which had been made by the plaintiff had been communicated to him, and that he had authorised Baxter, Payne, and Lepper to write the letter of Dec. 9, 1930. That being so, the only question is whether the letter itself constituted a concluded agreement.

It is to be observed that the letter does not purport to be an unconditional acceptance of the plaintiff's offer, but merely informs him that "subject to the terms of a lease," the defendant is prepared to accept the offer. This may mean that the defendant is prepared to accept the offer subject to such terms as shall be contained in a lease when it has come into existence and has been executed by him, or it may mean that he is ready to accept the offer subject to the terms of the proposed lease being agreed upon by the parties, that is to say, subject to an agreement being come to by the parties as to the terms to be contained in a lease thereafter to be executed. In either case the letter only expresses the defendant's willingness to accept the offer on certain conditions and not the definite acceptance of the offer on those conditions. Assuming, however, that the letter amounts to a conditional acceptance of the offer, the question then arises which of the two constructions I have indicated is the true construction. On the same day on which the letter was written the solicitors for the defendant sent a draft lease to the plaintiff's solicitors for approval. The draft lease so sent contained unusual covenants, for instance (to mention only one), a covenant restricting the class of goods to be sold in the shop. On Dec. 11 the plaintiff wrote to Baxter, Payne, and Lepper, stating that he wished to confirm the letter of the 9th, and added: "Of course this is subject to my solicitors' approval of the lease."

On these facts, even if the alternative construction contended for by Mr. Gover be the right construction, there would obviously be no concluded agreement until after the terms of the lease had been agreed between the parties. It is plain that an agreement to grant a lease the terms of which are to be the subject of a future negotiation and agreement between the parties is not a concluded agreement to grant a lease. It has been argued, however, by both counsel for the plaintiff, that such an agreement amounts to a concluded agreement to grant a lease conditional upon the parties agreeing to the terms of the lease, and when the parties, or their solicitors, have reached an agreement as to the terms to be included in the proposed lease the original agreement to grant the lease is absolute. In my opinion this argument is fallacious. An agreement to grant a lease which is conditional on an agreement being reached as to the terms to be contained in it is not an enforceable agreement. The subject-matter of the suggested agreement is the granting of a lease, and if the terms of the lease are not agreed but are left to future negotiation and agreement the original agreement amounts to nothing more than an agreement to enter into an agreement at a future time. It is not as if the alleged agreement in the present case were an agreement defining all the essential terms of the lease, subject only to the approval by the solicitors to the parties of the form of the lease; in such a case it might be held that there was a concluded agreement, leaving merely the terms of it to be reduced into proper form by the solicitors.

Even on the plaintiff's construction the agreement is one which leaves all the terms of the lease to be subsequently negotiated, and is therefore too vague to be enforceable. The matter, however, does not rest there, for, in my opinion, the

true construction of the expression "subject to the terms of a lease" is not that A
contended for by counsel for the defendant. The expression means "subject to the
terms to be contained in a lease" executed by the lessor and therefore implies that
a lease has to come into existence and has to be executed by the lessor before any
binding agreement is reached. The expression "subject to the term of a lease" is
at least as strong as "subject to contract" and was inserted in the letter of Dec. 9
in order to keep the matter open until a lease was actually executed by the defend- B
ant. If this be so, no concluded bargain would be reached until the lease had
been executed by the defendant, even although the negotiations as to the terms to
be contained in the lease had been brought to a conclusion by agreement between
the solicitors of the parties.

Counsel for the plaintiff was forced to admit that if the construction contended
for by the defendant be the right construction of the letter he could not succeed, C
but he strenuously urged that the alternative construction was the true construc-
tion. Even then he was confronted with the difficulty that in the pleadings the
only contract alleged is that contained in the letter of Dec. 9 which, besides not
mentioning what covenants were to be inserted in the lease, does not give the date
when the term is to commence. He, therefore, applied for leave to amend by
pleading the letter of Dec. 29, and by alleging that the two letters taken together D
constituted the agreement sought to be enforced. I allowed the pleadings to be
treated as amended in this respect, and the amendment necessitates my referring
to the correspondence, though I do not propose to go through it in detail, because
it has all been read. I turn to the letter dated Dec. 17, in which the defendant's
solicitors, writing to the plaintiff's solicitors, say:

"We have now received our client's instructions on the draft lease, and we E
return it to you, as amended by us in green ink. With regard to the payment
of rent, our client informs us that it was agreed between his agents and your
client that rent should be payable from the time of the granting of the lease.
He is not, therefore, prepared to agree to June 25 as the date for the first
payment, but he will agree to accept March 25 as the date when a proportionate
amount from the date of possession will be payable." F

At that stage of the correspondence all the terms to be contained in the proposed
lease had been agreed between the solicitors with one exception, namely, the date
from which the rent was to commence to be payable. That letter was received by
the plaintiff's solicitors, who took their client's instructions and on Dec. 23 wrote
agreeing that rent should commence to run from March 25, and, therefore, altered
the draft lease so as to make the first payment of rent become payable on June 24. G
They sent back the draft lease so altered to the defendant's solicitors, notifying
them of the alteration. Thereupon the defendant's solicitors wrote the letter of
Dec. 29 now relied on by counsel for the plaintiff as completing the contract. That
letter, as far as material, is in the following terms:

"We have now received our client's instructions on the draft lease, and he is H
prepared to accept your client's alterations. We are, therefore, having the
lease engrossed, and will forward you a counterpart for execution by your client
in due course. . . ."

It is to be noted that in this letter the expression "is prepared to accept" again
occurs, but I will once more assume in favour of the plaintiff that that expression
is equivalent to "accepts." I

It is contended that as at this stage of the correspondence all the terms of the
draft lease had been agreed, there was a fulfilment of the only condition contained in
the letter of Dec. 9, and therefore that the agreement originating in that letter had
become a concluded agreement.

This contention raises the question whether the defendant's solicitors had any
authority to enter into a contract on behalf of their client, if, as I will assume, they
in fact purported to do so. In my opinion, they had no such authority. It was
then further contended that even if the solicitors had no such authority, yet they

A were the agents of the defendant by their letter to communicate the fact that the defendant agreed to all the terms of the draft lease, and that in those circumstances the letter of Dec. 29 was a sufficient memorandum of the agreement made by the defendant and signed by his duly authorised agents within s. 40 of the Law of Property Act, 1925.

B It seems to me that in view of some of the cases to which I have been referred and particularly of *Daniels v. Trefusis* (1), to which I called attention in the course of the argument, there is something to be said for the contention that if the letters of Dec. 9 and 29 are to be construed as contended for by counsel for the plaintiff, then by Dec. 29 the parties had in fact agreed to the terms to be inserted in the lease, and the defendants' solicitors in communicating the acceptance by their client of those terms did in fact sign a memorandum of agreement made by their clients within the meaning of the statute. If that be the true view, then the agreement was not an agreement contained in or concluded by the letters of Dec. 9 and 29, but another agreement which is not pleaded and was arrived at and concluded for the first time when the defendant himself accepted the final alterations in the draft lease. If, however, I have correctly construed the letters of Dec. 9 and 29, there is no necessity to go into the questions raised by counsel under the amended pleadings as the defendant never purported definitely to accept the plaintiff's offer, and all the negotiations were subject to a lease being executed.

E In these circumstances I have reluctantly come to the conclusion that there is no binding contract between the parties. My reason for being reluctant in arriving at this conclusion is because the conduct of the defendant in abruptly breaking off the negotiations when all the terms which were to be inserted in the proposed lease had been agreed, and letting the shop to another tenant, does not commend itself to me.

F [The learned judge then proceeded, in case there was a successful appeal from his decision, to deal with the question what damages it would have been proper to award, had the plaintiff succeeded, regard being had to the fact that the defendant had let the premises to a third party and thereby rendered it impossible to make a decree for specific performance, and he assessed the damages at £250 10s.; but said that, as it was, the action must be dismissed with costs.]

Action dismissed.

Solicitors: *Teff & Teff; Lovell, White, & King.*

[*Reported by* GEOFFREY P. LANGWORTHY, Esq., *Barrister-at-Law.*]

TART v. G. W. CHITTY & CO., LTD.

[KING'S BENCH DIVISION (Swift and Charles, JJ.), June 12, 1931]

[Reported [1933] 2 K.B. 453; 102 L.J.K.B. 568; 149 L.T. 261]

Road Traffic—Negligent driving—Travelling at such speed as to be unable to avoid collision—Not keeping proper look-out.

On a dark evening, when it was raining and blowing hard, a Foden steam wagon pulled up in a very dark place, 9 in. from the kerb, in a 14 ft. street, for the driver's mate to attend to the rear lamp, which had gone out. A motor cyclist whose light threw a beam 15 yards, and who stated he could easily stop the motor cycle in that distance, crashed into the back of the wagon and was injured. On these facts, in an action brought by the motor cyclist against the owners of the wagon, the county court judge found that the defendants' servants were negligent, but that the defendants had not shown that the plaintiff was negligent.

Held: judgment must be entered for the defendants because the evidence was consistent only with contributory negligence on the part of the plaintiff, who must either have not been keeping a proper look-out or have been travelling at such a fast speed that he was unable to stop his motor cycle or to swerve so as to avoid the collision.

Butterfield v. Forrester (1) (1809), 11 East, 60.

Notes. When this case was decided contributory negligence by the plaintiff was a complete defence to an action based on negligence. This common law rule has now been abolished by the Law Reform (Contributory Negligence) Act, 1945, s. 1, which provides instead that where there has been contributory negligence by a claimant the damages recoverable by that claimant must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Despite the decision in this case a person who collides with an unlighted stationary vehicle or other obstacle is not necessarily guilty of negligence: see *Tiddy v. Battman*, [1933] All E.R. Rep. 259; *Stewart v. Hancock*, [1940] 2 All E.R. 427; *Morris v. Luton Corporation*, [1946] 1 All E.R. 1.

As to the duty to drive at a speed at which the driver can stop or alter course within the range of his vision, see 23 HALSBURY'S LAWS (2nd Edn.) 640, para. 899, text and notes (o) and (p); and for cases on the subject, see 36 DIGEST (Repl.) 92-94, 502-509.

Cases referred to:

- (1) *Butterfield v. Forrester* (1809), 11 East, 60; 1 Man. & G. 571, n; 103 E.R. 926; 36 Digest (Repl.) 177, 939.
- (2) *Page v. Richards and Draper* (1920), cited in 149 L.T. 263, D.C.; 36 Digest (Repl.) 93, 502.

Appeal from the county court of Ashford.

On Jan. 3, 1931, at about 5.45 p.m., a Foden steam wagon owned by the defendants, and in charge of their servants, was approaching the town of New Romney, Kent, when the driver and his mate found that their rear light was giving trouble. It was raining, blowing hard, and very dark. On reaching New Romney they discovered that the rear lamp gave no light. They drew up the wagon in the High Street, New Romney, between two lighted shops, but at a place which was described by all the witnesses as very dark. The roadway was 14 ft. and the wagon 7 ft. wide. The rear wheels of the wagon were about 9 in. from the kerb, so that the off-wheels just crossed the middle line of the roadway.

The driver then went to a shop to purchase cigarettes whilst the driver's mate went to the back of the wagon to attend to the lamp. Whilst there he saw the plaintiff, Mr. Frank Robert Tart, riding a motor bicycle, approaching the back of the wagon. When the motor bicycle was about 3 yards away from him the

A driver's mate jumped for the kerb and reached it in safety. The plaintiff crashed into the wagon and was injured.

In an action brought by the plaintiff in the county court to recover damages for personal injuries alleged to have been caused by the negligence of the defendants, their servants or agents, the plaintiff was unable to give any evidence about the accident or the events immediately preceding it: he was unconscious for three weeks after the accident. He stated that the lamp on his motor bicycle would cast a beam for 15 yards, and that within that distance he could easily pull up his motor bicycle. On proof of the above-mentioned facts, which were not substantially in dispute, the county court judge found that the defendants' servants were guilty of negligence in leaving the wagon on the highway with no rear light and unilluminated by either the street lamps or the lighted shop windows, and he also found that the plaintiff had not been guilty of negligence and he gave judgment for him for £400 damages.

The defendants appealed.

B. O'Malley for the defendants.

H. S. Comyns Carr, K.C., and R. Eagle for the plaintiff.

D **SWIFT, J.**—This is an appeal from the judgment given by His Honour Judge CLEMENTS in the county court of Ashford, Kent. The appeal arises out of an action which was brought by Mr. Frank Robert Tart against the defendants, G. W. Chitty & Co., Ltd., in which he claimed damages for personal injuries sustained through the negligence of the defendants' servants. The defendants alleged that he had himself brought about his injuries by his own negligence, which was either solely the cause of the accident or contributed to the accident.

E At the trial of the action facts emerged which were really not in dispute. The plaintiff knew nothing about the accident because he was very severely injured and for three weeks after the accident he was unconscious. Naturally enough, when he recovered consciousness, he knew nothing whatever about the accident or the events immediately preceding it. The facts not in dispute, which were proved before the learned county court judge, were these: On Jan. 3, 1931, at about 5.45 p.m., a Foden steam lorry, owned by the defendants and in charge of their servants, was travelling through a portion of the county of Kent and came into the town of New Romney. It was a wild night; it was raining hard, and it was blowing a gale. Before the lorry got to New Romney those in charge of it had had trouble with their tail light, and when they got into New Romney it was discovered that it had gone out. Thereupon the driver of the lorry drew it up in the High Street in New Romney at a place which was between two lighted shops, but at a place which was described by all witnesses as very dark, the darkest place he could find. Having stopped there with his rear wheels about 9 in. from the kerb, and his off wheels slightly crossing the imaginary line of the crown of the road, the lorry occupied a little more than half the road of the High Street. The lorry having stopped, Huntley, the driver's mate, went to the rear of the lorry and endeavoured to re-light the lamp whilst the driver of the lorry went into a neighbouring shop to purchase cigarettes.

G It has been suggested that the driver of the lorry, in leaving his lorry there and going into the shop to buy cigarettes, did something which was negligent. I do not think the learned county court judge found that, but the learned county court judge has found in terms that those in charge of the lorry were negligent in leaving it in the place they did under the conditions that they did. From that finding there has been no appeal and about that finding there is before us no complaint.

I Whilst Huntley, the driver's mate, was at the back of the lorry endeavouring to re-light his lamp, a motor bicycle driven by the plaintiff, Mr. Frank Robert Tart, came along the High Street at New Romney. He had a lamp on his bicycle which, according to his evidence, would cast a beam for 15 yards, and, according to his evidence, in 15 yards he could easily pull up his motor bicycle. He came along the High Street; he did not apparently—we do not know, for he cannot tell

us—observe either the motor lorry or the man who was standing at the back of it endeavouring to light the lamp. When he was, it is said by Huntley, about 3 yards away from him, Huntley realised that the motor bicycle was coming on him, and he jumped to the kerb and avoided it. The plaintiff cyclist struck the motor lorry at the rear on the off-side, was hurled across the road on to the kerb on his right-hand side, and there he sustained severe injuries for which the county court judge, in the circumstances which I shall narrate in a few minutes, awarded him the sum of £400. Those are the facts. I think I have stated every fact which was proved in evidence which is material. A B

On those facts the county court judge found that the defendants' servants were guilty of negligence. He then had to consider a further question. He said :

"I have to weigh the matter in the balance and see whether there is any evidence of negligence on the part of the defendants, and was there any contributory negligence on the part of the plaintiff; could he have avoided the consequences of the negligence if there had been any?" C

That is, in my view, a perfectly clear, a perfectly proper direction to himself or statement of the law relating to this matter. Having found that those in charge of the lorry were guilty of negligence he had then to ask himself whether the plaintiff could by the exercise of ordinary reasonable care, which is demanded of a motor cyclist travelling along such a road under such conditions as were existent that night, have avoided the result of the defendants' negligence. The learned county court judge, having put that question to himself, came to the conclusion that in truth the plaintiff had not been guilty of negligence. He said that in the circumstances of this case he was not satisfied that the plaintiff could by the exercise of ordinary reasonable care have avoided the result of this accident, and he therefore gave judgment for the plaintiff for the sum of £400. From that judgment the defendants appeal. D E

It has not been disputed before us that initially in this matter the defendants' servants were guilty of negligence. They put upon the highway an obstruction which was improperly lighted in that it had no lights of its own at the back and in that none of the surrounding lights of the town, the lights of the shop windows or the street lamps, illuminated it at all. The learned county court judge said they were negligent in stopping in that position. Then what happened? The plaintiff ran into it, and it must be he ran into it for one of two reasons: either he was not keeping a proper look-out, such a look-out as a reasonable man riding a motor cycle along that street would have kept on such a night, or, if he were keeping a proper look-out, he was travelling at such a speed that he was unable to stop his motor cycle or to swerve from the course he was pursuing in such a way as to avoid colliding with the obstruction which had been put in front of him. One of those two events must have happened, and if that be so, then he must, in fact and in law, have been guilty of negligence. The learned county court judge has said that he was not. This court is not sitting here to review his decision, in the sense of coming to any conclusion of our own upon the facts if there was material upon which he could come to his conclusions, but is sitting here merely to see whether he has properly applied the law in this case. The question accordingly is whether or no we can interfere with what he has done. F G H

In my view the question whether there was or was not evidence on which a judgment might be founded is always a question of law. If there is evidence, then the judgment cannot be disturbed by this court, however profoundly this court may disagree with it; but if there is no evidence, then, as a matter of law, the judgment can and ought to be reversed. Was there any evidence here on which the learned county court judge could find that the plaintiff had not been guilty of negligence? There is the admitted fact proved that he drove his motor vehicle on to this obstructive steam lorry. That cannot be disputed. There is no evidence the other way, and that fact points to one conclusion only, either he was not looking out, in which case he was, as a matter of law, guilty of negligence, or, if he was looking I

A out, he was going too quickly or for some other reason had not his bicycle under such proper control that he was able to avoid this collision. I think there was no evidence on which the county court judge could come to his conclusion that the plaintiff was not guilty of contributory negligence. It is said, and said perfectly rightly, that the onus was on the defendants to show that the plaintiff was guilty of contributory negligence, and it is said that they have not done so because the
B learned county court judge said, in spite of all the evidence, "I am not satisfied that the defendants have made this out." As a matter of law, the evidence being all one way, he ought to have been satisfied, and if, the evidence being all one way and proving conclusively that there was negligence on the part of the plaintiff, he still said, as he did, "I am not satisfied that the defendants have shown that there was contributory negligence on the part of the plaintiff," he erred in a matter
C of law.

I am fortified in the view which I take of this case even if I am not bound, although I am inclined to think that I am bound, by the judgments of ROWLATT, J., and of MCCARDIE, J., in *Page v. Richards and Draper* (2). I take the facts of that case from the judgment. ROWLATT, J., said:

D "The plaintiff, who was walking along the road, knew nothing material to the case except that he was struck in the back by a motor car, and the driver of the motor car never saw the plaintiff until he struck him. That is all. On those facts the learned county court judge has found that there was no negligence on the part of the driver, but I do not think he can possibly have found that—of course, we are not reviewing him—that means, we are not re-trying
E the case—without making a mistake in point of law, or misdirecting himself, as it is sometimes called—misunderstanding the law and misapplying its principles. It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping, or deflecting his course, at any time to avoid anything he sees, after
F he has seen it. If there is any difficulty in the way of his seeing, like a fog for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma: either he was not keeping a sufficient look-out, or, if he was keeping the best look-out possible, then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no
G negligence in running into the back of a man. If he had had better lights or had kept a better look-out, the probability is that the accident would never have happened."

MCCARDIE, J., said:

H "About ten o'clock on a night in July of last year the plaintiff was walking home with one or two friends, and while he was so walking along, a car, driven by the defendant, Draper, came up behind. The lights of that car would show at least 30 yards ahead, yet, in spite of that fact, the car drove into the plaintiff, Page, and caused him serious hurt. Under those circumstances I cannot see how the defendant Draper can avoid the dilemma in which he is put by law. Either he did not keep a good look-out, in which case he was
I negligent, or if he did keep a good look-out, then he failed to have the car at such a speed, or under such control, as to enable him to avoid the plaintiff's body. There is no escape from the dilemma. I cannot see upon this evidence—which counsel, with their high sense of honour, have agreed upon between themselves—how the learned judge can fail to find negligence against Draper."

The case was then sent back to the learned county court judge in order that he might go into the whole matter, with the direction that as a matter of law the defendant was in the unfortunate dilemma that either he did not keep a proper

look-out or he was going too fast to avoid that which his look-out showed him. As my brother CHARLES has said in the course of the argument, in laying down the law in that way in that case ROWLATT, J., and McCARDIE, J., were not saying anything which was new. They were repeating again, as it has been repeated again and again since it was decided in the year 1809, the principle laid down in *Butterfield v. Forrester* (1):

"One who is injured by an obstruction in a highway against which he fell cannot maintain an action if it appears that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction."

In that case BAYLEY, J., said (11 East at para. 61):

"The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault."

LORD ELLENBOROUGH, C.J., said (11 East at para. 61):

"A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Here, to my mind, it is perfectly clear, however wrong and improperly the defendants acted in putting their steam lorry in the place where it was, the plaintiff might by the exercise of ordinary care have avoided the collision, and he must, therefore, have failed to exercise ordinary care, and, as a matter of law was guilty of negligence, and such negligence should have been found as a matter of law, on those facts, by the learned county court judge. It is said, and I agree it is rightly said, that the learned county court judge expressed the proposition of law perfectly accurately. He did. My trouble about it is that expressing the law perfectly accurately he obviously has not applied it. He knew what it was, but he has not applied it to those facts, and the evidence permitted him to find nothing else on these facts but that the plaintiff was guilty of contributory negligence. For these reasons I think this appeal should be allowed.

CHARLES, J.—I agree. I do not want to re-state the facts that my brother SWIFT has already stated, but, shortly, the position presented to the learned county court judge was as follows: In a 14 ft. roadway there was a Foden wagon unlighted standing 9 in. from its kerb, and that Foden wagon was 7 ft. wide. It was a dark, wet night, and there was a good deal of wind blowing. The plaintiff, on his motor cycle, came along towards that unlighted lorry. He had his lamp, and his lamp was lighted, and his lamp would throw a beam 15 yards ahead according to his own testimony. For some reason he failed to see this very large object—the Foden steam wagon—and ran into it. In running into it he sustained grievous hurt. It is said by counsel that in those circumstances this court has no jurisdiction to interfere with a finding that the plaintiff was not guilty of contributory negligence, and that he was therefore entitled to recover damages in this action.

The true position is that the evidence that was given is consistent only with negligence on the part of the plaintiff. If you put that proposition the other way there was no evidence on which a judgment could be founded that the plaintiff was not guilty of contributory negligence. This is a question which we can and ought to consider, and is, in my opinion, within the jurisdiction of this court. The

A learned judge enunciated the principles of law which he had to apply correctly, but when he came to apply them he did not, in my opinion, apply them correctly. I agree that the appeal must be allowed.

Appeal allowed. Judgment entered for the defendants.

Solicitors: *L. Bingham & Co.; Berry Tompkins & Co.*

B [Reported by C. J. MORAN, Esq., Barrister-at-Law.]

Re GROSVENOR SETTLED ESTATES. DUKE OF WESTMINSTER v. McKENNA

D [CHANCERY DIVISION (Maugham, J.), December 2, 3, 1931]

[Reported [1932] 1 Ch. 232; 101 L.J.Ch. 145; 146 L.T. 402]

Settled Land—Leasing powers of tenant for life—Power to grant new lease on surrender of old without underlease being got in—Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6—Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict., c. 120), s. 2—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 42 (1)—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 150.

E Section 42 (1) of the Settled Land Act, 1925, and s. 150 of the Law of Property Act, 1925, empower a tenant for life of settled freehold land subject to a lease and underlease to accept a surrender of the lease and to grant a new lease of the land at the best rent obtainable and with power of re-entry on non-payment thereof even though the underlease is not surrendered, because such a new lease “take[s] effect in possession” within the meaning of s. 42 (1).

F *Re Ford’s Settled Estate* (1) (1869), L.R. 8 Eq. 309, followed; *Ecclesiastical Comrs. for England v. Treemer* (2), [1893] 1 Ch. 166, considered.

G Per **Curiam**: Contemporaneous legislation, such as the 1925 property legislation, must so far as possible be construed as intended to produce a consistent whole. The 1925 property legislation was of a remedial character and must be construed in a beneficent way.

Notes. As to the effect on underlessees of surrender of the head lease for renewal, see 23 HALSBURY’S LAWS (3rd Edn.) 689, para. 1418, text and notes (l)–(q); and for cases on the subject, see 24 DIGEST (Repl.) 587–588, 7068–7071. As to the statutory requirement that leases by a tenant for life shall take effect in possession, see 29 HALSBURY’S LAWS (2nd Edn.) 721, para. 1002, text and note (s); and for cases on the subject, see 40 DIGEST (Repl.) 832, 3080–3083. For the Settled Land Act, 1925, s. 42 (1), s. 64, see 23 HALSBURY’S STATUTES (2nd Edn.) 110, 144; and for the Law of Property Act, 1925, s. 150, see *ibid.*, vol. 20, p. 755.

Cases referred to:

- I (1) *Re Ford’s Settled Estate* (1869), L.R. 8 Eq. 309; 40 Digest (Repl.) 832, 3081.
(2) *Ecclesiastical Comrs. for England v. Treemer*, [1893] 1 Ch. 166; 62 L.J.Ch. 119; 68 L.T. 11; 41 W.R. 166; 9 T.L.R. 78; 37 Sol. Jo. 66; 3 R. 136; 31 Digest (Repl.) 585, 7053.
(3) *Goodright v. Cator* (1780), 2 Doug.K.B. 477; 99 E.R. 304; 31 Digest (Repl.) 533, 6575.

Adjourned Summons as to whether a tenant for life had power to accept a surrender of a lease and grant a new lease in lieu without underleases being got in.

Hugh Richard Arthur, Duke of Westminster, was tenant for life under a settlement of 1901 of 6, Grosvenor Gardens, London, subject to a lease to Robert John

Waller for ninety years from Sept. 29, 1865, which contained a proviso for re-entry upon the rent reserved being unpaid for twenty-one days. A

In 1928 an underlease was granted for seven years from July 1, 1928, to the Secretary of State of the United States, containing a similar proviso for re-entry.

The plaintiff (the Duke) in 1930 desired to accept a surrender of the lease and, without a surrender of the underlease, to grant a new lease for ninety years from March 25 of that year. The proposed rent, £400 a year, was the best rent that could reasonably be obtained; the proviso for re-entry upon the rent remaining unpaid for twenty-one days was proposed to be inserted therein. B

Powers of leasing were contained in the settlement which were not material. This summons asked (i) whether the plaintiff had power under the settlement and/or the Settled Land Act, 1925, to grant a valid and effective new lease of the premises in the form of the draft before the court, on having a surrender of the lease, and without having a surrender of the underlease, in reliance on s. 150 of the Law of Property Act, 1925, and (ii) if not, that under s. 64 of the Settled Land Act, 1925, an order might be made authorising such grant. C

Law of Property Act, 1925, s. 150 :

“(1) A lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any underlease derived thereout. (2) A new lease may be granted and accepted, in place of any lease so surrendered, without any such surrender of an underlease as aforesaid, and the new lease operates as if all underleases derived out of the surrendered lease had been surrendered before the surrender of that lease was effected. (3) The lessee under the new lease and any person deriving title under him is entitled to the same rights and remedies in respect of the rent reserved by and the covenants, agreements and conditions contained in any underlease as if the original lease had not been surrendered but was or remained vested in him. (4) Each underlessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his underlease (subject to the payment of any rent reserved by and to the observance of the covenants agreements and conditions contained in the underlease) as if the lease out of which the underlease was derived had not been surrendered. (5) The lessor granting the new lease and any person deriving title under him is entitled to the same remedies, by distress or entry in and upon the land comprised in any such underlease for rent reserved by or for breach of any covenant, agreement or condition contained in the new lease (so far only as the rents reserved by or the covenants, agreements or conditions contained in the new lease do not exceed or impose greater burdens than those reserved by or contained in the original lease out of which the underlease is derived) as he would have had—(a) If the original lease had remained on foot; or (b) If a new underlease derived out of the new lease had been granted to the underlessee or a person deriving title under him; as the case may require.” D E F G

Settled Land Act, 1925, s. 64 :

“(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner. (2) In this section ‘transaction’ includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing or arrangement; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settle- H I

A ment; and 'effected' has the meaning appropriate to the particular transaction; and the references to land include references to restrictions and burdens affecting land."

Leases and Sales of Settled Estates Act, 1856, s. 2:

B "It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed: First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease ninety-nine years, or where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance, to grant building leases for longer terms, then for such term as the court shall direct. . . . Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof: and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of not less than twenty-eight days after it becomes due."

Settled Land Act, 1925, s. 42:

E "(1) Save as hereinafter provided, every lease—(i) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease; (ii) shall reserve the best rent that can reasonably be obtained . . . ; (iii) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days."

F *Gavin Simonds, K.C., and F. Baden Fuller* for the plaintiff, the tenant for life. [Besides the cases referred to in the judgment, they cited *Goodright v. Cator* (3).] *Grant, K.C., and W. G. Hart* for the first tenant in tail in remainder.

Cleveland-Stevens, K.C., and M. G. Hewins for the first tenant for life in remainder.

G *Sir Herbert Cunliffe, K.C., and C. J. Radcliffe* for the trustees of the settlement.

MAUGHAM, J. [after stating the facts, continued:] The question here arises on the true construction of s. 42 of the Settled Land Act, 1925, taken in conjunction with s. 150 of the Law of Property Act, 1925.

I According to the common law of England, it was impossible to effect the surrender of a lease to a landlord unless existing underleases, if any, were at the same time got in or in some way terminated. That state of things was exceedingly inconvenient where some underlessee, perhaps of a small portion of the property demised, refused—except, it might be, on the payment of a large compensation—to facilitate the transaction by surrendering his underlease to his immediate landlord, even though he was offered a new underlease on exactly similar terms. I may, for example, instance the case of an underlessee of a cottage on a large farm refusing to allow a very beneficial contract to be carried out: and the illustration under modern circumstances which occurs to me is that of a lease of a block of flats where there is perhaps one sub-tenant who is refusing to facilitate a surrender which would in no way prejudice him. The attention of the legislature was called to this difficulty as long ago as 1730, in which year was passed the Landlord and Tenant Act, 1730—I use the modern short title. I was referred to that Act in the statutes at large, where, in the recital with which s. 6 of the Act begins, I find carefully set out the reasons for avoiding the great inconvenience which, according

to the recital, frequently came to lessors and lessees by reason of some under-tenants being in a position to prevent or delay the renewing of the principal lease by refusing to surrender their underleases. Accordingly, s. 6 of the Act made provision whereby chief leases, as they were then called, could, in the future, be renewed without the surrender of existing underleases, if any. Shortly stated, the effect of the Landlord and Tenant Act, 1730, undoubtedly was to leave untouched the rights and duties of the underlessee, and to place the persons to whom the new leases were granted in the position of assignees of the reversion to the underlease. The result was necessarily to some extent anomalous, and led to a rather curious position with regard to the chief landlord's rights of re-entry and possession.

The Landlord and Tenant Act, 1730, had long been in force when the Leases and Sales Estates Act, 1856, was passed. That Act gave to the Court of Chancery power to authorise leases of settled estates subject to certain conditions. One of those conditions was that every such lease should be made to take effect in possession at or within one year next after the making thereof. Another was that every such lease should contain a condition of re-entry on the non-payment of the rent for a period of not less than twenty-eight days after it became due: and there were other conditions to which I need not at the moment refer.

The question arose whether the court had power under that Act to authorise a lease upon the surrender of an existing lease, although an underlease granted by the surrendering lessee was unexpired; or, in other words, whether the court had power, under the Leases and Sales of Settled Estates Act, 1856—relying on the provisions of the Landlord and Tenant Act, 1730—to authorise the granting of a lease leaving an existing underlease unaffected and unsurrendered. The question came before MALINS, V.-C., in *Re Ford's Settled Estate* (1). There, as in the present case, the application was unopposed. I note that Mr. Renshaw appeared for the petition and Mr. Woodroffe for the trustees. The case is reported exceedingly shortly, and the learned Vice-Chancellor, according to the report, merely decided that the proposed new lease would take effect in possession and made the order. The case has been looked up, and a slightly more elaborate statement of the order has been found in the records of the court. The underlease in question, it appears, was an underlease of the ground floor of the premises. The lessee, wishing to pull down and re-build, offered to surrender his lease, to accept a long lease at a larger rent, and to spend some money on re-building. The court ordered that the conditional agreement into which the parties had entered should be carried into effect, and gave power to grant a lease for the term of eighty-four years, terminable at the option of the lessee as therein mentioned, in conformity with the Landlord and Tenant Act, 1730, and the Leases and Sales of Settled Estates Act, 1856, and subject to the provisions and restrictions therein contained.

That decision, which was of a somewhat advantageous character for the tenants for life of settled estates, appears, so far as I have been able to ascertain, in all the textbooks. I think it has never been questioned or doubted, and it seems probable that a number of leases were granted pursuant to that decision before the Settled Land Act, 1882, came into force. Since that Act came into force doubts have been entertained whether a tenant for life having the power to grant leases subject to the provisions of the Settled Land Act, 1882, was empowered to grant a lease on the surrender of an existing lease without getting in an underlease, in reliance on the provisions of the Landlord and Tenant Act, 1730. Those doubts were expressed in a note in four editions of WOLSTENHOLME'S CONVEYANCING AND SETTLED LAND ACTS*, and I observe that they have been repeated in a note to s. 42 (1) of the Settled Land Act, 1925, in WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES—which is the eleventh edition of WOLSTENHOLME'S CONVEYANCING AND SETTLED LAND ACTS—vol. 2, p. 140. Section 42 (1) provides that a lease by a tenant for

* See the note to sect. 7, sub-sect. (1), of the Settled Land Act 1882 (now replaced by sect. 42, sub-sect. (1), of the Settled Land Act 1925) in Wolstenholme's Conveyancing and Settled Land Acts (7th edit.), pp. 305, 306; (8th edit.), p. 323; (9th edit.), pp. 345, 346; and (10th edit.), pp. 385, 386.

- A life must be made to take effect in possession not later than twelve months after its date, must reserve the best rent that can reasonably be obtained, and must contain a condition of re-entry on the rent not being paid within the time therein specified, not exceeding thirty days. Having regard to those provisions, the main doubt must necessarily be whether it ought to be held, on the true construction of that section, that such a lease can be granted without the surrender of any existing underlease. In that connection it must be borne in mind that the provisions of the Landlord and Tenant Act, 1730, have been in effect reproduced, without variation, in s. 150 of the Law of Property Act, 1925, which begins with the statement that
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“a lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any underlease derived thereout.”

- C It is necessary to consider s. 150 of the Law of Property Act, 1925, carefully in order to discover the result of the transaction, the problem being, of course, the same in that respect now as it was when the Landlord and Tenant Act, 1730, was passed. It is particularly to be noted that each underlessee

“is entitled to hold and enjoy the land comprised in his underlease (subject to the payment of any rent reserved by and to the observance of the covenants agreements and conditions contained in the underlease) as if the lease out of which the underlease was derived had not been surrendered.”

- D That provision plainly maintains the rights of the underlessees, provided that they comply with the obligations imposed by the underleases under which they hold; and sub-s. (5) provides: [After reading the subsection [which is printed ante] his Lordship continued:] In the present case, as in *Re Ford's Settled Estate* (1), there is no active opposition to the argument put forward on behalf of the tenant for life, but I think that I have derived from counsel appearing for the other parties to the summons all the assistance which I could have obtained had there been an active opponent to the application.
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- It is only candid to say that real doubts arise by reason of the language used in s. 42 (1) of the Settled Land Act, 1925. Only in a somewhat qualified sense can it be said that a lease granted while an underlease is still on foot takes effect in possession. It can take effect in possession only sub modo, and the right of re-entry can be exercised only subject to the conditions and qualifications in s. 150 of the Law of Property Act, 1925. I have felt the weight of the arguments which have been called to my attention as being arguments which an active opponent to this application might have put forward. However, I think that, in the circumstances under consideration, both the words “to take effect in possession” and the reference to the conditions of re-entry can be explained. In such a case as the present it can be said, not unreasonably, that the lease is to take effect in possession, in regard to the immediate lessor, in contradistinction to a lease which is expressed to be a lease to take effect in reversion, which is the context to be found in s. 42 (1) of the Settled Land Act, 1925. I think, also, that in such a case the reference in the same subsection to the condition for re-entry can be construed as a reference to the right of re-entry against the immediate lessee. I would add that *prima facie*, in the case of contemporaneous legislation such as that of 1925, it is the duty of the court, as far as possible, to construe the legislation as intended to produce a consistent whole, and I would emphasise the fact that, in certain cases, grave injury might be done to a tenant for life of settled land unless in granting a lease under s. 42 of the Settled Land Act, 1925, he had power to rely on s. 150 of the Law of Property Act, 1925. But, however that may be, I think that in the present case the court is bound to place great reliance on such a decision as *Re Ford's Settled Estate* (1), pronounced and reported as long ago as 1869, and not, so far as I know, criticised in any reported case; indeed, I think that it derives some support from *Ecclesiastical Comrs. for England v. Tremer* (2). In *Re Ford's Settled Estate* (1) the learned Vice-Chancellor must, in my opinion, be taken as having decided—although the report, which is very meagre, does not in fact so state—that
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a new lease granted under the Leases and Sales of Settled Estates Act, 1856, while an underlease was still outstanding, was yet a lease taking effect in possession. A

That case must be taken to have been well known at the time of the passing both of the Settled Land Act, 1882, and of the legislation of 1925. Also it is well settled, and it is to be assumed, that Parliament not only knows the statute law, which is obvious, but must also be taken to be aware of any judicial interpretation of words which have received judicial interpretation if the same or substantially the same words are contained in later enactments in regard to the same subject-matter. I think that I am justified in taking the view that the legislature, in passing the legislation of 1925, was not disregarding the ancient decision in *Re Ford's Settled Estate* (1), and that, accordingly, in employing the language in s. 42 of the Settled Land Act, 1925, referring to leases taking effect in possession and to the necessity for a condition of re-entry, was not using those words in a sense narrower than that which had been put upon them in 1869. It is to be added that the legislation of 1925 was of a remedial character and must be construed in a beneficent way. I cannot decline to accede to the argument which has been put before me unless I can hold that the judgment in *Re Ford's Settled Estate* (1) was wrong, which I should be very loath to do in a case relating to real property in reliance on which titles have been obtained, or unless I can distinguish in some way the language used in the Law of Property Act, 1925, and the Settled Land Act, 1925, from that used in the Landlord and Tenant Act, 1730, the Leases and Sales of Settled Estates Act, 1856, and the Settled Land Act, 1882. I think that I should be wrong in taking either of those courses, and I therefore hold that the plaintiff has power, under the Settled Land Act, 1925, to grant the lease in the form proposed, although the underlease has not been surrendered. B C D E

Declaration accordingly.

Solicitors: *Boodle, Hatfield & Co.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

A

Re SUNNYFIELD

[CHANCERY DIVISION (Maugham, J.), October 14, 1931]

[Reported [1932] 1 Ch. 79; 101 L.J.Ch. 55; 146 L.T. 206]

B

Sale of Land—Restrictive covenant—Discharge—Duty of court to see all persons affected have opportunity to be heard—Covenant by purchaser expressed to be for the benefit of adjacent land—No such land any longer retained by vendor—No express assignment of benefit of covenant—No building scheme—No definition in deed containing covenant of property for benefit of which covenant entered into—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 84 (2)—Land Registration Act, 1925 (15 Geo. 5, c. 21), s. 82.

C

In 1873 freehold premises, which were not affected by any building scheme, were conveyed to D. by the Ecclesiastical Commissioners, and D. covenanted with them and their successors that he, his heirs and assigns would not erect more than four houses thereon, which were to be used as private residences, or allow them to be used for a purpose which the surveyor to the commissioners might deem injurious to their adjoining property. These restrictions were entered on the Land Registry Charges Register in 1909. In 1931 neither the commissioners, who no longer retained any of the adjoining property, nor the holders of adjacent property acquiring title under them, any longer claimed to enforce the covenants, the benefit of which had never been expressly assigned. On a summons taken out by D.'s successor in title under the Law of Property Act, 1925, s. 84 (2), and the Land Registration Act, 1925, s. 82, for a declaration that "Sunnyfield" was no longer subject to the restrictions and for cancellation of the entry on the register.

D

E

Held: in the absence both of express assignment and of anything in the deed containing the covenants to define the property for the benefit of which they were entered into, the benefit of the covenants had not passed with the adjoining land, and, therefore, the premises conveyed to D. were no longer bound by the covenants.

F

Renals v. Cowlishaw (2) (1879), 11 Ch.D. 866, and *Rogers v. Hosegood* (3), [1900] 2 Ch. 388, applied.

Per CURIAM: The court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard.

G

Notes. Referred to: *Re Ecclesiastical Comrs. for England's Conveyance*, *Re Law of Property Act*, 1925, [1936] Ch. 430.

As to the statutory jurisdiction of the court to make declarations as to restrictive covenants affecting land, see 14 HALSBURY'S LAWS (3rd Edn.) 571, para. 1062, text and notes (a)–(c), and 29 *ibid.* (2nd Edn.) 452–453, para. 660, text and note (f); and as to retention of land capable of being benefited by such a covenant, see 14 *ibid.* 563, para. 1050. For the Law of Property Act, 1925, s. 84 (2), and the Land Registration Act, 1925, s. 82, see 20 HALSBURY'S STATUTES 607 and 1013 respectively.

H

Cases referred to:

I

- (1) *Reid v. Bickerstaff*, [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 958, C.A.; 40 Digest (Repl.) 341, 2770.
- (2) *Renals v. Cowlishaw* (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (3) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- (4) *Chambers v. Randall*, [1923] 1 Ch. 149; 92 L.J.Ch. 227; 128 L.T. 507; 39 T.L.R. 6; 67 Sol. Jo. 61; 40 Digest (Repl.) 329, 2701.

Adjourned Summons for declarations as to restrictive covenants, and for cancellation or amendment of the Land Charges Registry entries thereof.

The following facts are taken from the judgment:

By a conveyance dated April 3, 1873, made between the Ecclesiastical Commissioners and John Henry Dallmeyer, land, which at the date of the present summons was comprised in freehold land and premises known as "Sunnyfield," West Heath Road, Hampstead, was conveyed to John Henry Dallmeyer in fee simple, and John Henry Dallmeyer entered into covenants with the vendors and their successors that he, his heirs or assigns would, inter alia, not erect on the land more than four houses, and would not use the houses or allow them to be used otherwise than as private residences, or use the land or allow it to be used for any purpose which, in the opinion of the surveyor for the time being to the vendors, might be or become injurious to the adjacent property of the vendors, their successors or assigns. On Jan. 26, 1909, the restrictions were entered in the Charges Register at the Land Registry; and, on Oct. 16, 1924, Alexandrina Elizabeth Henrietta Menke, the applicant, bought "Sunnyfield." During May, 1931, the applicant tried to sell "Sunnyfield" as a private residence, but owing to its size and the cost of upkeep, no private purchaser was forthcoming. Two prospective purchasers, however, negotiated for the purchase of it in two lots, conditionally upon the footing that the restrictions should be proved to be no longer effective. None of the eight owners of adjacent property deriving title under conveyances from the Ecclesiastical Commissioners claimed the right to enforce the restrictions, nor was that right claimed by the Ecclesiastical Commissioners, who no longer had any land in the immediate neighbourhood of "Sunnyfield," and, after extensive inquiries, no indication was found that "Sunnyfield" had ever been the subject of a building scheme.

The applicant, by this summons, asked, by way of relief under s. 84 (2) of the Law of Property Act, 1925, and s. 82 of the Land Registration Act, 1925, that (i) it might be declared that no part of "Sunnyfield" was any longer affected by any of the restrictions; (ii) alternatively, that the nature and extent of the restrictions might be declared and whether the same were at the date of this summons enforceable, and, if so, by whom; and (iii) that the entry of the restrictions in the Charges Register at the Land Registry might be cancelled or amended.

The Law of Property Act, 1925, provides:

"Section 84 (2). The court shall have power on the application of any person interested—(a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or (b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom. (3) The Authority shall, before making any order under this section, direct such inquiries, if any, to be made of any local authority, and such notices, if any, whether by way of advertisement or otherwise to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any inquiries notices or other proceedings previously made, given or taken, the Authority may think fit. (4) The Reference Committee mentioned in this section may make rules in relation to any applications to be made to the Authority under this section, . . ."

Gavin Simonds, K.C., and R. F. Roxburgh, for the applicant, the owner of the servient land, referred to *Chambers v. Randall* (4); *Reid v. Bickerstaff* (1); *Rogers v. Hosegood* (3); and *Renals v. Cowlishaw* (2).

W. F. Waite, for the commissioners, the covenantees, disclaimed any right to enforce or benefit under the covenants.

Andrewes-Uthwatt, for an adjacent owner, advanced no claim to enforce the covenants.

MAUGHAM, J., stated the facts, and continued: When such an order as this is asked for, the court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard, stating

A their objections in argument before the court, and inviting the court to refuse to exercise its powers. In the present case, it seems that every effort has been made to give notice to all persons having a probable interest in the property, and accordingly I ought not to refuse to proceed to the hearing of the matter.

B The questions which I have to determine are, first, whether I can come to the conclusion that there never was a building scheme in the technical sense, under which purchasers from the Ecclesiastical Commissioners came under covenant to conform to the restrictions for the benefit of the estate in course of development; and, secondly, whether, assuming that there was no building scheme, the Ecclesiastical Commissioners are entitled, or any purchaser from them of land adjoining "Sunnyfield" is entitled, to enforce the restrictions. The case is one in which it would not have been unreasonable to require purchasers to enter into restrictive covenants, so as to make the same the local law of the estate; but it is also one in which the Ecclesiastical Commissioners may have thought that there was no need to lay out the property as a building estate. The plots are of various sizes, some of them being very considerable in extent, and the Ecclesiastical Commissioners may have desired to retain the right to alter or vary, on sales by themselves, the nature of the restrictions which they wished to impose. Mr. Brian Clutton, a member of the firm of Messrs. Clutton, surveyors to the Ecclesiastical Commissioners, says, in para. 9 of his affidavit sworn in this case:

"So far as can be ascertained the said land was never offered for sale by public auction and never laid out as a building estate."

E That is not conclusive, but it certainly tends to show that there was no building scheme. Further, an affidavit by the applicant's husband, who is acting for her during her absence abroad, states that neither he nor his wife's solicitors have been able to hear of or find any suggestion of a building scheme in the extensive inquiries which they have made nor in the numerous documents which they have examined. That also is negative evidence, but it supports the statements of Mr. Clutton, and shows that there is very great improbability of there ever having been a building scheme. I need not do more than mention the name of one of the many cases relating to building schemes. *Reid v. Bickerstaff* (1) finally lays down the facts necessary to be established to enable the court to come to the conclusion that there is a building scheme in the legal sense.

F Bearing in mind the particular facts, and the statements made by judges in that and in other cases, I must draw the inference that in the present case there never was a building scheme affecting the property of which "Sunnyfield" forms part. The Ecclesiastical Commissioners no longer retain any property contiguous to "Sunnyfield," and do not themselves make any claim to enforce the restrictions. They take the view that there never was a building scheme.

G The second question which I have to decide involves the inquiry whether the benefit of the restrictions can have passed to any of the adjoining purchasers from the Ecclesiastical Commissioners. It is well settled that, apart altogether from building schemes, restrictive covenants may in certain cases be enforced by successors in title of the original covenantees—for example, if the benefit of the covenant has been expressly assigned by conveyance from the original covenantee, or if the covenant is expressed to be for the benefit of a parcel of neighbouring land purchased by a later purchaser, in which case the benefit passes even though the subsequent purchaser never knew of the covenant.

H In the present case the conveyances produced show clearly that there is no express assignment of any kind under which the restrictions can be enforced, and it is also clear from the conveyances that the restrictions are not expressed to be for the benefit of the adjacent property of the Ecclesiastical Commissioners or of any defined area near "Sunnyfield." In my opinion, it is settled law that, in the absence of an express assignment of a restrictive covenant such as is here in question, the purchaser of a piece of the adjoining land cannot claim the benefit of the restrictive covenant unless it appears that there is something in the deed con-

taining the covenant to define the property for the benefit of which it was entered into, so that the person entering into the covenant becomes aware at the date of the deed of the persons who may in future enforce the covenant. *Renals v. Cowlishaw* (2), *Rogers v. Hosegood* (3), and *Reid v. Bickerstaff* (1) show that the benefit of a restrictive covenant cannot pass unless it is expressly assigned or is so annexed to the land as to pass by mere conveyance.

I therefore come to the conclusion that there is no person in a position to enforce the restrictions, and accordingly I have power to declare that the land in question is not now bound by the covenant in question.

Declaration that the land was not bound by the covenant.

Solicitors: *Coward, Chance & Co.*; *Milles, Jennings White, & Foster*; *Bird & Bird*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

ESHELBY v. FEDERATED EUROPEAN BANK, LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), October 27, 1931]

[Reported [1932] 1 K.B. 423; 101 L.J.K.B. 245; 146 L.T. 336]

Guarantee—Conditional guarantee—Performance by creditor of work “in accordance with agreement”—Notice by creditor of default by principal debtor.

Pleading—Amendment—Claim—Addition of cause of action not existing at date of writ.

By a contract under seal made between a building owner, a contractor, and one T. and the defendant bank as guarantors the contractor undertook to do certain work for the building owner. By cl. 2 payment was to be made in four equal instalments, on Oct. 22, 1930, and Jan. 15, April 15, and July 15, 1931, “subject to the said works being duly executed in accordance with this agreement.” By cl. 11: “In consideration of the contractor and of the bank, at the request of the guarantor [T.], severally entering into this agreement, the guarantor hereby agrees with the contractor, and by way of separate agreement hereby agrees with the bank and undertakes as follows, that is to say: (a) That the company shall, subject to the said works being duly executed in accordance with this agreement, duly and punctually make to the contractor the payments prescribed by cl. 2 hereof, and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date, he, the guarantor, will himself immediately make the payment so in default to the contractor; (b) the obligation of the guarantor under the clause is to be a continuing obligation.” By cl. 12: “In consideration of the premises the bank hereby agrees and undertakes with the contractor that upon any default for three days or more (written notice of which shall be given to the bank by the contractor within three days of such default) on the part of the guarantor in making any payment under para. (a) of cl. 11 hereof the bank itself will immediately make the payment so in default to the contractor provided this contract has not been determined by the company.” The company did not pay the first instalment, but no notice of default was given under cl. 11 to T. nor under cl. 12 to the bank. T. refused to pay under his guarantee and on Nov. 27, 1930, the contractor issued a specially endorsed writ claiming the first instalment against the bank. The

- A** action was heard on March 16, 1931, by an official referee who gave leave to the contractor to amend the claim by adding the amount of the second instalment due on Jan. 15, 1931, which by that time had become due. The referee found that at the date of the issue of writ the contractor had not completed the work in accordance with the contract. He gave judgment for the contractor for the two instalments less £80.
- B** **Held** by the Divisional Court: as the claim for the second instalment was a new cause of action commencing after the issue of writ, the official referee had no power to amend the endorsement to the writ as he had.
- Held** by the Court of Appeal (SCRUTTON and SLESSER, L.JJ.): the liability of T. under his guarantee could not arise unless and until the work had been done in accordance with the contract, the work had not been so executed, and, accordingly, there had been no default by T. with regard to his undertaking under cl. 11 and no consequent liability by the defendant bank under cl. 12; further (by GREER and SLESSER, L.JJ.), the notices of default provided for in cl. 11 and 12 were conditions precedent to the liability of T. and the bank, and those notices had not been given; and, therefore, the contractor's claim must fail.
- D** **Notes.** Referred to: *Wilson v. Mitchell*, [1939] 2 All E.R. 869.
- As to the extent of a guarantor's liability, see 18 HALSBURY'S LAWS (3rd Edn.) 444 et seq.; and for cases see 26 DIGEST 79 et seq. As to the amendment of pleadings, see 25 HALSBURY'S LAWS (2nd Edn.) 256-260; and for cases see DIGEST (Pleading, Practice and Procedure) 92 et seq.
- E** Cases referred to:
- (1) *Tottenham Local Board of Health v. Lea Conservancy Board* (1886), 2 T.L.R. 410; 1 Digest 20, 157.
 - (2) *Creed v. Creed*, [1913] 1 I.R. 48; 23 Digest (Repl.) 61, *151.
 - (3) *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch.D. 713; 46 L.J.Ch. 311; 36 L.T. 433; 3 Asp.M.L.C. 411; 1 Digest 22, 179.
- F** (4) *H. Dakin & Co., Ltd. v. Lee*, [1916] 1 K.B. 566; 84 L.J.K.B. 2031; 113 L.T. 903; 59 Sol. Jo. 650, C.A.; 7 Digest 366, 135.
- (5) *Cutter v. Powell* (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 463, 3454.
- Appeal** from an order of a Divisional Court, allowing an appeal from an official referee.
- G** A company known as Olympus, Ltd., employed the plaintiff to carry out repairs and decorations to premises at 1, Sutton Place, Soho Square, W. An agreement under seal was entered into, dated Aug. 28, 1930, between the plaintiff and Olympus, Ltd., the defendants and one Taglioni being also parties to the agreement as guarantors. The plaintiff agreed to do the work according to the specifications attached to the agreement for £1,500, which was to be paid in four quarterly instalments each of £375 on Oct. 22, 1930, and Jan. 15, April, 15, and July 15, 1931. These payments were "subject to the said works being duly executed in accordance with the agreement." By cl. 11 of the agreement Taglioni agreed to pay the contractor himself if default were made by the company, and notice of such default were given to him. By cl. 12 the bank agreed that upon any default for three days or more, and of which notice was to be given within three days, on the part of Taglioni under cl. 11, they would pay the amount so in default. The same parties entered into an agreement under seal dated Sept. 8, 1930, which was in similar terms and provided for the payment to the contractors of £385 4s. by four instalments of £96 6s. payable on the same dates. Olympus, Ltd., were unable to pay the first instalment on Oct. 22, 1930. Taglioni refused to pay, and the plaintiff called upon the defendants to pay. They refused, and the plaintiff issued the writ in this action on Nov. 27, 1930, claiming £471 6s. The matter came before the official referee on March 16, 1931, and he, on his own initiative, allowed the plaintiff to amend his claim so as to include the instalment which fell

due on Jan. 15, 1931. After taking evidence and getting an expert to inspect the work, the official referee found that at the date of the issue of the writ £80 would have to be spent in order to complete the work according to the contract, and on March 26, 1931, he gave judgment for the plaintiff for the amount of the two instalments less the above £80. The defendants appealed on the grounds (i) that the official referee had no jurisdiction to allow the amendment, as the second instalment did not fall due till after the issue of the writ; and (ii) that they were not liable at all under the guarantee, the work not having been duly executed under the contract.

du Parcq, K.C., and *Joseph Baker* for the defendants.

Lord Erleigh, K.C., and *Alan Bell* for the plaintiff.

SWIFT, J. [after stating the facts continued:] There is a very great deal to be said for the view taken by the official referee, but, in my opinion, he had no power to make the amendment to the writ which he did. When an action has been started the court has, at all its stages until it is finally determined, most ample powers of amendment, and it is the duty of the court to exercise those powers. The rules of the Supreme Court provide, in Ord. 28, r. 1, that the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. By r. 12 of that order:

"The court or a judge may at any time and on such terms as to costs or otherwise as the court or a judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

It sometimes happens that neither party has a very clear and definite view of their real position until the witnesses have been examined and cross-examined and documents have been criticised in open court. If the true points at issue are to be determined, and real justice to be done, the pleadings of neither party should be too rigidly adhered to and the court should make such amendments as are necessary for the real rights of the parties to be determined. But here the learned official referee seems to me to have gone much further than amending the proceedings. He has allowed the plaintiff to bring into this action an entirely fresh cause of action which arose after the action had been started. He has done that without the consent of the defendants, and I can find no authority for the making of such an amendment.

In *Tottenham Local Board of Health v. Lea Conservancy Board* (1), an action brought to restrain the Lea Conservancy Board from allowing the effluent from the sewage works of the plaintiff board to flow into the River Lea, which they had given notice of their intention to do, it was sought to amend the statement of claim by stating facts relating to some proposed new works, and adding an alternative claim for an injunction to restrain the Lea Conservancy Board from interfering until it should be ascertained whether the proposed new works were efficient. *PEARSON, J.*, refused the application, and there was an appeal. *COTTON, L.J.*, said he would give no opinion whether the court had power to allow the proposed amendment. If there were power, he thought it ought not to be exercised in the circumstances of that case; but *BOWEN, L.J.*, said:

"It was not necessary to decide the point, but he had a very strong opinion that the amendment could not be allowed inasmuch as it related to a cause of action which did not exist at the time when the writ was issued."

FRY, L.J., did not express any opinion upon the matter at all. So far as I know, the remarks of *BOWEN, L.J.*, in that case are the only authority which is to be found in this country, with the exception of an observation of *SIR GEORGE JESSEL, M.R.*, in a case to which I will immediately allude upon this point whether or not

A a writ can be amended so as to include a cause of action which was not in existence at the time when the writ was issued. I can find nothing in the rules which justify such an amendment. To bring in such a cause of action does not seem to me to be amending the proceedings at all; it is starting a new cause of action, and one which could not have been sued upon at the time the action was started.

B There is an Irish case of *Creed v. Creed* (2) which seems directly to decide that such a thing cannot be done. The headnote is:

C "A.B., believing that X died intestate, took out administration intestate to him and commenced an action as such administrator against C.D. C.D., who had been aware that X left a will appointing him executor, declared that fact for the first time in his defence, and thereupon A.B. took out administration with the will annexed (C.D. having renounced) and sought to amend the pleadings accordingly. HELD: that A.B.'s application must be refused, as at the date of the issue of the writ she had no title to sue."

BARTON, J., said:

D "I am of opinion that this summons should be dismissed with costs as the plaintiff's letters of administration were void ab initio, and she had no title to sue when the action was brought."

In the present action there was no right on the part of the plaintiff to sue for that second instalment when the action was brought. I think that *Creed v. Creed* (2) is helpful guidance, and that, in the absence of any express rule on the matter in our own courts or in our own rules of proceedings, such a cause of action cannot

E be added to the writ here. The judgment of SIR GEORGE JESSEL, M.R., which I referred to, was given in *Original Hartlepool Collieries Co. v. Gibb* (3) (5 Ch.D. at p. 718), where he says:

F "Where a plaintiff issues a writ for damages he claims damages up to the time of issuing his writ, and where the defendant brings a counter-claim for damages it is his statement of claim in the same action, and that is up to the issuing of the writ, and, as far as I can see, it being a cross-claim and not a defence to the original claim, there is no reason why, if he adopts the plaintiff's writ, he should go beyond the issuing of the writ for damages, because that would not be justice. If the defendant can get damages in respect of another matter up to the date of his counter-claim, the plaintiff ought to have the same right so to increase his damages, to do justice. If it is a continuous

G act, injuring the plaintiff, and the plaintiff says: 'I am entitled to £500 damages up to my writ and £500 more to the time of your putting in your counter-claim,' and the defendant says: 'I am entitled to £600 damages subsequently to the issuing of the writ,' he would get a verdict for £100; although the plaintiff is entitled to the £500 damages he is estopped and the other is not. That does not seem to be consistent with justice. When I come to look

H at Ord. 20 [now Ord. 24] I find it relates to 'Matters arising pending the action.' If it was intended that the counter-claim should include matters arising pending the action, it would have said so; but I find it is carefully restricted by r. 1:

I "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply."

So that it is carefully restricted to defence, either to an action or to a counter-claim. The only way that I can see in which you could allege a

counter-claim for matters up to its date would be by saying that the counter-claim was a defence; but that is not the way it is treated throughout the rules. It is always treated as a cross-action, not as a defence, but a true cross-action; the rule being that you must set off damages in the cross-action against the damages in the first action. It seems to me, therefore, that you cannot bring your counter-claim for damages which accrued after the writ."

Up to there, what the learned Master of the Rolls has said has been, if I may say so, entirely in accordance with what has been in my mind throughout this case, and what I am endeavouring to say now. He goes on and makes this observation:

"By the leave of the court you can do anything. That is another matter, because the court can give leave to amend on both sides, and can easily amend the writ."

There I very respectfully differ. By leave of the court one cannot do anything; the court is limited in giving its leave to the powers which are conferred upon it by the rules and by the statute under which those rules are made, and I cannot see how without the consent of the parties—and, of course, one can do anything with consent—one can so amend a writ as to change completely the cause of action and bring in a cause of action which was non-existent at the time the writ was originally issued. The learned Master of the Rolls said: "The court can easily amend the writ." If it can, the court has not done it in the present case.

The court has amended the statement of claim, which is endorsed upon the writ, but it has not amended the writ itself; and, indeed, it could not have done so, because in order to make this action on the second instalment one which would come within the writ, the date of the writ would have had to be altered from Nov. 27, 1930, upon which it was issued and soon after which it was served, to some date after Jan. 15, 1931. I do not think the court could possibly alter the writ in that way. It could not make an amendment to say that the writ had not been issued until some date after Jan. 15, 1931. It seems to me, therefore, that this amendment ought never to have been made, and that this judgment, so far as it is for more than the £471 6s. which was originally claimed, is bad and must be set aside.

CHARLES, J.—The first point which has been discussed arose during the hearing by the official referee. In spite of vigorous protests made on behalf of the defendants, who wanted no such amendment, he amended the claim by allowing the plaintiff to add a claim for the second instalment under the contract, which was due on Jan. 15, 1931. By March, 1931, that instalment had become due, and so he said: "We will try the case as though the two instalments were due at the date of the writ." But they were not, and so what he did in fact, against the will of the defendants, was to make an amendment which related to a cause of action which did not exist at the date when the writ was issued. It has been argued that he had power to do this, but it is perfectly plain that in *Tottenham Local Board of Health v. Lea Conservancy Board* (1) **BOWEN, L.J.**, said the court was very clear as to the impropriety of amendments of this sort being made, and he said he

"had a very strong opinion that the amendment should not be allowed, inasmuch as it related to a cause of action which did not exist at the time when the writ was issued."

There are other authorities referred to by my Lord which point in the same direction, and; indeed, in the Rules of the Supreme Court there is nothing to warrant such an amendment being made. In my view, the amendment was wrongly made. The learned official referee had no power to make such an amendment at all, and, therefore, as to the £471 6s., which was the amount added by the amendment, judgment should be for the defendants.

THE COURT further held (i) that the guarantors were only bound if it were proved that the work had been duly executed in accordance with the contract and that condition had not been fulfilled, and (ii) that the receipt of a notice under cl. 11

A or cl. 12 of the contract was a condition precedent to the liability of Taglioni and the defendants respectively and no notice had been given. Accordingly, the appeal was allowed, and the plaintiff appealed to the Court of Appeal. There was no appeal against the decision of the Divisional Court that the second instalment under the contract could not be recovered, the amendment of the plaintiff's claim by the official referee not being justified.

B The plaintiff appealed.

Lord Erleigh, K.C., and *Alan Bell* for the plaintiff.

Turrell, for the defendants, was not called upon to argue.

SCRUTTON, L.J.—Two points are taken here, and the more important one, upon which I decide this case, is based upon the guarantee of Taglioni in cl. 11 of the agreement. His undertaking was that Olympus, Ltd., should

C “subject to the said works being duly executed in accordance with this agreement, duly and punctually make to the contractor the payments [prescribed], and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date, he, the guarantor, will himself immediately make the payment so in default to the contractor.”

D But it is admitted that at the relevant date the works were not duly executed according to the agreement. The amount of work by which they fell short of that standard has been assessed at £80 by the official referee. Taglioni refused to make any payment under cl. 11. The Divisional Court have held that the sum of £471 6s. was never due to the plaintiff, by Olympus, Ltd., and that it was a condition precedent to the liability of Taglioni that this sum should be due to them. In *Dakin & Co., Ltd. v. Lee* (4), a decision of the Court of Appeal, the facts were somewhat similar, the parties being those to a building contract. The court considered that in the circumstances of that case, as between the building owner and the builders, the work had been substantially performed and that the builders were entitled to the contract price, subject to a counter-claim. That decision turned upon the particular facts of that case. But on the facts of this case where the performance of a builder's contract is in dispute between the builder and a surety for the building owner, and the liability undertaken by the surety is that if the work is done in accordance with the agreement the building owner shall pay, and that on the building owner's default he will pay, the surety's liability cannot arise where the work has not been done in accordance with the agreement. The sum payable on the day stipulated, Oct. 22, 1930, was due from Olympus, Ltd., and in the event of default by Taglioni, but, in the circumstances, Taglioni was not liable on his guarantee. I agree with the view taken by the Divisional Court on this point, and that is sufficient to decide this case. The appeal will be dismissed.

E A further point was taken by the defendants that, as the plaintiff had not given to Taglioni the notice of default under cl. 11 or to the defendants the notice of default under cl. 12 of the agreement, to which they were respectively entitled, there was no liability on Taglioni and the bank, as these notices, it was contended, were conditions precedent to their liability. Fortunately, it is unnecessary for me to decide this case upon such a point as that.

F **G** **H** **I** **GREER, L.J.**—I agree that this appeal should be dismissed. The bank were only liable under this agreement in the event of an earlier liability on the part of Taglioni. The question arises, therefore, whether Taglioni was in default. The provision in cl. 11 was that

“upon any default for three days or more on the part of the company (written notice of which shall be given by the contractors to the guarantor within six days of such default) in making any payment on the prescribed date”

the guarantor—Taglioni—would himself immediately make the payment so in default. Was the giving of written notice of default within six days of the default

by the contractor to Taglioni a condition precedent to Taglioni's liability? The point, though it may appear technical, is in reality one of substance, for it bears upon the question whether there was any liability by the defendants to pay these moneys. It is clear in reading cl. 11 of this agreement that the event upon which Taglioni agreed to make the payment was not the default by itself on the part of Olympus, Ltd., but upon that default, due notice of which shall have been given to Taglioni by the contractor. Both the default and the notice of it were conditions precedent to Taglioni's liability, and no notice of default within the six days was given. Accordingly, there was no default on the part of Taglioni, and so there was no liability on the defendants under cl. 12 of the agreement. It is upon that ground that I decide this case in favour of the defendants.

I feel some difficulty upon the other point on which SCRUTTON, L.J., has based his judgment. For, if the decision in *Dakin & Co., Ltd. v. Lee* (4) lays down a principle of law, it seems to me to be contrary to the principle laid down in a long series of cases, based on *Cutter v. Powell* (5), that where work is to be done for a named sum, neither that sum nor any part of it can be recovered while the work remains undone. I prefer, therefore, not to decide the case upon this point, for it would involve further consideration of whether the decision in *Dakin's Case* (4) can be reconciled with the principle laid down in *Cutter v. Powell* (5). It seems to me to make no difference that the defendants here are guarantors, for their liability depends on that of Taglioni. If the contractor here had not broken his contract so as to make himself liable in damages, but had only through some trifling omission failed, as the plaintiffs in *Dakin & Co., Ltd. v. Lee* (4) were held to have failed, to recover the full contract price, then I am inclined to think that Taglioni, had he received the stipulated notice of default, would have been liable to make the agreed payment, and that, therefore, on his default, had the defendants received the stipulated notice of that default, they would have been liable in this action. But this I do not decide. I rest my judgment on the other ground—that the plaintiff has omitted to give the notices of default which under the agreement between the parties are conditions precedent to the liability of the defendants.

SLESSER, L.J.—I agree. In my opinion, both points taken by the defendants are good. By cl. 11 Taglioni undertook that Olympus, Ltd., should "subject to the works being duly executed in accordance with this agreement . . . make to the contractor," the plaintiff, the payments stipulated for in cl. 2,

"and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date, he, the guarantor, will himself immediately make the payment so in default to the contractor."

It has been found as a fact by the official referee that the works never were duly executed in accordance with the agreement. It follows that Olympus, Ltd., were never in default, and so Taglioni was never in default, and also there was no liability on the defendants under cl. 12 of the agreement. I also agree with GREER, L.J., that this appeal should be dismissed on the ground that, in the absence of the notices of default required by cl. 11 and 12 of the agreement, there was no liability on either Taglioni or on the bank. I can only read these clauses as providing that the notices of default were conditions upon which these guarantees were to operate.

Appeal dismissed.

Solicitors: *Steadman, Van Praagh, & Gaylor; Arram, Fairfield & Co.*

[Reported by R. A. YULE, Esq., and C. G. MORAN, Esq., Barristers-at-Law.]

A

WINKWORTH v. RAVEN

[KING'S BENCH DIVISION (Swift and Macnaghten, JJ.), January 12, 13, 23, 1931]

[Reported [1931] 1 K.B. 652; 100 L.J.K.B. 206; 144 L.T. 594;
47 T.L.R. 254; 75 Sol. Jo. 120]

B

Inn—Damage to guest's property—Motor car—Unheated garage—Damage to water-jacket of engine by frost—No negligence by innkeeper.

Though an innkeeper may be said to be an insurer of the goods of his guest against loss by theft with certain exceptions, he is not an insurer of the person of the guest or of the guest's goods generally. He is only responsible for injury to the guest or to the guest's goods if negligence on his, the innkeeper's, part is proved.

C

Accordingly, where the plaintiff, a guest at an hotel of which the defendant was the proprietor, garaged his motor car in the unheated garage provided by the defendant, and, owing to frost, the water-jacket of the engine was cracked,

D

Held: the defendant, as innkeeper, was only bound to supply such accommodation for the plaintiff and his goods as he possessed; he undertook that that accommodation was reasonably fit for the purpose, but he did not warrant that it was the best that could be devised, nor promise that it would protect the guest or his goods from every form of danger; there was no proof of negligence on his part; and, therefore, the plaintiff was not entitled to recover from him in respect of the damage to the car.

E

Notes. Applied: *Williams v. Owen*, [1956] 1 All E.R. 104.

As to an innkeeper's liability to his guest, see 21 HALSBURY'S LAWS 445 et seq.; and for cases see 29 DIGEST 5 et seq.

Cases referred to:

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(1) *Maclean v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 33 T.L.R. 351; 29 Digest 9, 120.

(2) *Dawson v. Chamney* (1843), 5 Q.B. 164; 1 Dav. & Mer. 348; 13 L.J.Q.B. 33; 7 J.P. 689; 7 Jur. 1037; 114 E.R. 1210; 29 Digest 13, 166.

(3) *Morgan v. Ravey* (1861), 6 H. & N. 265; 30 L.J.Ex. 131; 3 L.T. 784; 25 J.P. 376; 9 W.R. 376; 158 E.R. 109; 36 Digest (Repl.) 21, 85.

G

(4) *Hyde v. Trent and Mersey Navigation Co.* (1793), 5 Term Rep. 389; 101 E.R. 218; 8 Digest (Repl.) 19, 100.

(5) *Fell v. Knight* (1841), 8 M. & W. 269; 10 L.J.Ex. 277; 5 Jur. 554; 151 E.R. 1039; 29 Digest 6, 60.

(6) *Browne v. Brandt*, [1902] 1 K.B. 696; 71 L.J.K.B. 367; 86 L.T. 625; 50 W.R. 654; 18 T.L.R. 399; 46 Sol. Jo. 339, D.C.; 29 Digest 7, 75.

H

(7) *Brabant & Co. v. King*, [1895] A.C. 632; 64 L.J.P.C. 161; 72 L.T. 785; 44 W.R. 157; 11 T.L.R. 488; 11 R. 517, P.C.; 3 Digest 73, 137.

Appeal from Northampton County Court.

The plaintiff was the owner of a Vauxhall car, and on Feb. 4, 1929, he came to the Grand Hotel, Northampton, of which the defendant was the proprietor. He garaged his car in the building attached to the hotel, and used for that purpose. He had previously stayed at the hotel and used the garage, which he knew was a three-sided roofed structure, the fourth side being open, but secured by an iron grill padlocked at night. He stayed at the hotel for about a fortnight. On Feb. 10 the weather was warm with rain. On Feb. 11 it began to freeze. At about 6 p.m. the plaintiff drained the water from the radiator of the car and poured warm water through it, leaving the drain taps open. On Feb. 12 he tried to start the car, but failed. He then discovered that the water-jacket of the engine was cracked. In the present action he claimed the amount spent in repairs, which were agreed at £34 16s. 8d., on the ground that the defendant had been negligent in accommodation for the car and not taking proper precautions to guard against frost. The

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defendant denied liability, pleading that there had been no breach of duty on his part, and that the damage was caused by the act of God, and, in the alternative, that the damage was caused by the plaintiff's own negligence in not taking proper steps against frost. The learned county court judge held that there was no duty on the part of the defendant or his servant, the attendant at the garage, to run off the water or otherwise interfere with the cars in the garage, but he held that the defendant ought to have provided arrangements for heating the garage, which was partially open on one side, in order to avoid the effects of frost, inasmuch as he took cars into the garage for reward. He, therefore, gave judgment for the plaintiff, whom he found not negligent, and against this the defendant appealed.

H. H. Joy, K.C., and R. C. Vaughan for the defendant.
Lawrence Vine for the plaintiff.

Cur. adv. vult.

Jan. 23. The following judgments were read.

SWIFT, J.—This is an appeal from the judgment of His Honour Judge DRUCQUER, delivered in the county court of Northampton, holden at Northampton on April 8, 1930. The case raises a question of great importance to innkeepers and the owners of motor cars.

The learned judge came to the conclusion that the defendant was liable and gave judgment against him for £34 16s. 8d. The question of law now arises whether or no the defendant is liable to the plaintiff for the damage sustained by the latter's car. It appears to me that this question can only be determined by ascertaining exactly what was the relationship between the plaintiff and the defendant. The duty of the defendant to the plaintiff may be quite different according to the relationship between them. The defendant might have occupied the position of warehouseman, garage proprietor or innkeeper—and his liabilities might vary according to which of the positions he occupied. Here he was an innkeeper and, in my opinion, an innkeeper only. An innkeeper is commonly said to be an insurer of goods of a guest brought to the inn against loss by theft. This is, I think, substantially accurate, because an innkeeper undertakes by the common law that the goods of his guest shall not be stolen by his default, and if loss of the goods occurs it is to be presumed that the goods have been stolen by failure of the innkeeper to take proper care of them unless he can show (a) that the guest retained control in such a way that he relieved the innkeeper from his duty to take care of them, or (b) that the loss occurred by the negligence of the guest, or (c) by the act of God or the King's enemies. But an innkeeper is not an insurer of the person of the guest nor of the latter's goods generally; he is only responsible in case of injury to the guest or his goods if negligence on the part of the innkeeper is proved: per McCARDIE, J., in *Maclean v. Segar* (1), [1917] 2 K.B. at p. 328.

I can find no case in which an innkeeper has been held liable for injury to goods as opposed to loss of the goods unless default on the part of the innkeeper has been proved. If a guest's goods are damaged while at an inn he must prove that such damage arose by an act or omission of the innkeeper or his servants which was negligent—that is, was done in breach of some duty which the innkeeper owed to the guest. The marginal note to *Dawson v. Chamney* (2) (5 Q.B. at p. 164) says:

"When chattels have been deposited in a public inn, and there lost or injured, the *prima facie* presumption is that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted. . . ."

In *Morgan v. Ravey* (3)—the goods were lost—the question whether the innkeeper was responsible apart from negligence did not arise. POLLOCK, C.B., said (6 H. & N. at p. 277):

"The objection was that it [the direction to the jury] assumed the defendants were liable if there was negligence in the plaintiff, and that therefore the defendants would be liable, though not only not negligent but even diligent.

A But we think that is the law. It is true the expression in the forms in 'tort' is that the loss was propter defectum of the innkeeper; but we think the cases show that there is a defect in the innkeeper wherever there is a loss not arising from the plaintiff's negligence, the act of God, or the Queen's enemies."

I cannot regard that case as any authority for saying that an innkeeper is responsible for "damage to" as distinguished from "loss of" goods apart from proof of

B negligence.

An innkeeper is not necessarily a warehouseman or garage proprietor nor any other kind of bailee for reward: see *Hyde v. Trent and Mersey Navigation Co.* (4). He, of course, may, in addition to being an innkeeper, assume such other position for himself and thereby take upon himself the duties attaching to such position, but in this case the innkeeper was not such a person. An effort was made on his

C behalf to suggest that he was acting as warehouseman or garage proprietor and that he had as such made special terms, but this contention was abandoned. The county court judge says:

"By his defence, the defendant states, in the first place, that he received the car upon terms which were in writing contained on the receipt given to the plaintiff at the time the car was garaged, namely,

D 'All reasonable precautions against fire, theft, burglary, and accidental damage are taken by us, but attention is drawn to the fact that we will not accept responsibility for any loss or damage sustained from any of these risks by the motor vehicle stated on this receipt.'

E I will deal with that defence at once. The plaintiff denied that he ever received such a receipt, and counsel, for the purposes of this case, accepted that denial and abandoned that particular defence."

This case must, I think, be decided on the basis that the relationship between the plaintiff and the defendant was purely and simply that of guest and innkeeper.

What duty, then, does an innkeeper owe to the guest who brings to his inn and garages there a motor car? I think it is clear that he insured that the car shall

F not be stolen, but I think he does not insure that the car shall not be damaged, and, if damage is in fact sustained by the car, the guest must prove that such damage was caused by the failure of the innkeeper by himself or his servants to observe some duty which he owed to the guest. It is suggested in this case that the defendant owed a duty to provide a place in which the guest could put his car so built or so equipped with heating apparatus that the car could not be damaged

G by frost. This seems to me to be putting the duty much too high. An innkeeper is only bound to supply such accommodation for his guest and his goods as he in fact possesses. A traveller arriving at a village inn could not complain that he was not lodged in a bedroom heated by radiators supplied with all the amenities to be found in a first-class hotel in a great city, or that his horse and carriage or his motor car were not placed in stables, warehouses, or garages of the quality to be

H found in the most modern and pretentious establishments. Nor could he complain that the innkeeper did not provide any accommodation or adequate accommodation for his horse or carriage or motor car: see *Fell v. Knight* (5), *Browne v. Brandt* (6). The innkeeper undertakes that the accommodation which he offers is reasonably fit for the purpose but he does not warrant that it is the best that can be devised, nor does he promise that such accommodation shall protect the guest or his goods

I from every form of danger. Here the defendant provided a garage which, under ordinary weather conditions, was perfectly suitable for the garaging of a motor car. It was unsuitable for the garaging of a motor car with water in the radiator or water-jacket during frost. That fact was as well known to the plaintiff as it was to the defendant. The plaintiff had put his car into the garage and had kept it there on this occasion (which was not the first time he had used the garage) for a fortnight before Feb. 11; on that day it was he who, when a frost occurred, first suggested that the water should be let out, and he himself did it, although, as found by the county court judge, too late. It has been found by the county court

judge that the innkeeper, by his servant, was guilty of no negligence in not drawing the water off. I think this is obviously right, for the man would not know at what minute the car would be required again by the owner, and in the absence of instructions he might be unwarrantably interfering if he had drawn the water from a guest's car. A

What, then, was the position in fact when on Feb. 11 or 12, 1929, the car was damaged by frost? The plaintiff, as a guest at the inn, had placed his car in the place provided by the defendant for the use of guests bringing cars to his house. That place was perfectly safe and proper for cars with water in the radiators on the vast majority of days in the year, but it became unsuitable if and only if water were left in the radiator or water-jacket on those few days of the year on which severe frost occurred. If severe frost was to be anticipated, it was the business of the plaintiff to let the water out of his car. He did not do so, and the damage resulted. In these circumstances I cannot see that the innkeeper has failed in any duty he owed his guest. The learned county court judge has apparently treated him as a warehouseman and has held on the authority of *Brabant & Co. v. King* (7) that he owed a duty to the guest to provide a garage which should in all circumstances protect the car from harm. But he was not a warehouseman. He at one time wanted to say he was, and then to limit his liability by alleging some special contract, but this was abandoned, and, in my view, his obligations were those of an innkeeper and nothing more. As such I can find no authority for holding him liable for damage to the guest's goods which arises through the goods not being suitable for the accommodation offered, and a car with water in it was not suitable for the accommodation which the innkeeper held himself out to travellers as supplying. B C D

For these reasons I think the county court judge was wrong in holding the defendant liable. This appeal must I think be allowed, the judgment entered in the county court set aside, and judgment entered for the defendant with costs here and below. E

MACNAGHTEN, J., stated the facts and continued: The learned county court judge has held that the defendant was liable on the ground that an innkeeper who provides a garage for the use of his guests is bound by law to provide a garage which protects their cars from the effects of frost; and the question we have to determine is whether this view of the obligations of innkeepers is correct. For the reasons expressed by my Lord I think that the law does not impose any such obligation upon an innkeeper. F

By the custom of the realm an innkeeper is bound to provide such accommodation as may be available at his inn for any traveller who may come there, and, subject to the provisions of the Innkeeper's Act, 1863, is answerable for the loss of the goods of his guests. But the guest is only entitled to such accommodation as the inn affords. If the inn has a garage and the guest, with full knowledge of its supposed defects, chooses to use it, he cannot, in my opinion, be heard to complain that it was not a suitable garage for his car, or that the innkeeper ought to have provided a better garage. It was argued on behalf of the plaintiff that on the Monday morning, when the risk of injury to the car by frost was imminent, it was the duty of the defendant's caretaker to empty the water out of the car, and that the defendant was responsible for this supposed act of negligence on the part of his servant, but the learned judge has held that the caretaker had no such duty, and I think that his decision on this question, if it is to be regarded as a question of law, is plainly right. The plaintiff might indeed have had very good cause to complain if the caretaker had interfered in any way with the mechanism of his car. I, therefore, think that this appeal should be allowed and that judgment should be entered for the defendant with costs here and below. G H I

Appeal allowed.

Solicitors: *Stanley, Hedderwick, & Anderson; Amery, Parkes & Co.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

A

R. v. KENDRICK AND SMITH

[COURT OF CRIMINAL APPEAL (Swift, Wright and Humphreys, JJ.), March 23, 24, 1931]

B

[Reported 144 L.T. 748; 23 Cr. App. Rep. 1; 29 Cox, C.C. 285]

Criminal Law—Autrefois convict—Offences founded on same evidence—Uttering letter demanding money with menaces—Threatening to publish with intent to extort—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 29 (1) (i), s. 31 (2).

C

The test whether a plea of "autrefois convict" has been established is not whether the facts relied on by the Crown are the same in the two trials, but whether the accused has been convicted of an offence which is the same, or practically the same, as that with which he is charged on the second trial.

D

The offences of threatening to publish with intent to extort, contrary to s. 31 (2) of the Larceny Act, 1916, and of uttering a letter demanding money with menaces, contrary to s. 29 (1) (i) of the Act, are distinct and separate, and the fact that the accused has already been convicted of the former will not sustain a plea of autrefois convict if he is subsequently charged with the latter, even though the two charges be supported by the same evidence.

R. v. Barron (1), [1914] 2 K.B. 570, applied.

Notes. As to autrefois convict, see 10 HALSBURY'S LAWS (3rd Edn.) 404-407; and for cases see 14 DIGEST (Repl.) 378 et seq. For Larceny Act, 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 1011.

E

Cases referred to:

(1) *R. v. Barron*, [1914] 2 K.B. 570; 83 L.J.K.B. 786; 78 J.P. 311; 30 T.L.R. 422; 58 Sol. Jo. 557; 10 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 380, 3718.

(2) *R. v. King*, [1897] 1 Q.B. 214; 66 L.J.Q.B. 87; 75 L.T. 392; 61 J.P. 329; 13 T.L.R. 27; 41 Sol. Jo. 49; 18 Cox, C.C. 447, C.C.R.; 14 Digest (Repl.) 385, 3761.

F

(3) *R. v. Elrington* (1861), 1 B. & S. 688; 31 L.J.M.C. 14; 5 L.T. 284; 8 Jur.N.S. 97; 10 W.R. 13; 9 Cox, C.C. 86; 121 E.R. 87; sub nom. *R. v. Ebrington*, 26 J.P. 117; 14 Digest (Repl.) 384, 3751.

(4) *R. v. Grimwood* (1896), 60 J.P. 809; 13 T.L.R. 70; 14 Digest (Repl.) 383, 3743.

G

Appeals against conviction.

In January, 1931, Kendrick and Smith, the appellants, were indicted at the Central Criminal Court before the Recorder of London on an indictment containing eight counts. Counts 1 and 4 charged both appellants with uttering letters demanding of the prosecutor, with menaces and without any reasonable or probable cause, money, contrary to s. 29 (1) (i) of the Larceny Act, 1916. Counts 2 and 5 charged both appellants with demanding money with menaces, contrary to s. 30, but these counts were not proceeded with at the trial. Counts 3 and 6 charged both appellants with threatening to publish certain photographic negatives touching the prosecutor, with intent to extort money, contrary to s. 31 (2) of the Larceny Act, 1916. Counts 7 and 8 charged Smith only with receiving the negatives, knowing them to have been stolen, but only count 8 was proceeded with at the trial. The jury convicted both appellants on counts 3 and 6, and Smith also on count 8, but were unable to agree on counts 1 and 4. The recorder ordered the appellants to be tried at the February sessions of the Central Criminal Court on these counts. At the second trial pleas of autrefois convict were filed on behalf of both defendants. Kendrick's plea was that he ought not to be further prosecuted "because he has been lawfully convicted of the offence charged therein and/or substantially the same offence." Smith's plea was the same, except that it omitted the words "and/or substantially the same offence." Issue was joined, and the jury were sworn to

I

try whether the pleas were established. The recorder directed the jury that the offences charged in counts 3 and 6, of which the appellants had been convicted at the first trial, were not the same, or substantially the same, as the offences charged in counts 1 and 4. The jury found that the pleas were not established. The trial then proceeded, and both appellants were found Guilty on counts 1 and 4. Kendrick was sentenced to two years' imprisonment with hard labour and five years' penal servitude (concurrent), Smith to two years' imprisonment with hard labour and four years' penal servitude (concurrent). Smith appealed against both convictions; Kendrick against the later conviction only, but he applied for leave to appeal against the sentence of penal servitude.

A. H. S. Vivian, for the appellant Kendrick, referred to *R. v. Barron* (1), *R. v. King* (2), *R. v. Elrington* (3), *R. v. Grimwood* (4), Administration of Criminal Justice Act, 1851, s. 12, and Interpretation Act, 1889, s. 33.

E. H. Jessel for the appellant Smith.

Sir Percival Clarke and *G. G. Raphael* for the Crown were not called upon to argue.

The judgment of the court was delivered by

SWIFT, J.—Sections 29, 30 and 31 of the Larceny Act, 1916, prohibit certain actions, and make those acts criminal offences. Those acts are ordinarily and commonly spoken of as "blackmail." The word has no meaning in law, but it is a convenient expression and one well understood by everybody for the making in some form or other of some unlawful demand upon another person.

Before we discuss the points of law raised in the appeal, it is desirable to briefly recapitulate the facts of the case. At the second trial neither prisoner went into the witness-box or called any evidence. It was established that the prosecutor, who was described throughout as Mr. X, was, in the summer of 1928, staying at some riverside place. While he was there, one of the party in which he was took two photographs of him in an indecent position with a female. The negatives of those photographs were kept by a member of the party, who put them into a drawer in his club. From that drawer they were stolen by a servant of the club, and found their way into Smith's hands. On May 23, 1930, the prosecutor received a letter, which he destroyed and did not answer. On Sept. 4 he received a letter from Kendrick, whom the prosecutor did not know at all. That letter bore Kendrick's correct address, and had been addressed to the prosecutor at his club and forwarded to his house. It was in the following terms:

"Dear Sir,—With reference to my letter to you of the 23rd May last, which was addressed to, and intended for you, but which, I believe, you handed over to your cousin, the letter was brief and to the point, and was to the effect that you may recollect being photographed about eighteen months or so ago at an hotel in Maidenhead. These photographs, the negatives of which are in my possession, were to say the least very personal, and should be of the greatest and utmost interest to you. If such is the case, would you reply to me at the above address, with a view to making an appointment, as you would perhaps like to regain possession of them. Yours faithfully, L. W. Kendrick."

To that letter the prosecutor did not reply. On Sept. 12 he received the following letter:

"Dear Sir,—I am enclosing prints from the negatives, about which I wrote you on the 4th inst. and to which, as yet, I have received no reply. Yours faithfully, L. W. Kendrick."

A print of each of the photographs was enclosed. The prosecutor did not reply to the letter. It is not immaterial to observe that the prints sent to the prosecutor were of a nature to cause uneasiness, if not fright, to anyone who had been photographed in such a situation and found that the photographs were in the hands of a stranger who knew who he was. On Oct. 13 the prosecutor received another letter:

- A** "Dear Sir,—Having ignored my previous communications, I presume you have lost interest in your rather indiscreet escapade at Maidenhead, and do not wish to claim that which belongs to you. Therefore, in the event of me not hearing from you in the course of a day or two, I shall have no alternative but to dispose of these negatives to my best advantage. Yours faithfully, L. W. Kendrick."
- B** The prosecutor handed that letter to his solicitors. On Oct. 17 he received another letter:
- "Dear Sir,—To date I have received no reply from you to my letter of the 12th inst.; but before proceeding further, I have a suggestion to make that would prove of advantage and benefit to you, if you would arrange for a strictly private interview one evening early next week, either at my address here or in town. If here, any time after five p.m. would suit me, and if in town, it would have to be after seven p.m. My suggestion might prove advantageous to you, and I strongly advise you to meet me—preferably here—as soon as convenient next week. Yours faithfully, L. W. Kendrick."
- On Dec. 3 he received another letter:
- D** "Dear Sir,—As you have not replied to my previous letters, and therefore do not appear interested in regaining the negatives mentioned, in fairness to myself, after the trouble I have taken to get them, I am considering sending a print from each to the 1,300 members of your club for Christmas. Yours faithfully, L. W. Kendrick."
- The prosecutor's club referred to contains about 1,300 members, ladies and gentlemen in good social position, including the prosecutor's wife and other relations. A list of members of the club was exhibited in the course of the trial, either that list or a similar one having been found in the possession of the appellant Smith. That letter the prosecutor took to his solicitors, and they went to the police, and from Dec. 13 acted under police instructions.
- F** The prosecutor caused a letter to be written to Kendrick, and Kendrick agreed to meet the prosecutor at Charing Cross Station. On Dec. 17 the police took a room at a house in Soho. Inspector Bower was locked into a cupboard in that room. The prosecutor went to Charing Cross, saw Kendrick at the meeting place, and they went together to the room in Soho. In the room he and Kendrick had a conversation which was overheard by Inspector Bower in the cupboard and by Divisional-Inspector Howell, who stood outside the door. The prosecutor asked
- G** Kendrick if he was the writer of the letter making the appointment to meet, and he said he was. When asked if he had the negatives with him he said "No." The prosecutor then asked: "How much do you want to get them for me?" Kendrick said: "I am acting for two other people, who are demanding a large sum of money running into thousands of pounds. I have a suggestion to make. If you will pay me something, I will try to cook their goose." The following conversation then ensued. The prosecutor: "How much do you want?" Kendrick:
- H** "How much are you prepared to give?" The prosecutor: "£50." Kendrick: "That won't do." The prosecutor: "What about £100?" Kendrick: "Yes." The prosecutor: "Am I to understand you that if I give you £100 you will do everything to prevent this threat from coming into action?" Inspector Howell, at the door, heard the prosecutor say: "I can never pay that"; and then he heard
- I** Kendrick say "£100." The inspector then went into the room. The prosecutor said: "It is about some photographs; this man is trying to blackmail me for money." Kendrick did not say anything. Inspector Bower, who had overheard the conversations between the prosecutor and Kendrick, was then released from the cupboard and came into the room and said to Kendrick: "I have heard everything. I heard you say: 'If you give me £100 I can cook their goose.'" Inspector Howell then told Kendrick he would arrest him for demanding money with menaces. Kendrick said: "I am only acting as an agent in this for a friend. I am doing it because my account is overdrawn. My friend's name is Smith; he trades as a

barber in the name of Mackenzie at Gravesend. He is the man who gave me the prints I sent to this gentleman." That night, about midnight, Inspector Bower went to Gravesend and saw Smith get out of the train from London. He asked Smith to go to the police station, and Smith there made a statement. In that statement he describes how he got the negatives and showed them to Kendrick, and said that they concluded that the prosecutor would like to have them back, and that they agreed to approach the prosecutor with a view to returning the negatives in the hope that the prosecutor would reward them. After making that statement, Smith was arrested and said: "I realised that it would mean this." At Smith's house the two negatives were found and also a list of the members of the prosecutor's club. A B

At the close of the case for the prosecution, counsel for both appellants submitted that no demand for money could be read into the letters, and in addition counsel for Smith submitted that there was no evidence against him. Both appellants gave evidence at this trial. On that evidence the jury convicted both the accused on counts 3 and 6, and Smith on count 8 also. At the second trial neither of the appellants gave evidence, and the jury convicted them on counts 1 and 4 also. It has been argued before us that upon the second trial these two men ought to have been acquitted—that the matter should not have been left to the jury—on the ground that both had been lawfully convicted of the same offence, or practically the same offence, at the Central Criminal Court in January last. That plea, which was raised before the recorder and was left to the jury practically with the direction that they could decide it only in one way, raises a question of law, namely, what it is necessary to prove in order that an accused person may rely on the plea of autrefois convict. It is quite clear that, to enable an accused person to rely on that plea, the offence with which he is charged on the second occasion must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. It is not enough to say that the evidence tendered on the second charge was the same evidence as that offered to prove the first charge. It is not the evidence which is material to the charge that grounds the plea, but the offence which is charged. That becomes perfectly clear when one considers the judgment of this court given by LORD READING, C.J., in *R. v. Barron* (1), where he refers to *R. v. King* (2) and says ([1914] 2 K.B. at p. 574): C D E F

"The headnote to the report of this case states that 'a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods,' and HAWKINS, J., is reported there as having said: G

'It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not their legal operation.' "

LORD READING continued:

"It is quite plain that the learned judge did not intend to lay down and did not lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, 'practically the same' the words are, and as the two offences in the present case are not either exactly or practically the same it does not help the appellant." H I

LORD READING then pointed out a difference in the reports of that case, and continued:

"It would appear that the decision of the court was given, either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner, who was induced thereto

- A** by false pretences, whereas conviction at the trial for larceny implied that the defendant feloniously took the goods without the consent of the owner. The substantial identity of the offence was recognised in *R. v. King* (2) as an essential condition to the validity of the plea of autrefois convict or autrefois acquit, and that case made no change in the general and well-settled principle of law applicable to these pleas. The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as 'gross indecency,' i.e., whether the acquittal on the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence."
- B**
- C**

I emphasise the words "The test is not, in our opinion, whether the facts relied upon are the same in the two trials." The question is whether the appellant has been acquitted of an offence which is the same offence as that with which he has been charged.

- D** That being the law, we must look carefully to see whether the charge proceeded with at the trial in February was the same charge, or rather was a charge of the same offence, as the charge of which the jury had found the prisoners guilty at the trial in January. It is not necessary to say more than that the former was framed under s. 29 of the Larceny Act, 1916, while the latter was framed under s. 31, to show how completely different the offences were. One was a charge of uttering a letter demanding of the prosecutor with menaces and, without any reasonable or probable cause, money. That charge, framed under s. 29, is a felony punishable by penal servitude for life. It is impossible to say that that offence is the same, or substantially the same, as the offence charged under s. 31, namely, with intent to extort money from the prosecutor, threatening to print or publish certain matters or things touching him, which is a misdemeanour punishable by two years' imprisonment. It may well be that the evidence before the court shows
- E**
- F** that both these offences have been committed, but that does not make them the same offence. The fact that the evidence is the same, or that the facts proved are the same, does not make the two offences identical. They are quite distinct and separate. It may be that the greater includes the less, and that if you prove a case under s. 29 you must prove a case under s. 31, but I do not decide that this is so. It seems to this court that the recorder adopted a perfectly proper attitude
- G** with regard to the pleas of autrefois convict, and that he was clearly right in directing the jury as a matter of law that these offences were not the same. The appeals, therefore, fail.

Appeals dismissed.

- H** Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

